

DRAFT REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

CONTRACTORS IN RULEMAKING

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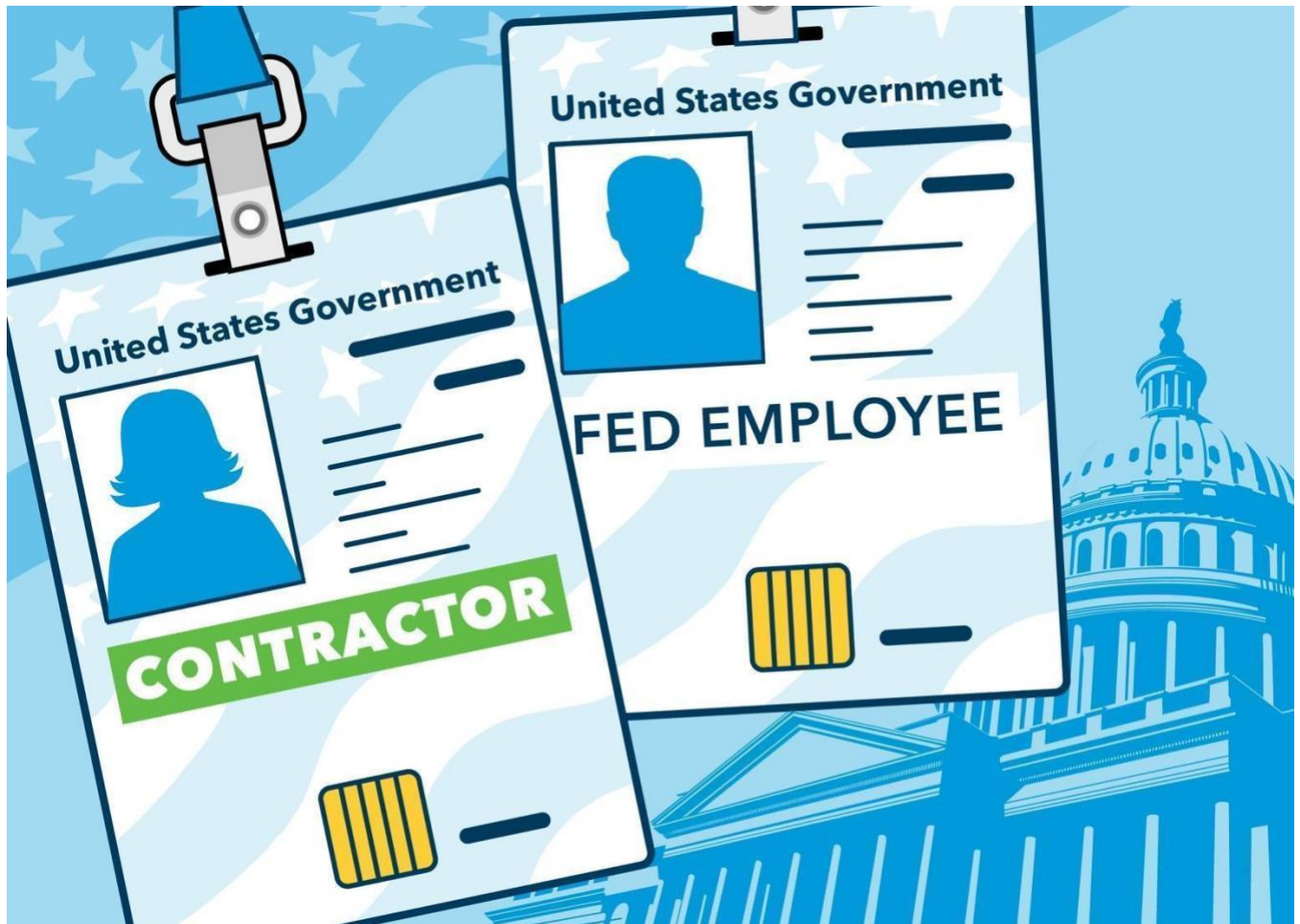
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Draft Report to the Administrative Conference
of the United States (ACUS)



Bridget C.E. Dooling & Rachel Augustine Potter

March 8, 2022

The views and recommendations expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

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“Contractors are us—they’re feds—but in italics.”¹

“To the extent that a contractor would be involved at all [in rulemaking], which in and of itself strikes me as highly irregular, I cannot think of an instance where such participation would be anything more than clerical or non-substantive.”²

I. Introduction

In agencies across the federal government, contractors have become a ubiquitous presence. Often working side-by-side with federal employees, contractors perform work that is both mundane and substantive, routine and highly specialized. Private sector contractors³ have performed services on behalf of the government since the Republic’s earliest days,⁴ but the scale and scope of government reliance on contractors has increased considerably in recent decades. This trend and its underpinnings are well-documented by scholars and oversight bodies, and the consequences for the government and for society are well theorized. Attention to the issue can be particularly acute on the heels of scandals, when a contractor or an agency has in some way crossed the public-private line.⁵ But in the day-to-day, contractors round out the federal workforce in important, if sometimes controversial, ways.

Little attention has been paid to the role of contractors in rulemaking, specifically. From a procurement perspective, this oversight is somewhat logical since contracts for rulemaking are relatively paltry when measured by the broader scale of federal procurement dollars; as one expert described it to us, “rules aren’t aircraft carriers.”⁶ And in the scant places where scholars have taken up the issue, they have raised hypothetical, but largely unsubstantiated, concerns

¹ Interview 13.

² Survey response.

³ We use the term “private sector” in this report to mean non-governmental. The term encompasses both for-profit and non-profit organizations.

⁴ For a detailed description of the role of the private sector in the 18th and 19th century government, see JON D. MICHAELS, *CONSTITUTIONAL COUP* (2017) and NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013).

⁵ For example, abuses and scandals involving private sector contractors in Iraq and Afghanistan have garnered sustained political, media, and academic attention to contractor use in the national security and intelligence arenas. *See, e.g.*, JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RSCH. SERV., RL32419, *PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES* (2008); U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-255, *PRIVATE SECURITY CONTRACTORS: DOD NEEDS TO BETTER IDENTIFY AND MONITOR PERSONNEL AND CONTRACTS* (2021); Dana Priest & William M. Arkin, *National Security Inc.*, WASH. POST, July 20, 2010; ALLISON STANGER, *ONE NATION UNDER CONTRACT* (2009); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 43 (2007).

⁶ Interview 31 (suggesting that procurement oversight is often focused on high dollar value purchases like aircraft carriers, rather than smaller dollar buys like rulemaking services).

about the inappropriate use of contractors in rulemaking.⁷ The general lack of attention to contractors in rulemaking has led some to the false impression that most or all rulemaking activities are “inherently governmental”—an important concept that we describe in detail below—and are therefore off-limits to contractors. However, this report establishes that contractors are used for a wide variety of rulemaking tasks, and sometimes extensively so.

This report sheds light on the ways that federal agencies use contractors to support the rulemaking process. We begin with a discussion of the current academic literature on outsourcing for government services and then outline legal considerations that apply to rulemaking contracts in particular. Turning to a set of in-depth interviews with 45 agency officials, experts, and contractors and a survey of agency rulemaking officials,⁸ we next unpack agency perspectives on the appropriateness of contractors in rulemaking. We then provide an inventory of dozens of discrete tasks that contractors have performed in the rulemaking context. We also explore the reasons why agencies use (or do not use) contractors when writing rules. The next sections highlight agency practices for managing contractors in rulemaking and discuss other ways that agencies expand their capacity, beyond using contractors. We conclude with a set of proposed recommendations.

Our research reveals wide variation in how agencies approach the use of contractors in rulemaking. Not only do agencies have highly divergent attitudes about what contractors may and should do in rulemaking, they also perceive different risks and benefits of contractor use and manage contractors in different ways. What emerges is a complex picture, with contractors essential to rulemaking at some agencies, occasionally useful to a subset of agencies, and kept away from rulemaking at other agencies. Rulemaking differs from other functions that agencies perform in important and meaningful ways; the goal of this report is to draw a clear portrait of the contributions that contractors make in rulemaking, while also giving close consideration to the risks and challenges associated with using contractors in this space.

Before proceeding, we offer two caveats on the scope of this report. First, the regulatory process in the United States is expansive and, for the purposes of this report, we have limited the scope to the rule writing process within federal agencies. Typically, this process ranges from the data collection phase that precedes the publication of a proposed rule to the publication of a final rule in the *Federal Register*. This means that we generally exclude post-promulgation activities, such as enforcement.⁹

Second, the research design we employ allows us to answer some questions better than others. The dearth of information about contractors in rulemaking—from both a data transparency perspective and a scholarly perspective—means that we began this project with little information

⁷ See, e.g., JON D. MICHAELS, CONSTITUTIONAL COUP 111 (2017) (arguing that “[e]verywhere we look, the federal government is engaged in deep service contracting: the outsourcing of sensitive policy design and policy-implementing responsibilities” including rulemaking activities (emphasis omitted)); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 24-25, 191 (2007) (arguing that “[a]gencies contract with regularity for a variety of private management services” including rulemaking activities and that some of these activities “cross[] the line”).

⁸ See Section IX for a description of the methodological approach employed in the survey and the interviews.

⁹ See, e.g., Miriam Seifter, *Rent-a-Regulator: Design and Innovation in Environmental Decision Making*, in GOVERNMENT BY CONTRACT 94 (Jody Freeman and Martha Minow eds., 2009) (describing third-party entities used for certification, compliance, and enforcement).

about the extent to which contractors perform rulemaking tasks. The design we employ is qualitative, chronicling the roles that contractors take on in rulemaking, and any relevant issues associated with their use. Our research permits us to say clearly that some agencies use contractors for a variety of rulemaking tasks beyond what has previously been documented. It does not, however, allow us to answer questions about “most agencies” or “most contracting firms.” As discussed in Appendix A, our design includes in-depth interviews with non-random “snowball” recruitment and a survey that asks agency rulemaking contacts about contractor involvement in specific, recently-issued rules. We therefore eschew prevalence estimates, instead offering a descriptive summary that can serve as a roadmap for future exploration that builds on our core finding, which is that contractors have a significant presence in rulemaking.

II. Background

Contractor use in the rulemaking process is part of a larger landscape of government contracting. The rise of government contracting, intended to improve the efficiency and effectiveness of government, has drawn the attention of scholars and oversight bodies concerned about the implications of this trend. This has given way to law and policy that shapes modern contracting—including contracting for rulemaking activities—in important ways.

A. Contractors in contemporary public administration

The extent to which government agencies today rely on private sector contractors to perform bureaucratic functions is significant. In Fiscal Year 2020, the U.S. Government spent \$665 billion on contracts for goods and services. Services contracts made up \$391.8 billion, or roughly 59% of that total, encompassing a vast array of activities like professional services, logistics, general health care, information technology, and much more.¹⁰ Spending on services has been increasing,¹¹ while the size of the federal civilian workforce has remained relatively level since 1960 at about approximately two million Full-Time Equivalents (FTEs).¹² These trends are well documented, with scholars referring to contractors as a “shadow” of government that supplements the federal civilian workforce.¹³

¹⁰ U.S. GOV’T ACCOUNTABILITY OFF., A SNAPSHOT OF GOVERNMENT-WIDE CONTRACTING FOR FY 2020 (2021), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic#:~:text=In%20fiscal%20year%202020%2C%20the,billion%20from%20fiscal%20year%202019>”.

¹¹ For example, a 2011 report by the Government Accountability Office documents that, over a five-year period, spending on contracts for professional and management support services at civilian agencies increased 44 percent. U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-87, MANAGING SERVICE CONTRACTS: RECENT EFFORTS TO ADDRESS ASSOCIATED RISKS COULD BE FURTHER ENHANCED (2011). See also Memorandum from Douglas W. Elmendorf to Representative Chris Van Hollen, Federal Contracts and the Contracted Workforce (Mar. 11, 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49931-FederalContracts.pdf>.

¹² JOHN DI IULIO, BRING BACK THE BUREAUCRATS 15-16 (2014). In FY 2020, the executive branch reported 2.18 million civilian full-time equivalent employees. U.S. Off. of Mgmt. & Budget, Historical Tables, Table 16.1—Total Executive Branch Civilian Full-Time Equivalent (FTE) Employees, 1981–2022, <https://www.whitehouse.gov/omb/historical-tables>.

¹³ DANIEL GUTTMAN & BARRY WILLNER, THE SHADOW GOVERNMENT (1976). Light also describes contractors as a “shadow of government.” PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 1-6 (1999). Estimates of the number of contractors vary. According to the *Washington Post*, in 2010 the ratio of contractors to federal employees in the

Although there are mechanisms in place to track federal spending and procurement on a broader level, there is no official accounting of the amount spent on services related to rulemaking per se. At the outset, Congress appropriates monies to federal agencies by funding particular programs and accounts. However, these allocations are rarely, if ever, made at the rule or even the contract level; instead, they are often bundled in a way that makes it hard to parse. Thus, even though congressional appropriations and agency budgets are public information, it is nearly impossible to track forward from appropriated dollars to contracts for rulemaking services.

Another potential avenue for assessing spending for rulemaking services is through the federal procurement system. Once an agency makes a contract award, it reports contract-related spending and actions to a centralized procurement database managed by the General Services Administration (GSA), the Federal Procurement Data System-Next Generation (FPDS). In this system, agencies disclose which products or services they obtained via contract. However, the system was designed for broader procurement oversight, not for oversight of niche functions like rulemaking.¹⁴ And, as we explain throughout this report, rulemaking contractors perform work in a variety of contexts and under different contracting vehicles (e.g., rulemaking services can be just one service among many that a contractor provides to an agency). Thus, while the information in the FPDS is public and does provide aggregate agency spending patterns, it is of limited utility in terms of understanding the bigger picture of contractor roles in the federal rulemaking process.

Two things are clear about contracted services for rulemaking, however. First, although it is not possible to attach a total dollar figure to rulemaking contracts, they certainly amount to only a small slice of overall federal spending on service contracts.¹⁵ Second, relying on contractors to help with rulemaking fits into a broader trend towards outsourcing of government services, one that has attracted the attention of scholars from a variety of disciplines, including public

Department of Homeland Security was one to one. Dana Priest & William M. Arkin, *National Security Inc.*, WASH. POST, July 20, 2010. Meanwhile, Light finds that, in 2017, across the federal government there were three private contractors for every one federal employee. PAUL C. LIGHT, *THE GOVERNMENT INDUSTRIAL COMPLEX* 36-38 (2019). Finally, Schooner and Swan note that the number of contractor support personnel in Iraq and Afghanistan frequently exceeded the number of military personnel. Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Unexamined Effect of Surrogates on the Public's Casualty Sensitivity*, 6 J. NAT'L SEC. L. & POL'Y 11, 17 (2012).

¹⁴ As one expert explained to us, the FPDS is “designed to help identify how tax dollars are allocated to contractors . . . [it is] hard to go in and say how [a contract] applies to individual regs since this is not what the system was designed to do.” Interview 33. Awards in the FPDS database do have codes denoting the product or service which was purchased and some of those codes (e.g., regulatory analysis studies and cost benefit analysis studies) are naturally associated with rulemaking. However, as Potter explains, those codes are not dispositive of all rulemaking contracts, since agencies might reasonably classify rulemaking services under other headings (e.g., program management and support). Rachel A. Potter, *How much of Rulemaking is Done by Contractors?*, BROOKINGS INSTITUTION (Feb. 16, 2022), <https://www.brookings.edu/research/how-much-of-rulemaking-is-done-by-contractors>. Additionally, the FPDS system includes an “award description” field that might theoretically be of use in linking contracts to rulemaking functions. However, this field is often left blank or is otherwise unusable. A recent GAO report found that the award description field in the FPDS “was inconsistent with the established standard in 24 to 35 percent of awards.” U.S. GOV'T ACCOUNTABILITY OFF., *GAO-20-75, DATA ACT: QUALITY OF DATA SUBMISSIONS HAS IMPROVED BUT FURTHER ACTION IS NEEDED TO DISCLOSE KNOWN DATA LIMITATIONS* (2020).

¹⁵ For example, in evaluating contract spending associated with two services that are closely tied to rulemaking, Potter shows that the total dollar amounts are little more than a rounding error in the broader picture of federal spending on services. Potter, *supra* note 14.

administration, administrative law, political science, and economics.¹⁶ This literature, which we review in brief below, highlights both the benefits and the risks associated with the government contracting for services. Although this existing work does not engage deeply with the rulemaking process, we draw out the implications for rulemaking where appropriate.

B. Potential benefits of contractor use

The turn toward private sector provision of government services did not happen accidentally. Rather, beginning with President Ronald Reagan, outsourcing—and privatization more generally—found a series of bipartisan political champions who advocated for managing federal work in this way. Reagan famously quipped “Government is not the solution to our problem, government is the problem,” a line that was emblematic of his administration’s focus on getting the private sector more involved in government work.¹⁷ Contracting was also a key part of subsequent presidents’ administrative management programs. For example, President Bill Clinton’s effort to “reinvent government” and the associated National Performance Review (NPR) included a focus on outsourcing.¹⁸ President George W. Bush also undertook a competitive sourcing initiative, which required public-private competitions to decide how some federal work was to be completed.¹⁹ These political efforts were rooted in an understanding that buying goods and services from the private sector would yield three principal benefits: efficiency, flexibility, and expertise.²⁰

Efficiency refers to the idea that “private firms can provide goods and services ‘better, faster, and cheaper’ than government.”²¹ In 2012, the Office of Management and Budget (OMB) reported that “[g]overnment-wide strategic sourcing of items such as office supplies and domestic shipping services has already saved nearly \$200 million since FY 2010” and that “agency-level strategic sourcing of goods like IT and medical equipment have saved hundreds of millions

¹⁶ We note that different terminology is used in this literature, including “outsourcing,” “contracting,” and “privatizing,” among other terms. For purposes of this report, we use the terms outsourcing and contracting interchangeably. We understand privatization to mean the conversion of formerly public assets into private assets, which is not a topic we cover in this report.

¹⁷ Michaels describes how Reagan’s turn toward outsourcing was a second-best solution after earlier privatization efforts were unsuccessful. JON D. MICHAELS, CONSTITUTIONAL COUP 87-98 (2017). Nevertheless, Reagan “laid the groundwork for the Privatization Revolution to come” *Id.* at 98. *See also* Michal Laurie Tingle, *Privatization and the Reagan Administration: Ideology and Application*, 6 YALE L. & POL’Y REV. 229, 229-231 (1988).

¹⁸ The NPR’s final report included numerous recommendations that involved streamlining government procurement and encouraging agencies to consider private sector provision of government services. *See* AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS. REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993), available at <https://files.eric.ed.gov/fulltext/ED384294.pdf>. The NPR drew heavily from the work of Osborne and Gaebler, who included contracting as one of 36 alternatives to standard delivery of government services by public employees. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT 31 (1992).

¹⁹ This market-driven approach was premised upon the idea that requiring agencies to engage in commercial competition with the private sector would induce cost savings and efficiency. *See generally* Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263 (2004); Keith Snaveley & Uday Desai, *Competitive Sourcing in the Federal Civil Service*, 40.1 AM. REV. PUB. ADMIN. 83 (2010).

²⁰ Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT 15 (Jody Freeman and Martha Minow eds., 2009).

²¹ KEVIN R. KOSAR, CONG. RSCH. SERV., RL33777, PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION (2006).

more.”²² Cost-savings may also be available for other kinds of services, though this is contested.²³ In short, the idea is that at least for some goods and services, private firms are able to provide a better deal for the taxpayer and for government, especially when the contracts are awarded competitively.²⁴

Second, contracting for services may offer *flexibility* to agencies. As Fukuyama notes, “because the rules for dismissing civil servants are so cumbersome, it is often easier to hire a contractor to undertake a job, which can be terminated when no longer necessary.”²⁵ This agility provides agencies with “surge capacity” to manage high workload periods.²⁶ For example, when Congress passes a major piece of legislation, that new law may direct an agency to issue many new rules. Such directives often include deadlines, which compel agencies to issue regulations quickly. Including contractors in the regulatory workflow might help an agency to smooth out this sudden demand for regulatory productivity. This type of support may be particularly useful for agencies that issue rules infrequently, and which therefore do not maintain a large staff of regulatory personnel.

Finally, outsourcing is one way for government agencies to expand their *expertise*.²⁷ For instance, it may be difficult for an agency to lure a top scientist with expertise in a niche area away from a university or the private sector and into government service. Further, the services of such an expert might only be required for a time-limited project. Hiring this expert as a contractor allows the government to tap into expertise, without making an unnecessary long-term investment.

²² Joe Jordan, *Historic Savings in Contracting – and Plans for More*, WHITE HOUSE BLOG, Dec. 6, 2012, <https://obamawhitehouse.archives.gov/blog/2012/12/06/historic-savings-contracting-and-plans-more>.

²³ Compare Aaron Barkley, *Cost and Efficiency in Government Outsourcing: Evidence from the Dredging Industry*, 13 AM. ECON. J. MICROECON. 514, 517 (2021) (estimating savings of 23% for larger projects), with Paul Chassy & Scott Amey, *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, Project on Government Oversight (Sept. 13, 2011), <https://www.pogo.org/report/2011/09/bad-business-billions-of-taxpayer-dollars-wasted-on-hiring-contractors/>. Sclar also notes that, in practice, government’s efficiency gains are rarely realized to their full theoretical potential; “Most public contracting takes place in markets that range from no competition (monopoly) to minimal competition among very few firms (oligopoly). Although oligopoly is preferable to monopoly, it is still far removed from the salutary competition venerated by privatization advocates.” ELLIOTT SCLAR, *YOU DON’T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* 69 (2001).

²⁴ Where markets lack competitors for government contracts, this will impede efficiency. Jocelyn M. Johnston & Barbara S. Romzek, *The Promises, Performance, and Pitfalls of Government Contracting* 3, in *THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY* (Robert Durant ed. 2010); KEVIN R. KOSAR, CONG. RSCH. SERV., RL33777, *PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION* (2006). Efficiency is further hampered when agencies themselves limit competition by offering non-competitive contracts, a trend that is increasingly common. Recent government reports have decried decreased competition in the awarding of federal procurement contracts. See AUTHOR REDACTED, CONG. RSCH. SERV., R40516, *COMPETITION IN FEDERAL CONTRACTING: AN OVERVIEW OF THE LEGAL REQUIREMENTS* (2015); MAJORITY STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, *MORE DOLLARS, LESS SENSE: WORSENING CONTRACTING TRENDS UNDER THE BUSH ADMINISTRATION* (June 2007).

²⁵ Francis Fukuyama, *The Intrinsic Functions of Government* 110, in *PUBLIC SERVICE AND GOOD GOVERNANCE FOR THE TWENTY-FIRST CENTURY* (James L. Perry, ed., 2020).

²⁶ OFF. OF FED. PROCUREMENT POL’Y, *INHERENTLY GOVERNMENTAL FUNCTIONS POLICY LETTER*, 56 Fed. Reg. 65279, 65280 (Dec. 16, 1991) (explaining that “[a]gencies award service contracts for various reasons, such as . . . to meet the need for intermittent service”).

²⁷ *Id.* at 65280 (explaining that agencies also award service contracts “to acquire special skills not available in the Government”).

C. Concerns about contracting for government services

Despite the sizable potential benefits afforded by contracting, scholars and observers have also noted its many potential downsides.²⁸ A general theme is that efficiency may come at the expense of important public law principles.²⁹ We focus on three of the most prominent critiques relating to the implications of contracting on government capacity, accountability, and ethics.

First, concerns about contracting for government services often focus on the hollowing out of long-term government *capacity*.³⁰ The crux of this concern is whether, in the context of broad scale outsourcing of services, government retains the ability to meaningfully oversee the work that contractors do. A 2008 report by the Government Accountability Office, for example, found that nearly half of the contract specialists overseeing contracts at one Department of Defense agency were themselves contractors.³¹ Examples like this naturally raise questions about whether appropriate safeguards are in place to ensure work is done well and to prevent problems like self-dealing. Scholars have characterized the mechanisms to ensure that the government maintains sufficient capacity as weak.³²

Second, concerns about *accountability* have several dimensions.³³ On a broad level, it is often quite difficult for those outside the agency—be they members of Congress, scholars, the media, or the public—to observe which government functions are being performed by a contractor versus a government employee.³⁴ Much of this disconnect owes to the fact that many federal transparency laws do not apply to contractors in the same way they do to federal agencies and

²⁸ E.g., Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT 123 (Jody Freeman and Martha Minow eds., 2009).

²⁹ E.g., Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in GOVERNMENT BY CONTRACT 128 (Jody Freeman and Martha Minow eds., 2009) (noting the problem of using efficiency as the sole criterion of success).

³⁰ Recent scholarship has been highly critical of the extent of government reliance on contractors. Kimberly N. Brown, *We the People, Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1363 (2013) (characterizing the current situation as an “accountability vacuum”); PAUL C. LIGHT, THE GOVERNMENT INDUSTRIAL COMPLEX 8-14 (2019) (referring to the “government-industrial complex”); JOHN DI IULIO, BRING BACK THE BUREAUCRATS 6 (2014) (noting the “Leviathan by proxy”); JON D. MICHAELS, CONSTITUTIONAL COUP 111 (2017) (describing a “Constitutional coup”); CHIARA CORDELLI, THE PRIVATIZED STATE 7-13 (2020) (discussing the “regression to the state of nature”).

³¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-360, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS (2008).

³² Fukuyama discusses the weak enforcement of protection provisions associated with private sector competitions managed under OMB Circular A-76, while Verkuil describes the feeble protections associated with the inherently governmental function test, a standard we describe later in this report. Francis Fukuyama, *The Intrinsic Functions of Government* 108, in PUBLIC SERVICE AND GOOD GOVERNANCE FOR THE TWENTY-FIRST CENTURY (James L. Perry, ed., 2020); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 127-29 (2007).

³³ By accountability we mean the ability of government to hold contractors responsible for the actions taken (or not taken) during the course of a contracted relationship.

³⁴ In her work examining the role of contractors in the defense arena, Minow acknowledges these oversight challenges: “the lack of transparency and disclosure makes it difficult for the public—and for me—to know what is going on with the military’s use of private contractors. The private firms disclose some of their activities in promoting their services, but they can resist media and Congressional inquiries, claiming that they need to do so to protect proprietary information.” Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, Democracy*, 46 B.C. L. REV. 989, 999 (2005).

their employees. As one scholar explains, there are a number of “statutes mandating transparency at an agency and individual level, including the Freedom of Information Act [(FOIA)], the Government in the Sunshine Act, the Federal Advisory Committee Act, and a host of financial and political disclosure requirements imposed on anyone hoping to work for the federal government. None of these rules apply to contractors.”³⁵ Even when limited insight into what contractors do is possible, the highly technical nature of some agency and therefore contractor work and the use of subcontractors (which further extends the accountability chain) can also impede the ability of those outside the agency to hold contractors to account.

In addition, the limited applicability of statutory oversight schemes (e.g., FOIA) forecloses the opportunity for lawsuits that would directly hold contractors to account for their actions. Broadly, the government’s decision about whether to outsource a particular function tends to be reviewed only in particular contexts, such as contract disputes or the decision to privatize a function.³⁶ It is not, as a general principle, reviewed in the context of invalidating an agency action under the Administrative Procedure Act.

Agencies may also struggle to effectively oversee the contractors that work for them. The use of overly rigid contracting vehicles may lock agencies into suboptimal contract relationships. For instance, an agency may be aware that a vendor is underperforming in some way, but be unable to remedy the situation due to legal and procedural constraints. One scholar notes that a growing tendency for agencies to use “omnibus” contracts, which bundle several services under one umbrella, can exacerbate accountability problems as “they create a series of secondary relationships between contractors and subcontractors that may displace government as a voice in directing the production of goods and services.”³⁷ Problems like these make it difficult for agencies to exercise appropriate oversight, presenting another obstacle for contractor accountability.

Third, *ethics* are a concern for anyone working in or for the government given the importance of the public trust. However, the safeguards in place for government employees and contractors are different. While government employees are subject to a host of ethics statutes and regulations that relate to their positions, including disclosures of financial holdings and limitations on political activities, contractors face many fewer limitations. Indeed, as one scholar notes, most ethics restrictions “do not apply to government contractor personnel, even those employees

³⁵ Francis Fukuyama, *The Intrinsic Functions of Government* 112, in PUBLIC SERVICE AND GOOD GOVERNANCE FOR THE TWENTY-FIRST CENTURY (James L. Perry, ed., 2020). Fukuyama further muses that “the lack of transparency can then affect the legitimacy of government as a whole, as citizens are not sure who it is that is responsible for delivering services, or whom to hold accountable when things go wrong.” *Id.* at 112. We discuss the legal considerations associated with contractors and federal recordkeeping and disclosure laws in Section II(D) of this report.

³⁶ *E.g.*, *Just in Time Staffing v. United States*, 143 Fed. Cl. 405 (Fed. Cl. 2019) (discussing relevance of inherently governmental functions in a contract dispute); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 195 (2007) (“Since 1996, bid protests have been considered in the U.S. Court of Federal Claims. Judicial review of decisions whether to treat a government function as inherent or not can be obtained by granting plaintiffs (government officials who lost competitions and their unions) standing to challenge results under existing law.”); *Nat’l Air Traffic Controllers Ass’n v. Sec’y of the Dep’t Transp.*, 654 F.3d 654 (6th Cir. 2011) (discussing relevance of inherently governmental functions to a privatization dispute). *See also* Kimberly N. Brown, *We the People, Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1363 (2013).

³⁷ PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* 185 (1999).

working side by side with and performing the same functions as government employees. As a result, government contractor personnel may routinely be giving advice that is tainted by conflicts of interest.”³⁸

At their core, questions about contractor ethics center on employee allegiance. Federal employees swear an oath to uphold the Constitution, report to others who have also sworn that same oath, and are held to a wide array of ethical requirements to discourage self-interested action in the course of employment.³⁹ Contractors, in contrast, serve three sets of interests: their contractual obligations to the government, the interests of their private sector employers, which may have organizational goals that are different from or even conflict with those of the federal agency, and their own individual interests. Contractors do not swear an oath⁴⁰ and while some are covered by ethical requirements arising from individual agency regulations, specific contract terms, or due to their own companies’ policies, the result is uneven application of these expectations.⁴¹

D. Legal considerations

The Administrative Procedure Act (APA) is considered the “backbone for the rulemaking process”⁴² as it lays out the basic steps that agencies must follow when promulgating new rules. The APA’s rulemaking language speaks to *what* an agency must do in a procedural sense⁴³ but it is not especially prescriptive with respect to the details of *how* an agency must fulfill these basic requirements. For example, while the APA requires that upon receiving comments on a proposed rule “the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose,”⁴⁴ it does not indicate how the agency might go about writing the concise general statement, who has that responsibility, or whether a contractor might reasonably assist the agency in performing such a function.⁴⁵

³⁸ Kathleen Clark, *Ethics for an Outsourced Government* 23 (Mar. 10, 2011) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/kathleen-clarks-final-project-report>. This report informed an ACUS recommendation on the topic of contractor ethics. Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48789, 48792 (Aug. 9, 2011). See also Kathleen Clark, *Ethics, Employees and Contractors: Financial Conflicts of Interest In and Out of Government*, 62 ALA. L. REV. 961 (2011). See also Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 898-900 (2000) (documenting how thin conflicts-of-interest provisions can be in practice).

³⁹ We discuss contractor ethics requirements in the legal considerations section that follows.

⁴⁰ Verkuil explains the power of the oath: “the oath is meant to divide the public and private sectors . . . when freely entered into, the oath can inspire those who take it and become a source of professional pride.” PAUL R. VERKUIL, *VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT* 97 (2017).

⁴¹ Clark, *supra* note 38, at 28-30 (mapping applicability of ethics restrictions); Recommendation 2011-3, *supra* note 38.

⁴² RACHEL A. POTTER, *BENDING THE RULES* 28 (2019).

⁴³ 5 U.S.C. § 553 et seq. (2020).

⁴⁴ 5 U.S.C. § 553(c).

⁴⁵ Scholars have considered ways that the APA could be used to help ameliorate problems caused by the status quo. E.g., Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1315 (2003) (suggesting that Congress could amend the APA to subject contracts to its requirements); Alfred C. Aman, *Privatization and Democracy: Resources in Administrative Law*, in *GOVERNMENT BY CONTRACT* 284 (Jody

It follows that, although it constitutes the core of the rulemaking process, the APA is not an especially helpful guide to understand the legal considerations relevant to the question of contractors in the rulemaking process.⁴⁶ Instead, we consider three legal dimensions of particular relevance: federal procurement law and policy (with particular emphasis on the concept of an “inherently governmental function”), ethics laws, and federal recordkeeping and disclosure requirements.

1. Federal procurement law and policy

A complete description of federal procurement law and policy—that is, the statutes, regulations, guidance, and judicial opinions that form the complex legal environment in which federal contracting takes place—is beyond the scope of this report. However, some understanding of these policies and how they get made is helpful to understanding aspects of this report and its recommendations.

The Federal Acquisition Regulation (FAR) “is the primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds.”⁴⁷ The Department of Defense (DOD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) jointly issue the FAR under the authority of Title 41 of the U.S. Code.⁴⁸ Agencies may also implement or supplement the FAR with their own regulations, as needed.⁴⁹ The vision for the FAR and the agency regulations is “to deliver on a timely basis the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives.”⁵⁰ The Office of Federal Procurement Policy (OFPP), in the OMB, is authorized by statute to provide “overall direction” for government-wide procurement

Freeman and Martha Minow eds., 2009) (suggesting that the public should have an opportunity to comment on proposed contracts, like they do for proposed rules). One scholar responded that this was using a “nuclear weapon to kill a gnat.” Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT 187 (Jody Freeman and Martha Minow eds., 2009).

⁴⁶ Along similar lines, scholars have raised potential constitutional issues triggered by expansive use of contractors in agency policymaking, but these concerns have yet to find traction in the courts. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (noting the inability of the state action doctrine to address constitutional concerns with privatization and advocating, instead, for such arrangements to be analyzed as private delegations subject to extra scrutiny); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1913-15 (2015) (explaining how courts could oversee the executive’s duty to supervise privatized arrangements); JON D. MICHAELS, CONSTITUTIONAL COUP 119, 126-27 (2017) (arguing that contractors are a threat to, among other things, the “administrative separation of powers” when retained by political appointees and therefore more compliant with political direction than civil servants); Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in GOVERNMENT BY CONTRACT 314 (Jody Freeman and Martha Minow eds., 2009) (discussing limitations on delegations to contractors as a matter of the Appointments Clause); Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1511-19 (2001) (considering how the Appointments Clause and the Tenth Amendment might apply to certain privatization efforts).

⁴⁷ FAR Foreword (2021), <https://www.acquisition.gov/far/forwarda>.

⁴⁸ FAR 1.103 (2021); FAR 1.101 (2021), Title 41 U.S.C.

⁴⁹ As explained in the U.S. Department of Labor Acquisition Regulation, “The purpose of the DOLAR is to implement the FAR, and to supplement the FAR when coverage is needed for subject matter not covered in the FAR.” DOLAR 2901.101(b). A list of agency-specific regulations is available at <https://www.acquisition.gov/content/regulations>.

⁵⁰ FAR 1.102 (2021).

activities.⁵¹ Together, DOD, GSA, NASA, and OFPP comprise the FAR Council, which manages the FAR.⁵²

The FAR includes hundreds of provisions including those on improper business practices and personal conflicts of interest;⁵³ classified information;⁵⁴ proper public notice of contracting actions;⁵⁵ competition requirements;⁵⁶ contractor qualifications, including debarment and suspension;⁵⁷ types of contracting vehicles;⁵⁸ opportunities for small businesses;⁵⁹ applicability of labor laws to acquisitions;⁶⁰ environmental provisions;⁶¹ privacy and disclosure;⁶² foreign acquisition;⁶³ intellectual property;⁶⁴ bonds, insurance, taxes, accounting, and finance;⁶⁵ bid protests;⁶⁶ and much more. As of FY 2019, the FAR was almost 2,000 pages long. Apart from the FAR, OFPP occasionally issues policy letters and other materials with guidance, some of which gets added to Circular A-76, which “establishes Federal policy regarding the performance of commercial activities.”⁶⁷

There has long been a notion in procurement law that certain functions are reserved to the government and therefore inappropriate for contractors.⁶⁸ Circular A-76 explains that it is the policy of the United States to retain governmental functions in-house, because “[c]ertain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.”⁶⁹ While the principle is easy enough to understand at a high level, bright lines that govern day-to-day practice in government have been elusive. This broad principle, for example, does not expressly reference rulemaking or other specific types of government action.

The FAR, which reflects the Federal Inventories Reform Act of 1980,⁷⁰ offers more specificity, defining an inherently governmental function as:

⁵¹ Office of Federal Procurement Policy Act § 6, 41 U.S.C. § 1121 (2019).

⁵² 41 U.S.C. § 421(f) (2019)

⁵³ FAR Part 3 (2021).

⁵⁴ FAR 4.4 (2021).

⁵⁵ FAR Part 5 (2021).

⁵⁶ FAR Part 6 (2021).

⁵⁷ FAR Part 9 (2021).

⁵⁸ FAR Part 16 (2021).

⁵⁹ FAR Part 19 (2021).

⁶⁰ FAR Part 22 (2021).

⁶¹ FAR Part 23 (2021).

⁶² FAR Part 24 (2021)

⁶³ FAR Part 25 (2021).

⁶⁴ FAR Part 27 (2021)

⁶⁵ FAR Parts 28-32 (2021).

⁶⁶ FAR Part 33 (2021).

⁶⁷ OFF. OF MGMT. & BUDGET, CIRCULAR A-76 (Aug. 4, 1983, rev. 1999), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A76/a076.pdf>.

⁶⁸ The exact articulation of this policy has gone through many iterations issued in legislation, the FAR, and in OFPP guidance. Thomas J. Laubacher, *Simplifying Inherently Governmental Functions: Creating a Principled Approach from its Ad Hoc Beginnings*, 46 PUB. CONT. L.J. 791, 793-94 (2017).

⁶⁹ CIRCULAR A-76, *supra* note 67, at 1-2.

⁷⁰ Federal Activities Inventory Reform Act of 1980 § 5(2), Pub. L. No. 105-270.

a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements.

(1) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to-

(i) Bind the United States to take or not to take some action by contract, policy, *regulation*, authorization, order, or otherwise;

(ii) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) *Significantly affect the life, liberty, or property of private persons;*

(iv) Commission, appoint, direct, or control officers or employees of the United States; or

(v) Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of Federal funds.

(2) Inherently governmental functions *do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials*. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.⁷¹

This language expressly refers to activities that bind the government with respect to regulatory choices, and the language in subsection 1(iii) could also be understood to be referring to regulations. The FAR also explains in subsection 2 that merely giving information or advice to the government is not inherently governmental. The line that emerges is one of decision-making.

⁷¹ FAR 2.101 (2021) (emphases added).

The FAR further elaborates with a list of 20 examples of functions that are considered to be inherently governmental (e.g., “direct control of criminal investigations”), and 19 that are not considered to be inherently governmental (e.g., “[s]ervices in support of acquisition planning”).⁷² The list includes rulemaking examples as well. The “determination of agency policy, such as determining the content and application of regulations, among other things” is considered to be inherently governmental, while a broad range of services associated with “planning activities,” “analysis, feasibility studies, and strategy options to be used by agency personnel in developing policy,” and—most directly—the “development of regulations” is not considered to be inherently governmental.⁷³ Again, the line is between advice-giving and decision-making.

The FAR also notes that there is a set of functions that are not considered to be inherently governmental functions, but which “may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance.”⁷⁴ The FAR does not define this category of activities.

While the general principle—that some tasks are inappropriate for contractors—has long been clear, the challenge of finding the line in practice has drawn the attention of lawmakers, practitioners, and academics.⁷⁵ In response, OFPP has taken several steps over the last several decades to more fully explain how agencies should determine whether an activity is inherently governmental.⁷⁶ In 1991, OFPP issued a proposed policy letter to further define the term “because executive agencies, Members of Congress, and the General Accounting Office have from time to time either requested guidance regarding, or inquired about, the propriety of awarding contracts for certain types of functions or administering contracts in certain ways.”⁷⁷ OFPP acknowledged that “[w]hile it is clear that certain functions, such as the command of combat troops, may not be contracted, others, such as building maintenance or food services, may be. There is, however, some difficulty in determining whether services that fall between these extremes may be acquired by contract.”⁷⁸

As we discuss below, rulemaking includes many activities that fall between these extremes. Rulemaking, like many government activities that involve internal administrative processes, can readily be distinguished from the use of contractors in military settings, for example, because:

⁷² *Federal Acquisition Regulation; Inherently Governmental Functions*, 61 Fed. Reg. 2627, 2628-29 (Jan. 26, 1996) (establishing FAR 7.503(c)-(d)).

⁷³ *Id.*

⁷⁴ FAR 7.503(d) (2021).

⁷⁵ E.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-92-11, GOVERNMENT CONTRACTORS: ARE SERVICE CONTRACTORS PERFORMING INHERENTLY GOVERNMENTAL FUNCTIONS? REPORT TO THE CHAIRMAN, FEDERAL SERVICE, POST OFFICE AND CIVIL SERVICE SUBCOMMITTEE, COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE (Nov. 1991); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 555 (2005); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, Democracy*, 46 B.C. L. REV. 989, 1015 (2005).

⁷⁶ Thomas J. Laubacher, *Simplifying Inherently Governmental Functions: Creating a Principled Approach from its Ad Hoc Beginnings*, 46 PUB. CONT. L.J. 791, 793-94 (2017).

⁷⁷ OFF. OF FED. PROCUREMENT POL'Y, INHERENTLY GOVERNMENTAL FUNCTIONS POLICY LETTER, 56 Fed. Reg. 65279, 65280 (Dec. 16, 1991).

⁷⁸ *Id.*

The situation considered here is more subtle. The contractor is not asked to perform government functions directly (whether ‘inherent’ or not), but for help in making decisions. If the contractor does all the work to prepare a decision, has the decision line itself been crossed? When an official rubber-stamps a contractor’s recommendation, who is performing the government function?⁷⁹

In a final policy letter issued in 1992, OFPP acknowledged that prior guidance to agencies lacked detail and that “sometimes Federal agencies have permitted contractors to perform functions that should be performed by Government personnel.”⁸⁰ OFPP also accepted that the challenges would endure.⁸¹ The ongoing ambiguity has led to criticism. In the introduction to their volume *Government by Contract*, Jody Freeman and Martha Minow note that

[m]any critics are also concerned about the instability of the ‘inherently governmental’ designation and its failure in practice to rule functions in or out of eligibility for contracting. If the government may contract with private companies to provide military, national security, and criminal justice functions, why not contract out criminal prosecutions and executions or the Federal Reserve Board’s regulation and supervision of national monetary and financial systems?⁸²

In 2008, Congress required OMB, in consultation with federal stakeholders, to review and revise the definition of “inherently governmental function.”⁸³ In 2009, President Obama explained that

the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.⁸⁴

He directed OMB to “clarify when governmental outsourcing for services is and is not appropriate,” consistent with the 2008 legislation.⁸⁵

⁷⁹ PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 43 (2007).

⁸⁰ OFF. OF FED. PROCUREMENT POL’Y, *POLICY LETTER ON INHERENTLY GOVERNMENTAL FUNCTIONS*, 57 Fed. Reg. 45096, 45096 (Sept. 30, 1992).

⁸¹ *Id.* at 45100 (noting that “[a]dditional problems in this area will probably arise in the future” but that its 1992 guidance was “much more detailed than anything that was available to agencies in the past”). Congress enacted the Federal Acquisition Inventory Reform Act of 1998 (FAIR Act). Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270 (1998). This legislation required agencies to prepare annual lists of agency activities that are not considered to be inherently governmental. FAIR Act § 2.

⁸² Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 13-14 (Jody Freeman & Martha Minow eds. 2009).

⁸³ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 321, 122 Stat. 4534, 4411 (2008).

⁸⁴ Presidential Memorandum, *Government Contracting*, 74 Fed. Reg. 9755, 9755-9756 (Mar. 4, 2009).

⁸⁵ *Id.*

Following a proposed policy letter in 2010, OFPP issued a final policy letter in 2011.⁸⁶ Among other changes, the policy letter created a new category for “functions closely associated with the performance of inherently governmental functions” in light of “the risk that performance may impinge on Federal officials’ performance of an inherently governmental function.”⁸⁷ These activities “may be performed by either Federal employees or contractors.”⁸⁸ The final policy letter applies these categories to four functions: budget development, policy and regulatory development, human resources management, and acquisition planning, execution, and management.

As shown in Table 1, for “policy and regulatory development” functions, the final policy letter explains that “[t]he determination of the content and application of policies and regulations” is inherently governmental, while “[s]upport for policy development, such as drafting policy documents and regulations, performing analyses, feasibility studies, and strategy options” is closely associated with inherently governmental functions.⁸⁹

⁸⁶ OFF. OF FED. PROCUREMENT POL’Y, PROPOSED POLICY LETTER ON WORK RESERVED FOR PERFORMANCE BY FEDERAL GOVERNMENT EMPLOYEES, 75 Fed. Reg. 16188 (Mar. 31, 2010); OFF. OF FED. PROCUREMENT POL’Y, FINAL POLICY LETTER 11-01 ON PERFORMANCE OF INHERENTLY GOVERNMENTAL FUNCTIONS, 76 Fed. Reg. 56227 (Sept. 12, 2011).

⁸⁷ FINAL POLICY LETTER 11-01 ON PERFORMANCE OF INHERENTLY GOVERNMENTAL FUNCTIONS, *supra* note 86, at 56238, 56241.

⁸⁸ *Id.* at 56241.

⁸⁹ *Id.* at 56241.

Table 1. Final Policy Letter: Functions⁹⁰

Function	Inherently Governmental	Closely Associated
Budget development	The determination of budget policy, guidance, and strategy, and the determination of Federal program priorities or budget requests.	Support for budget preparation, such as workforce modeling, fact finding, efficiency studies, and should-cost analyses.
<i>Policy and regulatory development</i>	<i>The determination of the content and application of policies and regulations.</i>	<i>Support for policy development, such as drafting policy documents and regulations, performing analyses, feasibility studies, and strategy options.</i>
Human resources management	The selection of individuals for Federal Government employment, including the interviewing of individuals for employment, and the direction and control of Federal employees.	Support for human resources management, such as screening resumes in accordance with agency guidelines.
Acquisition planning, execution, and management	<p>During acquisition planning:</p> <ul style="list-style-type: none"> (1) Determination of requirements, (2) approval of a contract strategy, statement of work, incentive plans, and evaluation criteria, (3) independent determination of estimated cost based on input from either in-house or contractor sources or both. <p>During source selection:</p> <ul style="list-style-type: none"> (1) Determination of price reasonableness of offers, (2) participation as a voting member on a source selection board, and (3) awarding of contracts. <p>During contract management:</p> <ul style="list-style-type: none"> (1) Ordering of any changes required in contract performance or contract qualities, (2) determination of whether costs are reasonable, allocable, and allowable, (3) participation as a voting member on performance evaluation boards, (4) approval of award fee determinations or past performance evaluations, and (5) termination of contracts. 	<p>Support acquisition planning by:</p> <ul style="list-style-type: none"> (1) Conducting market research, (2) developing inputs for government cost estimates, and (3) drafting statements of work and other pre-award documents. <p>Support source selection by:</p> <ul style="list-style-type: none"> (1) Preparing a technical evaluation and associated documentation; (2) participating as a technical advisor to a source selection board or as a nonvoting member of a source evaluation board; and (3) drafting the price negotiation memorandum. <p>Support contract management by:</p> <ul style="list-style-type: none"> (1) Assisting in the evaluation of a contractor's performance (e.g., by collecting information, performing an analysis, or making a recommendation for a proposed performance rating); and (2) providing support for assessing contract claims and preparing termination settlement documents.

⁹⁰ *Id.* at 56234 (emphases added).

Intriguingly, the final policy letter notes that mere drafting of “official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity” is inherently governmental.⁹¹ Although OFPP did not explain its reasoning for placing legislative correspondence and other legislative drafting activities on the other side of the inherently governmental line, it may be a reflection of what others have noted previously, which is that “[a]nalysis and drafting are surely significant if not inherently governmental functions.”⁹² At least in the final policy letter, legislative drafting was over the line, whereas regulatory drafting was not.

Under the final policy letter, when contractors are given tasks that are closely associated with inherently governmental functions, “the Federal official’s review and approval must be meaningful; that is to say, it cannot be a ‘rubber stamp’ where the government is completely dependent on the contractor’s superior knowledge and is unable to independently evaluate the merits of the contractor’s draft or to consider alternatives to that draft.”⁹³ To this end, the final policy letter includes a checklist designed for “special management attention to contractors’ activities to guard against their expansion into inherently governmental functions.”⁹⁴ The checklist is shown in Figure 1.

The legal and policy landscape for inherently governmental functions has not changed significantly since 2011.

⁹¹ *Id.* at 56241.

⁹² PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 111 (2007).

⁹³ FINAL POLICY LETTER 11-01 ON PERFORMANCE OF INHERENTLY GOVERNMENTAL FUNCTIONS, *supra* note 86, at 56231.

⁹⁴ *Id.* at 56232.

Figure 1. Checklist for Closely Associated Functions⁹⁵

If the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate, the agency shall—

- (1) limit or guide a contractor’s exercise of discretion and retain control of government operations by both—
 - (i) establishing in the contract specified ranges of acceptable decisions and/or conduct; and
 - (ii) establishing in advance a process for subjecting the contractor’s discretionary decisions and conduct to meaningful oversight and, whenever necessary, final approval by an agency official;
- (2) assign a sufficient number of qualified government employees, with expertise to administer or perform the work, to give special management attention to the contractor’s activities, in particular, to ensure that they do not expand to include inherently governmental functions, are not performed in ways not contemplated by the contract so as to become inherently governmental, do not undermine the integrity of the government’s decisionmaking process as provided by subsections 5–1(a)(1)(ii)(b) and (c), and do not interfere with Federal employees’ performance of the closely-associated inherently governmental functions (see subsection 5–2(b)(2) for guidance on steps to take where a determination is made that the contract is being used to fulfill responsibilities that are inherently governmental);
- (3) ensure that the level of oversight and management that would be needed to retain government control of contractor performance and preclude the transfer of inherently governmental responsibilities to the contractor would not result in unauthorized personal services as provided by FAR 37.104;
- (4) ensure that a reasonable identification of contractors and contractor work products is made whenever there is a risk that Congress, the public, or other persons outside of the government might confuse contractor personnel or work products with government officials or work products, respectively; and
- (5) take appropriate steps to avoid or mitigate conflicts of interest, such as by conducting pre-award conflict of interest reviews, to ensure contract performance is in accordance with objective standards and contract specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and specific actions that will be taken to lessen the potential for conflict of interest or reduce the risk involved with a potential conflict of interest.

2. Ethics laws

In addition to federal procurement law and policy, several other statutes and policies intersect with government contracts for rulemaking activities. Chief among them are federal ethics laws. ACUS has previously explored the intersection of ethics rules and government contracting. In a 2011 project, Kathleen Clark produced a detailed report that surveyed the range of ethical restrictions on federal employees and compared them to contractor duties, finding several gaps.⁹⁶ She explained that the “extensive and complex array of ethics statutes and regulations restrict current and former government employees’ activities and financial interests . . . mostly do not apply to contractor personnel.”⁹⁷ She noted that while a patchwork of agency-specific ethics

⁹⁵ *Id.* at 56241-42.

⁹⁶ Clark, *supra* note 38, at 28-30, 41-49 (mapping applicability of ethics restrictions).

⁹⁷ *Id.* at 4.

rules apply to contractors in certain situations, “[t]here is no comprehensive regulation of government contractor ethics, even of those individuals who are working in government offices, side-by-side with government employees, providing services and exercising substantial discretion.”⁹⁸

Clark’s extensive work built on prior legislation and reports.⁹⁹ In 2008, Congress directed OFPP to issue a policy to address personal conflicts of interest for contractors involved in the acquisition process.¹⁰⁰ This narrow policy was issued by OFPP in 2009.¹⁰¹ More sweepingly, the Acquisition Advisory Panel—which was established by Congress to review federal procurement statutes, regulations, and policy¹⁰²—wrote about the potential for two main types of conflicts of interest associated with government contracting.¹⁰³ The first type of conflict was organizational conflicts of interest presented by the use of contractors in functions related to the procurement process, in which the contractor presumably has ongoing business interests.¹⁰⁴ An example of an organizational conflict of interest is a situation where a contractor is retained to help develop a contract that will be outsourced at a future point and this preliminary work gives them a competitive advantage in competing for future contracts with that agency.¹⁰⁵

The second type of conflict was personal conflicts of interest, which involve the applicability of ethics rules to contractor employees.¹⁰⁶ Government employees are subject to a host of ethical rules intended to ensure that public interest is not eclipsed by the private interests of decision-makers.¹⁰⁷ In practice, this means required ethics training and disclosures of certain activities and interests, as well as review of those disclosures, and investigations of alleged violations.¹⁰⁸ Both civil and criminal penalties are available for violations.¹⁰⁹ The legal landscape for contractors is different, and the Panel explained that “contractor personnel are not subject to the foregoing comprehensive set of statutory and regulatory ethics rules, even though in some cases they are

⁹⁸ *Id.*

⁹⁹ *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-169, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES (2008); REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS (2007), https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

¹⁰⁰ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 § 841(a), Pub. L. No. 110-417 (Oct. 14, 2008).

¹⁰¹ *Federal Acquisition Regulation; Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions*, 76 Fed. Reg. 68017 (Nov. 2, 2011).

¹⁰² Services Acquisition Reform Act of 2003 § 1423 (part of National Defense Authorization Act for Fiscal Year FY 2004, P.L. 108-136, 117 Stat. 1392 (Nov. 24, 2003)).

¹⁰³ REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 24-25, 391-419 (2007), https://www.acquisition.gov/sites/default/files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf [hereinafter ACQUISITION ADVISORY PANEL REPORT].

¹⁰⁴ *Id.* at 405-07.

¹⁰⁵ *See id.* at 406. The Panel Report also mentioned concerns about confidentiality associated with these practices. *Id.* at 392.

¹⁰⁶ *Id.* at 407-14.

¹⁰⁷ *See* 5 C.F.R. § 2635.101(a) (describing the duty “to place loyalty to the Constitution, laws and ethical principles above private gain”).

¹⁰⁸ Clark, *supra* note 38, at 4.

¹⁰⁹ ACQUISITION ADVISORY PANEL REPORT, *supra* note 103, at 408-09.

working alongside government employees in the federal workplace and may appear to the public to be government employees.”¹¹⁰ OFPP also previously acknowledged this issue in 1991, stating that “agencies have occasionally relied on contractors so as to raise questions about . . . the degree to which Government policy is created by private persons. Private persons may have interests that are not in harmony with those of the public, and may be beyond the reach of management controls otherwise applicable to public employees.”¹¹¹

The ACUS recommendation that followed Clark’s report, 2011-3, noted the “substantial disparity between the ethics rules regulating government employees and those applicable to government contractor employees.”¹¹² The recommendation articulated a definition of “high risk” contract activities based on the susceptibility of the activities to be endangered by either personal or organizational conflicts.¹¹³ This included, among other things, “[d]eveloping agency policy or regulations,” tasks for which contractors “will receive access to information relating to an agency’s deliberative processes, management operations, or staff that is not generally released to the public” as well as “have access to certain business-related information, including trade secrets, non-public financial information, or other non-public information that could be exploited for financial gain.”¹¹⁴ The recommendation called on the FAR Council to develop model language that agencies could use to address ethics issues for contracts involving high-risk activities.¹¹⁵

With this recommendation, ACUS joined the Acquisition Advisory Panel and the GAO in recommending additional steps to create new requirements to deal with both personal and organizational conflicts of interest.¹¹⁶ The Administrative Law and Regulatory Practice Section of the American Bar Association also endorsed the ACUS recommendation.¹¹⁷ In 2014, the FAR Council proposed a rule extending the “limitations on contractor employee personal conflicts of interest to apply to the performance of all functions that are closely associated with the inherently governmental functions.”¹¹⁸ The FAR Council withdrew the proposed rule in 2021, citing “the passage of time since the proposed rule was issued in 2014, and the fact that section 829 did not require any changes to the FAR.”¹¹⁹

¹¹⁰ *Id.* at 409.

¹¹¹ OFF. OF FED. PROCUREMENT POL’Y, INHERENTLY GOVERNMENTAL FUNCTIONS POLICY LETTER, 56 Fed. Reg. 65279, 65280 (Dec. 16, 1991).

¹¹² Recommendation 2011-3, *supra* note 38, at 48792.

¹¹³ *Id.* at 48793-94.

¹¹⁴ *Id.* at 48794.

¹¹⁵ *Id.*

¹¹⁶ Clark, *supra* note 38; Recommendation 2011-3, *supra* note 38; U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-169, ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES (2008); ACQUISITION ADVISORY PANEL REPORT, *supra* note 103, at 25.

¹¹⁷ James W. Conrad, Jr., Report to the House of Delegates, A.B.A. SEC. ADMIN. L. & REG. PRACTICE (2013), available at <https://www.acus.gov/sites/default/files/documents/ABA%20Resolution%20110A%20and%20Report.pdf>.

¹¹⁸ *Federal Acquisition Regulation; Extension of Limitations on Contractor Employee Personal Conflicts of Interest*, Proposed Rule, 79 Fed. Reg. 18503, 18504 (Apr. 2, 2014).

¹¹⁹ *Federal Acquisition Regulation; Extension of Limitations on Contractor Employee Personal Conflicts of Interest*, Proposed Rule; withdrawal, 86 Fed. Reg. 14862 (Mar. 19, 2021).

3. Recordkeeping and disclosure frameworks

Another set of laws relevant to the use of contractors in rulemaking is the statutory requirements that govern decision-making processes and associated disclosure requirements. For example, certain governmental records must be retained by the government under the Federal Records Act,¹²⁰ and some must be disclosed under Freedom of Information Act.¹²¹ In addition, some agencies are subject to additional process and disclosure requirements under the Government in the Sunshine Act.¹²²

These laws form a web of provisions that confer a measure of accountability upon government actions. Contractors, however, are not subject to these various requirements.¹²³ The accountability blindspot in which contractors operate is important because, as scholars have argued, accountability can suffer when the government turns to contractors.¹²⁴ For Rosenbloom and Piotrowsky, “when government activities are privatized or outsourced, democratic norms embodied in constitutional and administrative law are apt to be lost.”¹²⁵ These norms are deeply embedded in the rulemaking process. When agencies rely on contractors for support in rulemaking functions, activities that would otherwise be covered by these laws shift into the blindspot.¹²⁶

¹²⁰ Federal Records Act, 44 U.S.C. Chapter 31 (2020).

¹²¹ Freedom of Information Act, 5 U.S.C. § 552 (2020).

¹²² Government in the Sunshine Act, 5 U.S.C. § 552b (2020).

¹²³ Kimberly N. Brown, *We the People, Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1362-63 (2013); Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1306 (2003). *See also* Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 901-05 (2000) (tracing the development of case law on FOIA inapplicability to contractors).

¹²⁴ *E.g.*, Jack Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507 (2001); Kimberly N. Brown, *We the People, Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347 (2013).

¹²⁵ David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 AM. REV. PUB. ADMIN. 103, 103 (2005).

¹²⁶ The practical consequences of subjecting contractors to these various regimes is worthy of deep consideration. *E.g.*, Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT 185-86 (Jody Freeman and Martha Minow eds., 2009) (discussing the challenges of applying FOIA to contractors). One notable exception to this accountability blindspot is the Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 et seq. (2020), a law which addresses both agency information collection and recordkeeping requirements. Contractors are broadly subject to the PRA’s information collection provisions. At least one agency, the Department of Education, has made the PRA’s applicability to contractors explicit in their FAR supplement; *see* 48 C.F.R. § 3452.208-72.

III. How are contractors perceived in rulemaking?

While prior research has expressed concern that contractors are playing an increasing and problematic role in rulemaking,¹²⁷ this report offers the first detailed study of whether and how agencies use contractors in the rulemaking process. As a threshold matter, we find wide variation in whether agencies use contractors in the rulemaking process. Some respondents had the perspective that the tasks involved in rulemaking are inherently governmental, and therefore out of bounds for contractors. Others considered the use of contractors to be one of many ways to get work done, as needed, amid competing demands on scarce agency resources. A third category of respondents reported consistent and widespread use of contractors, such that they function much like regular staff.

A. A wide variety of perceptions

A primary and surprising finding of this report is that views about contractor usage for rulemaking functions vary greatly. On one end of the spectrum, one participant characterized the use of contractors in rulemaking to be “highly irregular” outside of clerical or “non-substantive” tasks.¹²⁸ This response stakes out one view, which is that contractors should not, as a matter of principle, be involved in the substantive aspects of the rulemaking process. Other respondents had a more neutral perspective, but they still concluded that contractors’ roles should be limited when it comes to rulemaking. One respondent explained that contractors “seldom—if ever—play a role in our Agency’s rulemaking activities.”¹²⁹ Another commented “I am not aware that [agency name] has ever used contractors in its rulemaking.”¹³⁰ And yet another respondent noted that, in their experience, contractors “usually work in back-office (IT) roles,” but not on rulemakings, which are handled by “[f]ull-time staff.”¹³¹

Among survey respondents who answered that contractors were not used in the rulemaking about which they were surveyed, and who provided reasons from a pre-set list, the most frequently selected reasons were “need for expertise,” “past practices,” “adequacy of agency resources,” and “consideration of inherently governmental functions.” One respondent explained that their agency’s regulatory program is “robust,” and that the process is handled internally.¹³² Another explained that “[w]e have a division [name omitted] that is responsible for handling the rulemaking activities, in conjunction with other Agency divisions [names omitted] as necessary.”¹³³ Relatedly, one respondent raised the extent and complexity of rulemaking as

¹²⁷ See, e.g., JON D. MICHAELS, CONSTITUTIONAL COUP 111 (2017) (arguing that “[e]verywhere we look, the federal government is engaged in deep service contracting: the outsourcing of sensitive policy design and policy-implementing responsibilities” including rulemaking activities (emphasis omitted)); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 24-25, 191 (2007) (arguing that “[a]gencies contract with regularity for a variety of private management services” including rulemaking activities and that some of these activities “cross[] the line”).

¹²⁸ Survey response.

¹²⁹ Survey response.

¹³⁰ Survey response.

¹³¹ Survey response. Here and throughout, we use gender-neutral pronouns to protect the identity of study participants.

¹³² Survey response.

¹³³ Survey response.

explanations for why contractors have not been used for rulemaking. They noted that their agency “is a small agency” with rules that “tend to be non-significant as provided under E.O. 12866, and we tend to get few comments.”¹³⁴ This view was supported by several personnel from other agencies who also indicated that their agency does not use contractors in the rulemaking process.

A middle group on this spectrum is characterized by the sense that an agency’s default is not to use a contractor.¹³⁵ One survey respondent explained that “[o]n occasion we might need actuarial assistance for the development of Regulatory Impact Analysis.”¹³⁶ Another indicated that their team used a contractor to process comments when there was a contract in place, but that this work is now handled internally.¹³⁷ Our interviews revealed a rich range of perspectives about when and why agencies engage contractors for rulemaking tasks. We describe these considerations below in Section V.

At the other end of the spectrum, some respondents indicated that contractors are integral to rulemaking. Some agencies lean on contractors to supplement their staff resources in an ongoing way. One interviewee explained that contractors are “basically staff augmentation”¹³⁸ and another indicated that “[c]ontractors are us—they’re feds—but in italics.”¹³⁹ One survey respondent indicated that “turnover and lack of staff” led to extensive use of contractors on at least one rulemaking.¹⁴⁰

B. Discussion

In this section we describe views collected in the course of our research about whether to use contractors in the rulemaking process. Quite clearly, views about the proper role of contractors in rulemaking vary considerably. This may be, in part, because of ambiguity about what it means for a task to be an inherently governmental function. While some interviewees expressed shock about the possibility of using contractors to help with rulemaking, others found it not just normal but necessary to pursue their agency’s mission.

This wide variation gives us pause. On the one hand agencies might be refraining from contractor use when it would actually be permissible and possibly beneficial; on the other hand, agencies might be treading close to or over the line in terms of which rulemaking tasks they entrust to contractors. We do not opine on legal conclusions for any particular examples, but we offer these descriptive findings for ACUS to consider. Overall, while it’s possible that there will

¹³⁴ Survey response. Another response was similar: “Out of the 20+ regulations I have worked on, we have never used an external contractor. There has not been a need for one.” Survey response. A third echoes a similar view: “We are a small agency with relatively few rulemaking actions We have extremely limited resources, so cannot afford contractors for rulemaking purposes, but we also don’t really have a need for those extra resources in most cases.” Survey response.

¹³⁵ Interview 12.

¹³⁶ Survey response.

¹³⁷ Survey response.

¹³⁸ Interview 1.

¹³⁹ Interview 13.

¹⁴⁰ Survey response.

always be close cases, the wide variation we found suggests that the general issue of contractor use in rulemaking is one that is ripe for additional debate and consideration.

IV. What tasks do contractors perform in rulemaking?

Among those agencies that use contractors for rulemaking functions, the types of tasks given to contractors are wide-ranging. These tasks differ on several dimensions; for example, there are differences in duration, contractor enmeshment into the workflow, and policy significance of the tasks.

In terms of duration, some tasks map directly onto time-limited stages of a rulemaking project, such as assistance with sorting and analyzing public comments, while others are ongoing, such as writing and research assistance. Others are special one-time projects (e.g., drafting internal guidelines for regulatory impact analysis or RIA) or more general, ongoing assistance (e.g., clerical support). The type of working relationship can vary, too, from specific, arms-length type engagements, such as writing an expert report or literature review, to long-term staffing assignments in which the contractors work side-by-side with agency employees.¹⁴¹ Tasks also range in terms of their policy significance, from the ministerial to those closely tied to policy-making. For example, contractors help with formatting documents, but they also help agencies interact with the public and with other parts of the executive branch, including the regulatory review process managed by the Office of Management and Budget (OMB).

This section offers a compilation of all tasks we uncovered in the course of this research.¹⁴²

A. Contractor tasks by rulemaking stage

Agencies follow a few general steps when promulgating rules.¹⁴³ The rulemaking process typically involves a pre-rule stage, the creation and publication of a proposed rule, a period for public comment on the proposal, and the drafting and publication of a final rule. In Table 2, we display contractor tasks arranged by these key rulemaking stages.

¹⁴¹ Frequency is another way in which contractor use varies. For example, with respect to comment management and analysis, one interviewee said “I don’t think [reviewing comments] was ever done in-house” at their agency. On the other hand, some reported turning to contractors for help with public comments only for rare, high-profile rulemakings. Interview 9. One interviewee explained that while they started to use contractors because of a sudden comment surge, they grew to use contractors for this purpose more routinely. Interview 1.

¹⁴² Of course, this list is not exhaustive and there may be additional tasks that did not arise in our research. Another important caveat is that no respondent indicated that contractors were doing *all* of the tasks described below.

¹⁴³ The basic steps of agency rulemaking are laid out in the APA, 5 U.S.C. § 553.

Table 2. Tasks Performed by Contractors during the Rulemaking Process

Pre-Rule Stage	Proposed Rule Stage	Public Comment Stage	Final Rule Stage & Beyond
<p>Plan regulatory timelines and strategies</p> <p>Conduct research:</p> <ul style="list-style-type: none"> ▪ Collect scientific data (e.g., including samples) ▪ Gather industry or other data ▪ Perform risk analysis ▪ Review literature ▪ Conduct site visits ▪ Determine stakeholder views ▪ Run surveys <p>Develop models</p>	<p>Draft and edit internal materials</p> <p>Draft proposed rule:</p> <ul style="list-style-type: none"> ▪ Write first draft (or portions) including preamble and regulatory text ▪ Review drafts ▪ Format documents <p>Provide data or other analytical support</p> <p>Draft analyses:</p> <ul style="list-style-type: none"> ▪ Prepare RIA and other analytical sections (e.g., RegFlex) ▪ Compose PRA materials <p>Help agency understand and reconcile reviewer feedback from other parts of agency (e.g., legal counsel) and executive branch (e.g., other agencies, OMB, EOP) reviewers</p>	<p>Monitor comments during comment period</p> <p>Process comments:</p> <ul style="list-style-type: none"> ▪ Transfer comments from agency to regulations.gov, and vice versa ▪ Maintain integrity to CBI ▪ Organize into a worksheet ▪ Analyze comments, including with use of NLP/AI tools ▪ Draft summaries for final rule preamble ▪ Help ensure agency responds to all comments 	<p><i>Same as Proposed Rule Stage, plus:</i></p> <p>Develop fact sheets, guidance, rollout materials</p> <p>Deliver Congressional Review Act reports to Congress</p> <p>Support implementation</p> <p>Provide litigation support</p>

1. Pre-rule stage

In this stage, the agency conducts internal planning and research, which might also include some amount of formal or informal public engagement.

Plan regulatory timelines and strategies. Some contractors assist agencies in crafting or recrafting regulatory programs. At one agency, this kind of help meant the contractor worked with the agency to reformulate how a fee program worked, including a strategy for rewriting the agency’s fee-related regulations.¹⁴⁴ At another agency, an interviewee described that a Federally-Funded Research and Development Center (FFRDC)—a special kind of entity that is run by contractors but is sponsored by a federal agency—serves as a “thought partner” for longer-term regulatory planning.¹⁴⁵ This involves helping to define strategic direction for policies over a three- to five-year timeframe, and includes research as described just below. The FFRDC staff are “deeply embedded” in strategic planning as well as helping to write particular rules.

Conduct research. Survey respondents indicated that contractors conduct preliminary or other research.¹⁴⁶ Interviewees reported that contractors help prepare advisory analyses that serve as inputs into an agency’s regulatory decisions. This could include producing a recommendation to the agency, or merely gathering information.¹⁴⁷ It could also include technical or other scientific data such as taking samples from site visits and running analysis on the samples.¹⁴⁸ Others mentioned environmental scans, literature reviews, white papers, surveys, dashboards, data analyses, reports, and other types of policy analysis.¹⁴⁹ Contractors can also convene stakeholders to gather views and other information at this stage.¹⁵⁰

Develop models. In addition to the data-gathering and research tasks, contractors also assist with building analytical models that agencies use for regulatory proposals.¹⁵¹ One interviewee mentioned a contractor’s proprietary model that their agency paid to access, and which is also used by industry groups for their own purposes.¹⁵²

2. Proposed rule stage

In this stage, agencies compile the statement of basis and purpose (or preamble) of the proposed rule, along with the regulatory text, which all gets published in the *Federal Register* as the “notice of proposed rulemaking” or “proposed rule.” The proposed rule can include certain analytical material, including regulatory impact analysis, that helps justify the choices made by the agency in the proposal. A number of policy decisions need to be made to allow the agency to complete this stage.

Draft and edit internal materials. Contractors help agency staff prepare memos for internal deliberations.¹⁵³

¹⁴⁴ Interview 3; Interview 7.

¹⁴⁵ Interview 22. We discuss FFRDCs more below in Section VII(F).

¹⁴⁶ Survey responses.

¹⁴⁷ Interview 1; Interview 16; Interview 27; Interview 22. One interviewee noted that part of the contract could include a requirement for the contractor to convene an outside expert panel to review the contractor’s recommendation. Interview 21.

¹⁴⁸ Interview 14; Interview 23; Survey responses.

¹⁴⁹ Interview 22; Interview 26; Interview 27.

¹⁵⁰ Interview 22.

¹⁵¹ Interview 7.

¹⁵² Interview 15; Interview 18.

¹⁵³ Interview 25.

Draft proposed rule. Proposed rules have multiple components, including the preamble, analysis sections, and regulatory text, all of which might be worked on by a contractor.¹⁵⁴ Some respondents discussed broad contractor involvement in preamble development; others described that certain aspects of a proposed rule, e.g., regulatory text, were exclusively handled by agency employees.¹⁵⁵ This could include writing the first draft, or editing agency staff work “for clarity.”¹⁵⁶ One interviewee estimated that any given preamble might be 60% written by federal employees and 40% written by contractors.¹⁵⁷ This person also called it “excruciatingly useful” to have contractors review drafts because they could point out where the agency might not be fully explaining their decisions.¹⁵⁸ Two interviewees noted their agency’s use of an FFRDC to formulate options and draft regulatory text.¹⁵⁹ In one case, the FFRDC wrote the first draft, sent it to agency staff who reviewed it to ensure alignment with the agency’s goals and to think through any operational challenges, and then provided comments back to the FFRDC.¹⁶⁰ From there, the FFRDC made edits, and the revised draft was then put into departmental clearance for internal agency review, with the FFRDC handling any necessary edits along the way. On the more ministerial side, one respondent also shared that their agency uses contractors to make sure rule and other documents align with templates and other formatting guidelines.¹⁶¹ Another noted that contractors help prepare the word processing file into the format required for transmission to the *Federal Register* for publication.¹⁶²

Provide data and other analytical support. In the course of drafting the rule, the agency might realize it is lacking data and turn to a contractor to help fill those gaps. Interviewees shared that contractors might convene experts, undertake surveys of the relevant industry, and conduct literature reviews.¹⁶³ This helped one interviewee “see what was going on in the world.”¹⁶⁴

Draft analyses. Beyond preparing inputs into the analytical materials noted just above, contractors also help draft the analyses themselves.¹⁶⁵ This sometimes includes different aspects of RIA, including economic analysis, Paperwork Reduction Act analysis, Regulatory Flexibility Act analysis, and more.¹⁶⁶ Some interviewees noted that they were unaware of their agency ever asking a contractor to prepare an RIA “from soup to nuts” or in its entirety.¹⁶⁷ Another explained

¹⁵⁴ Survey responses.

¹⁵⁵ Interview 13; Interview 16; Interview 18; Interview 27.

¹⁵⁶ Interview 25; Interview 27.

¹⁵⁷ Interview 13.

¹⁵⁸ Interview 13.

¹⁵⁹ Interview 21; Interview 22.

¹⁶⁰ Interview 22.

¹⁶¹ Interview 23.

¹⁶² Interview 3.

¹⁶³ Interview 18; Interview 19.

¹⁶⁴ Interview 18.

¹⁶⁵ Interview 21.

¹⁶⁶ Interview 13; Interview 16; Interview 20; Interview 21; Interview 25; Survey responses. This could include statistical support, development of a survey, fielding a survey, drafting the package of written materials used to support the agency’s request for OMB approval of an information collection request, attending internal meetings within the agency or with OMB. Interview 20. This could also include developing estimates to be used in PRA documentation. Interview 14; Interview 31.

¹⁶⁷ Interview 19.

that their agency had done so, but that the results “left such a bad taste in folks’ mouths” that “nobody really asked to use contractors after that.”¹⁶⁸

Help respond to reviewer feedback from within the agency or executive branch. One contractor explained that their firm helped their agency client address feedback received on the rule from other government reviewers.¹⁶⁹ For example, after the draft rule went to the agency’s legal counsel for review, the contractor would help the agency staff “understand and reconcile” feedback given. The contractor noted that they had “to understand the policy to be able to do this,” and that their own subject matter knowledge grew over time. They described their function as “extra hands” to help the agency work through reviewer comments. The contractor noted that their firm fulfilled this function for feedback received from the OMB review process, though they noted that the communication between OMB and the agency staff was always handled by the agency staff. Survey respondents also indicated that contractors helped manage all or portions of OMB review, as well as interagency collaborations or interagency working groups.¹⁷⁰

3. Public comment stage

In this stage, the agency gathers and reviews public comments sent in during the comment period. This stage might include some formatting and file management. It also involves reading and considering the comments as required by the APA. Agencies discharge the APA requirement to consider comments by writing responses to comments that get included in the preamble of the final rule.¹⁷¹ An agency’s response to comments is informed by—and informs—the policy choices it makes for the final rule.

Monitor comments during comment period. One interviewee noted that a contractor gave updates to the agency as the comment period proceeded.¹⁷² This might include, for example, summaries of who has filed comments and the number of comments received.

Process comments. Interviewees identified several distinct activities under this general topic. Multiple respondents explained that for rulemakings with a large number of comments, contractors help organize the comments in various ways.¹⁷³ Part of this could involve extracting comments from Regulations.gov, or adding comments received by the agency to the record on Regulations.gov.¹⁷⁴ A commonly mentioned task was organizing comments into a spreadsheet, table, or other searchable database.¹⁷⁵ This could also include the use of natural language processing tools to help identify mass comment campaigns, for example, or subject matter themes.¹⁷⁶ The contractor might take the first pass at determining these groupings, perhaps using

¹⁶⁸ Interview 3.

¹⁶⁹ Interview 25.

¹⁷⁰ Survey responses.

¹⁷¹ See, e.g., *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (describing the agency’s obligation to respond to “significant” comments submitted during the notice-and-comment process), cert. denied, 417 U.S. 921 (1974).

¹⁷² Interview 26.

¹⁷³ Interview 1; Interview 3; Interview 14; Interview 15; Interview 20.

¹⁷⁴ Interview 9.

¹⁷⁵ Interview 1; Interview 13; Interview 18; Interview 26.

¹⁷⁶ Interview 6; Interview 26; Interview 27.

text analysis tools, or the agency might provide the contractor with categories it should use.¹⁷⁷ This could also be an iterative process with multiple rounds of feedback between the agency and the contractor on the comment categories.¹⁷⁸ One interviewee noted that contractors help “maintain integrity” to any confidential business information (CBI) that may have been submitted as part of a comment.¹⁷⁹ Contractors also develop summaries of the comments.¹⁸⁰ One former agency employee noted that “we ended up reading [the comments] anyway” and that their agency never used the summaries verbatim, explaining that the contractors were helpful to sort and summarize the comments—and helpful to get a sense of which issues attracted a lot of comments—but that only agency staff had the subject matter expertise needed to consider the comments.¹⁸¹ Others agreed, and the term “subject matter expertise” came up in other interviews apropos of why agency staff were better-suited to review comment substance.¹⁸²

Draft preamble response to comments. One respondent noted that their agency directed contractors to write language for the preamble responding to comments “to answer this way, that way,” after which the agency staff would review the contractor’s work.¹⁸³ In that case, agency staff would review the contractor’s draft.¹⁸⁴ Contractors might also help the agency ensure that it is responding to all comments received.¹⁸⁵

4. Final rule stage and beyond

In this stage, the agency writes the final text for its preamble, which can include regulatory impact analysis (RIA) and a response to comments, and also includes the regulatory text. This final rule is what will become law. The tasks described above for contractors during the proposed rule stage also occur in the final rule stage. In addition, although our research plan did not set out to include downstream activities like implementation assistance, compliance, and enforcement activities, we include here the post-promulgation tasks that respondents shared with us of their own accord.

Develop fact sheets, guidance, rollout materials. One interviewee noted that contractors would help prepare communications materials that the agency would use to announce the rule to the public.¹⁸⁶ Survey respondents also indicated that contractors helped with public outreach, including meetings, fact sheet preparation, press release drafting, etc.¹⁸⁷

¹⁷⁷ Interview 13; Interview 15.

¹⁷⁸ Interview 26; Interview 27.

¹⁷⁹ Interview 13.

¹⁸⁰ Interview 6; Interview 20; Interview 27.

¹⁸¹ Interview 18.

¹⁸² Interview 9; Interview 14; Interview 13.

¹⁸³ Interview 15.

¹⁸⁴ Interview 15.

¹⁸⁵ Interview 20.

¹⁸⁶ Interview 13.

¹⁸⁷ Survey responses.

Deliver Congressional Review Act reports to Congress. This includes the use of a contractor to deliver reports to Congress as required by the Congressional Review Act, “due to the antiquated submission methods required for those reports.”¹⁸⁸

Support implementation. One interviewee noted that contractors could staff an implementation hotline or take other actions to support a rule’s implementation.¹⁸⁹ Another explained that contractors help with outreach and education, monitoring and evaluation, and systems support for data collection systems used by the public.¹⁹⁰

Provide litigation support. One interviewee noted that contractors helped agency staff review the rulemaking record in litigation to find support for the agency’s position.¹⁹¹

B. Ongoing activities and special projects

The tasks described above fit neatly into the stages of rulemaking; however, many contractor tasks seem to float across a rulemaking project. And a subset of tasks involves one-time special projects. Table 3 shows these types of tasks.

¹⁸⁸ Survey response. Recently, ACUS recommended that Congress should pass technical reforms to the Congressional Review Act. The recommendations included requiring these reports to be submitted electronically. Admin. Conf. of the U.S., Recommendation 2021-8, *Technical Reform of the Congressional Review Act*, 87 Fed. Reg. 1719 (Jan. 12, 2022). See also Jesse M. Cross, *Technical Reform of the Congressional Review Act* (Nov. 30, 2021) (report to the Admin. Conf. of the U.S.).

¹⁸⁹ Interview 13.

¹⁹⁰ Interview 22.

¹⁹¹ Interview 13.

Table 3. Ongoing Activities and Special Projects Performed by Rulemaking Contractors

Ongoing Activities	Special Projects
<p>Project management</p> <ul style="list-style-type: none"> ▪ Keep master document templates, project plans, timelines, document flow <p>Meeting and negotiation support</p> <ul style="list-style-type: none"> ▪ Attend internal policy meetings ▪ Take notes ▪ Help make slides for internal policy briefings ▪ Facilitate meetings with external stakeholders ▪ Convene expert panels ▪ Handle operations for negotiated rulemaking <p>Writing & editing services</p> <ul style="list-style-type: none"> ▪ Edit documents for style, clarity, grammar ▪ Ensure documents conform with drafting templates <p>Statistical/data support</p> <ul style="list-style-type: none"> ▪ Offer statistical support, collecting, pooling, and analyzing data <p>Policy development</p> <ul style="list-style-type: none"> ▪ Develop guidance documents ▪ Review agency drafts and provide substantive comments and feedback <p>Training</p> <p>General support</p>	<p>Develop guidelines for regulatory analysis</p> <p>Coordinate interagency review</p> <p>Recommend program design changes that lead to new regulations</p> <p>Develop IT systems for rulemaking process (e.g., document management system)</p> <p>One-off reviews of rule-related documents</p>

1. Ongoing activities

Project management. One respondent explained that their agency relies on contractors to help manage the workflow of regulatory projects.¹⁹² This involves keeping master documents up to date to avoid version control issues, maintaining templates, keeping the project plan up to date, and providing overall project management support. One interviewee called this “start to finish” support of a rulemaking.¹⁹³ In that case, the contractor was also providing policy research

¹⁹² Interview 1.

¹⁹³ Interview 25.

analysis, comment analysis, editing assistance, document management through all stages of the rulemaking, and communications support once the final rule was issued.¹⁹⁴ Another interviewee described using an FFRDC for rulemaking project management.¹⁹⁵

Meeting and negotiation support. Contractors might attend internal agency policy meetings to stay updated on internal thinking and also to take notes for the agency.¹⁹⁶ One respondent noted that contractors contributed information that would be used on slides for internal briefings.¹⁹⁷ A contractor might also take notes in meetings with external stakeholders and help the agency determine whether the stakeholder offered something new beyond the comment they submitted.¹⁹⁸ One interviewee, who has experience at an agency that used negotiated rulemaking procedures, explained that it was standard for the agency to hire a contractor to serve as a facilitator of the negotiation.¹⁹⁹ This would involve managing communications between the agency and the negotiating parties, as well as strategizing about how to move the negotiation forward. Another interviewee whose agency used a contractor to conduct negotiated rulemaking noted that contractors helped organize those negotiations.²⁰⁰

Writing and editing services. Several respondents mentioned contractors helping to improve the quality of various written documents by writing first drafts or editing.²⁰¹

Statistical/data support. One interviewee explained that their agency uses contractors to do routine data analysis of the agency's multiple, large data sets using "set formulas or methodologies."²⁰²

Training. One contractor shared that their firm offers regular training to agency staff on the rulemaking process in general as well as on drafting techniques.²⁰³ Another mentioned having contractors offer training to agency employees on plain writing techniques.²⁰⁴

General support. One respondent acknowledged that contractors served as support staff at their agency, serving as administrative assistants, paralegals, and in clerical roles.²⁰⁵

2. Special projects

Develop guidelines for regulatory analysis. Interviewees from two agencies explained that they use contractor support to help prepare agency-wide guidelines for the preparation of regulatory impact analyses, including economic analysis.²⁰⁶

¹⁹⁴ Interview 25.

¹⁹⁵ Interview 22.

¹⁹⁶ Interview 14; Interview 25.

¹⁹⁷ Interview 13.

¹⁹⁸ Interview 13.

¹⁹⁹ Interview 9.

²⁰⁰ Interview 16.

²⁰¹ Interview 25.

²⁰² Interview 21.

²⁰³ Interview 36.

²⁰⁴ Interview 24.

²⁰⁵ Interview 8.

²⁰⁶ Interview 18; Interview 19; Interview 23.

Coordinate interagency review. One respondent explained that their agency uses contractors to help the agency respond when the Office of Information and Regulatory Affairs (OIRA, part of the OMB) sends other agencies' rules over for review.²⁰⁷ Contractors help triage requests, working closely with agency staff to determine which of the agency's components should review the draft regulation. Contractors also circulate documents internally using standing email distribution lists and otherwise solicit staff input. If agency reviewers have comments, the contractors gather them up, and a staff member takes it from there.

Develop IT systems for rulemaking process (e.g., document management system). One interviewee shared that their agency worked with a contractor to build an in-house version of what would ultimately be replaced by Regulations.gov.²⁰⁸

One-off reviews of rule-related documents. One interviewee explained that the agency they previously worked for retained them later as a consultant to review draft documents on an ad hoc basis. This would include reviewing an analysis that an agency staff member had written or providing input on a literature review, tasks that they could do despite not being "as involved in what was happening at [the agency]."²⁰⁹

C. Discussion

Agencies use contractors for a wide range of rulemaking activities, far greater than has previously been documented. The tasks range from administrative tasks that do not involve the exercise of discretion to those deeply embedded into the agency's planning and deliberations. The inherently governmental function test draws a line at decision-making, but rulemaking offers a rich set of examples that demonstrate how challenging it can be to apply the test to tasks that feed into complex and interactive agency decision-making processes.

The set of tasks involved in managing public comments illustrates this principle. Aspects of this function could be considered ministerial, such as downloading the comments from Regulations.gov. But there are other, discretionary tasks embedded in managing, and certainly in responding to, comments. How comments are organized may tend to emphasize different issues more than others, the summaries may give the impression of more or fewer significant issues, and all of this could shape agency impressions of the public's reactions to the rule.

This is just one example of the points of discretion and judgment that are upstream from the ultimate policy choices reflected in an agency's rule. The concern is that when contractors exercise judgment as part of tasks like this, their own interests could manifest, either knowingly or unknowingly. Close collaboration between the agency staff and contractors, rather than having the contractor handle things alone, may help to blunt some of the risk of improper influence. Some agency interviewees reported that they would use contractor-developed comment tables to orient them to which comments to read on different issues, but then rely on their own subject matter expertise and judgment to interpret the comments.

²⁰⁷ Interview 23.

²⁰⁸ Interview 6.

²⁰⁹ Interview 11.

As another example, writing up responses to comments to include in the preamble to the final rule is a task that is laden with policy choices. While we did not encounter anyone who indicated that this task was entirely delegated to contractors, it seems clear that if contractors write the preamble or even just edit it, they have the potential to influence the rule’s outcome. Indeed, when contractors are seen as a member of the team, agencies may welcome their views. As one interviewee described it, albeit in another context, good work is good work no matter who does it, and why shouldn’t the government accept this kind of help from contractors?²¹⁰ For contracts in which the contractors are working side-by-side with agency staff and there is considerable trust, this might especially be the case. The flip side of this is that decisions might be made iteratively—through the course of the drafting process itself²¹¹—and therefore contractor involvement along the way almost necessarily involves some measure of influence. It is these points of influence where management control and contractor ethics are likely their most important. If managers are unaware of contractor conflicts-of-interest, this will inhibit their ability to properly supervise their work.

When it comes to determining what is inherently governmental, this granular discussion shows that managing the public comments includes a mix of ministerial and policymaking tasks, and as such “managing comments” does not lend itself to a binary classification of inherently governmental, or not. Overall, the activities described in this section prompt questions about the systemic use of contractors, as well as queries about contractor use of any given task. At a systemic level, one-time engagements are different in kind from multi-year contracts in which contractors work side-by-side with agency staff.²¹² The latter offers the opportunity for efficiency, with deeply interconnected workflows between agency and contractor, but it also opens the door to more significant harm from self-dealing. A looming question, discussed more below, is how agencies come to rely to extensively on contractors for certain regulatory projects. The roots of this question are worthy of additional study. A review of ongoing contracts that effectively supplement agency staff could be an effective way to assess whether such arrangements are ultimately in the public interest.

One-time or special project contracts, while they can be conducted at more of an arm’s length and offer opportunities to bolster agency capacity and credibility, can have their own challenges, including misaligned expectations, duplicative work, and other ethical concerns. For example, contracting for access to a proprietary model introduces the potential for conflicts of interest as well as challenges in compiling the administrative record if the model is not publicly-available. One-time contracts can also beget longer-term arrangements, as the contractor gets to know the agency’s needs, and the agency becomes comfortable with the contractor’s work. What might be

²¹⁰ Interview 31.

²¹¹ Interview 5.

²¹² These arrangements may come close to “personal services” contracts, which are generally prohibited by the FAR. FAR § 37.104. A personal services contract, “by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees.” FAR § 2.101. This prohibition may have become a dead letter. *See generally* Collin D. Swan, Note, *Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors*, 80 GEO. WASH. L. REV. 668 (2012). *Accord* Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT 176 (Jody Freeman and Martha Minow eds., 2009) (noting that the prohibition on personal services contracts is often “skirted de facto”).

a reasonable, iterative business development strategy for a contractor can be a slippery slope for an agency, especially if the agency very much needs the help. In general, it would be helpful to consider how existing contract management techniques account for this type of incremental creep, and to consider whether modified controls and other policies could better address contractor arrangements.

V. Why do agencies use contractors in rulemaking?

Contractors perform many functions in rulemaking, but sometimes agencies use them and sometimes they do not. What factors guide this decision? In this section we recount how agency officials perceive the advantages and disadvantages of contractors in rulemaking. Some of these benefits and drawbacks are straightforward and discussed extensively in the academic literature reviewed earlier, whereas others are more specific to the rulemaking process.

A. Advantages of relying on contractors

Agency respondents highlighted numerous benefits associated with contractor use. Most notably, contractors bring *outside expertise* to the rulemaking process. Often this expertise is highly domain-specific and not a skill set that the agency requires on a full-time basis. For example, one interviewee at an agency that regularly issues economically significant rules noted that when it came time for the agency to revise its guidelines for the Value of a Statistical Life (VSL), they used a contractor to hire academics with niche expertise in this field.²¹³ This contract allowed the agency to write new standards that were consistent with current academic research on the VSL, something that would not have been possible internally given the agency's own in-house expertise. Contractors may also have access to tools that the agency does not, such as survey software or panels of survey respondents²¹⁴ or have expertise in managing big projects, something the agency may not have.²¹⁵ By hiring a contractor, the agency can expand its toolkit for specific projects.

Not all contractor expertise is specific to individual rulemaking projects, however. For instance, interviewees at multiple agencies highlighted how useful contractors can be in writing rules.²¹⁶ Often program staff have subject matter expertise in other fields like engineering, and this expertise does not necessarily translate to rule writing and drafting.²¹⁷ Contractors can offer writing skills that complements agency staff expertise, stepping up to either draft documents directly or edit and revise documents initiated by program staff.

Contractors can also serve in a *surge capacity* function, helping to ease workloads during peak rulemaking periods. Because contractors are free from government hiring requirements, they may be able to quickly increase staffing in response to demands during the rulemaking process

²¹³ Interview 19.

²¹⁴ Interview 18.

²¹⁵ Interview 32.

²¹⁶ Interview 1; Interview 13; Interview 15.

²¹⁷ Interview 5; Interview 13.

and decrease it after the surge has passed.²¹⁸ One contractor we interviewed noted that they simply assigned more staff from another of the firm’s divisions to help out when a rule hit a particularly time-sensitive period (such as comment processing), something that may not be as easily accomplished within an agency setting.²¹⁹ This ability to add staff during peak periods can be especially useful when contractors can quickly assemble a diverse team with different skill sets.²²⁰

Flexibility is another important advantage of incorporating contractors into the rulemaking process. This point was most often raised by our subjects in terms of ability to staff up quickly during peak periods. Some agencies face difficulties in hiring full-time equivalent (FTE) staff. These difficulties arise because of FTE caps imposed on agencies, as well as budgetary concerns regarding financing a FTE line in future years.²²¹ Additionally, hiring a new federal employee can be a cumbersome and time-intensive process;²²² one agency interviewee suggested that while it takes an agency about eight months to hire a new FTE, it would only take a contractor about three months to find and hire someone with the desired expertise.²²³

Additionally, one agency respondent noted that contractor flexibility was particularly useful during periods of transition between presidential administrations.²²⁴ Often these periods are characterized by a push to complete new rules by the outgoing administration and, subsequently, a demand for new rules by the incoming administration—all without accompanying staff increases. Contractors can help agencies smooth the workflow during these transition periods.

Neutrality, or the ability of a contractor to serve in an arm’s length capacity, can also be an asset in the rulemaking process. The nature of the regulatory relationship makes it such that regulated entities may be hesitant to share information directly with agencies and may even sometimes put agencies in an adversarial role; contractors can be used as an outside third party in such

²¹⁸ Contractors have a comparative advantage relative to government agencies in terms of the ability to staff up quickly. However, this advantage is not absolute. One contractor we spoke with indicated that it was hard for them to staff one agency rulemaking project that was particularly “intense,” “visible,” and on an accelerated timeline. Although the firm rose to the occasion, they faced staff burnout issues the next time a similarly intense agency project arose. Interview 25.

²¹⁹ Interview 26.

²²⁰ Interview 1; Interview 25; Interview 26.

²²¹ Interview 16.

²²² See, e.g., U.S. MERIT SYS. PROT. BD., REFORMING FEDERAL HIRING: BEYOND FASTER AND CHEAPER” REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES (2006), https://www.mspb.gov/studies/studies/Reforming_Federal_Hiring_Beyond_Faster_and_Cheaper_224102.pdf; NAT’L COMM’N ON MIL., NAT’L, & PUB. SERV., INSPIRED TO SERVE: FINAL REPORT TO CONGRESS (2020), <https://www.volckeralliance.org/sites/default/files/attachments/Final%20Report%20-%20National%20Commission.pdf>; Eric Katz, *The Federal Government Has Gotten Slower at Hiring New Employees for 5 Consecutive Years*, GOV’T EXEC. (Mar. 1, 2018), <https://www.govexec.com/management/2018/03/federal-government-has-gotten-slower-hiring-new-employees-five-consecutive-years/146348/>.

²²³ Interview 19; Interview 21.

²²⁴ This respondent explained that staffing needs changed significantly between the Obama administration, which had a robust regulatory agenda, and the Trump administration, which issued fewer rules in that program area. This person also mentioned that a number of agency staff departed in the Trump administration. Then, in the Biden administration, they expected an increase in the number of rules to be issued, which meant they needed to ramp up staff resources once again. This experience made this respondent conclude that using contractors was a better use of resources than hiring new staff who might again be left without much to do in a future administration. Interview 1.

situations.²²⁵ The interviewee who noted that contractors are regularly used as mediators in negotiated rulemaking, or “reg neg,” explained that having a neutral broker between the agency and the negotiating stakeholders can set the right tone.²²⁶ Another official at a different agency indicated that contractors were very helpful when the agency needed to collect data about the industry it regulated; industry partners were reluctant to give potentially sensitive information directly to the agency, but more willing to acquiesce to data requests when a contractor was making the request.²²⁷

There are myriad other benefits associated with contractor use. Numerous respondents noted their impression that contractors can exclusively *focus* on a specific rulemaking task.²²⁸ Agency employees typically have multiple assignments on their plates, often dividing their attention over multiple projects. This might include long-term projects that lack firm internal deadlines, but which the agency nevertheless wants to complete. Once a specific task is delegated to a contractor, the task is more likely to get the contractor’s undivided attention and to be completed in a timely fashion. Another benefit is that contractors can serve as a point of *stability* and *institutional memory*, particularly in program areas where federal employees tend to cycle in and out.²²⁹ Finally, one person noted that contractors were often a set of “*fresh eyes*” in that they asked questions about agency practices and sometimes served as a “good push” to update those practices.²³⁰

B. Disadvantages of relying on contractors

Although contractors in rulemaking confer numerous benefits, many respondents pointed out the disadvantages and risks of using contractors in this setting. An overarching theme that united such comments was the *disconnect in workplace culture and shared values* between contractors and agency employees. At its worst these concerns center on trust issues—like whether a contractor is more likely to disclose confidential information²³¹ or violate *ex parte* communication rules during rulemaking²³²—or a perceived lack of professionalism among some contractors.²³³

The majority of the concerns raised, however, regarded the fact that contractors are often (understandably) unfamiliar with agency workflow and processes and that this lack of familiarity can breed problems.²³⁴ For example, one agency official explained that contractors with whom they had worked in the past had general experience conducting cost-benefit analysis (CBA), but were less familiar with CBA in a regulatory context. Specifically, this official noted that the contractor was not well acquainted with the CBA requirements in OMB Circular A-4,²³⁵ which

²²⁵ Interview 6; Interview 30.

²²⁶ Interview 9.

²²⁷ Interview 18; Interview 19.

²²⁸ Interview 6; Interview 13; Interview 18; Interview 19; Interview 23.

²²⁹ Interview 13; Interview 25.

²³⁰ Interview 6.

²³¹ Interview 1.

²³² Interview 5.

²³³ Interview 6.

²³⁴ Interview 7; Interview 18; Interview 31.

²³⁵ Interview 19.

cost the agency in terms of a slowed rulemaking process and increased time spent overseeing the contractor. An agency can run into these problems even when using an experienced contractor, as internal rulemaking processes and workflows are often agency-specific.

A related downside associated with the use of contractors in rulemaking is the *resource-intensive nature of contract management*. Several agency officials noted that considerable time and resources must be devoted to building the knowledge of first, how to set up contracts and, second, how to oversee contractors.²³⁶ Many indicated that it might not be worth the effort to use a contractor for smaller or less important rules.²³⁷ Not only must the official(s) overseeing the contract bridge any workplace culture gaps, they must do so within the scope of the existing contract and the time frame of the rulemaking. Sometimes when a specific rulemaking task is delegated to a contractor, it might move at a different pace than tasks that are being managed internally at the agency. Sometimes this is a quicker pace, but other times it is, unfortunately, slower.²³⁸ Additionally the contract must be structured to put the agency on the best footing; for example, if an agency contracts out for an analysis at the proposed rule stage, the contract must be structured so that the contractor is available to make amendments at the final rule stage or the agency must ensure that it has the in-house expertise on hand to handle any changes.²³⁹

The lurking potential for individual or organizational *conflicts of interest* is another risk of relying on contractors in rulemaking.²⁴⁰ One expert noted a specific type of contractor self-

²³⁶ Interview 5; Interview 21. Kelman notes that “the vast majority of what good program and contract managers need to be good at are the same things that *any* good manager needs to be good at.” Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in GOVERNMENT BY CONTRACT 174 (Jody Freeman and Martha Minow eds., 2009) (emphasis in original). However, contract managers face considerable obstacles to effectively overseeing contracts. For instance, Michaels notes that while procurement personnel are “well positioned to ensure that the contractors are not being wasteful or fraudulent,” they are “not necessarily well versed in the substantive policy or legal domains within which the contractors are working.” JON D. MICHAELS, CONSTITUTIONAL COUP 133-34 (2017). Additionally, strong contract management skills are not always valued within an agency. Kettl explains that at “in an agency dominated by scientists, technical expertise, not administrative finesse, marked the fast track upward. Technicians and other scientifically trained contract managers thus had strong motivation to escape from the task . . . as quickly as possible,” DONALD F. KETTL, SHARING POWER 123 (1993). Finally, the GAO has repeatedly identified shortages in agencies’ acquisition workforces as an area that not only places contracts at risk, but government more broadly. *See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-119SP, HIGH-RISK SERIES: DEDICATED LEADERSHIP NEEDED TO ADDRESS LIMITED PROGRESS IN MOST HIGH-RISK AREAS* (2021).

²³⁷ Interview 3; Interview 13; Interview 14; Interview 23.

²³⁸ Interview 7.

²³⁹ Interview 19.

²⁴⁰ Recent *ProPublica* reporting highlights how this kind of risk can present itself in the course of agency policymaking. *ProPublica* reports that over a 12-year period, McKinsey & Company, a consulting firm, provided the Food and Drug Administration (FDA) with upwards of \$50 million in consulting services, including helping the agency to define its strategic goals and objectives and also to develop a “new operating model” for its drug regulation division. Ian MacDougall, *McKinsey Never Told the FDA it was Working for Opioid Makers While Also Working for the Agency*, PROPUBLICA (Oct. 4, 2021), <https://www.propublica.org/article/mckinsey-never-told-the-fda-it-was-working-for-opioid-makers-while-also-working-for-the-agency>. During the same time period, the firm “counted among its clients many of the country’s biggest drug companies—not least those responsible for making, distributing and selling the opioids that have ravaged communities across the United States, such as Purdue Pharma and Johnson & Johnson.” *Id.* The overlap between McKinsey’s agency client and its private sector clients raises

dealing within agencies that might arise in response to rulemaking contracts; specifically, the prospect of relying on the same contractor for different regulatory functions could create perverse incentives for the contractor.²⁴¹ For example, a contractor that helped to write program regulations might be motivated to steer the rules in such a way that resulted more profitable business margins for its contract to help with regulatory enforcement after the rule is finalized.

A recent ACUS report raises a specific possibility for self-dealing in rulemaking contracts related to the use of AI to manage public comments:

FiscalNote [(a contracting firm)] works with government agencies while simultaneously providing “Issues Management” tools to make it easier for private organizations to track regulatory changes and submit comments on proposed rules. Consultants might be able to monetize their access to the inner workings of agency notice and comment systems by advising clients on how to carefully draft comments in order to achieve the desired agency classification and avoid being filtered out by an algorithm. They may also charge a premium for this “insider” expertise, disadvantaging stakeholders who do not hire their services.²⁴²

Although conflicts of interest concerns were raised by the experts we spoke with, this risk was less salient for agency officials. Few mentioned this potential. However, one agency official noted that they preferred to work with their agency’s Federally-Funded Research and Development Center (FFRDC)²⁴³ on sensitive rulemakings because those entities have stronger conflict of interest protections in place than most contractors and, therefore, avoid many of these potential issues.²⁴⁴

Another risk of contracting out rulemaking functions is the potential for a “*slippery slope*,” a concern with at least two dimensions. First, some respondents worried about crossing the inherently governmental line with rulemaking.²⁴⁵ Current guidance indicates that making policy choices is an inherently governmental function, and that many of the tasks listed in the prior section can be considered “closely associated with inherently governmental functions.” Many delegated tasks, like the drafting of a proposed rule, reflect a policy decision that has already

important questions about the advice it provided to the agency—and to members of the pharmaceutical industry—when the firm’s own financial interests were at stake or when the clients’ interests conflicted.

ProPublica also reported that McKinsey failed to disclose these organizational conflicts to the FDA in a clear violation of its contract with FDA. This shows the limits of a conflicts-of-interest regime that places the onus on the contractor to disclose its potential conflicts. Although the FDA’s contracts with McKinsey were not clearly tied to rulemaking, this type of organizational conflict of interest poses obvious risks in that context. For example, consider a contractor assisting an agency’s regulatory development while also advising clients on how to comment on, comply with, or push back on an agency’s regulations.

²⁴¹ Interview 31.

²⁴² David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* 63 (Feb. 19, 2020) (report to the Admin. Conf. of the U.S.), available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf>.

²⁴³ We discuss FFRDCs in greater detail in Section VII(F) of the report.

²⁴⁴ Interview 21.

²⁴⁵ Interview 21.

been made by agency personnel. However, there is some concern that because rulemaking involves iterative and complex decision-making, there is potential that contractors could creep up to—or even pass—the inherently governmental function line. While the OFPP final policy letter included a checklist to be used when agencies use a contractor for functions that are closely associated with inherently governmental functions, only one interviewee mentioned that their agency uses such a checklist.²⁴⁶ In that case, the checklist was part of a larger procurement package agency staff fill out to justify using a contractor. The extent to which it actually informed management practices throughout the contract’s administration—which was OFPP’s stated goal—is unclear.

A second concern regards the potentially additive nature of rulemaking contracts, where in some cases an agency can add rulemaking tasks à la carte. At least one agency official worried that rulemaking contracts have the potential—incrementally—to become unwieldy and difficult to manage.²⁴⁷ When this happened with a prior contract at the official’s agency, the Contracting Officer Representative was forced to find innovative ways to fund a contract that grew to be much larger than initially planned.

Finally, as noted earlier, *transparency* is limited with contractors. With respect to rulemaking, one expert noted that transparency is a core value.²⁴⁸ To the extent that contractors engage in proprietary work that is more shielded from the public than agency work, contractor use is potentially in conflict with this core value.

C. Discussion

Agencies grapple with a complex set of advantages and disadvantages surrounding their choices to turn to contractors for rulemaking support. The findings of this section are closely related to those from the prior sections of this report: understandings of these advantages and disadvantages are colored by perceptions of the appropriateness of contractors in rulemaking more generally. And respondents told us about the benefits and drawbacks of contractor use in the context of the specific tasks for which they personally had experience working with contractors.

We emphasize that given the number of legal, political, and operational constraints that agencies work under, the benefits of using contractors in rulemaking are numerous and considerable. Agencies can benefit from a contractor’s outside expertise, flexibility (including surge capacity), perceived neutrality, and their ability to concentrate on a specific set of tasks. Contractors also can serve as sources of workforce stability and institutional memory and offer an outsider’s perspective on agency work.

Although contractors offer the possibility of access to these benefits, the road to get there can be fraught. With respect to disadvantages, a lack of shared culture and values can limit contractor effectiveness and agencies may struggle to muster resources to adequately manage contractors. Using contractors may also expose agencies to new levels of ethical risk that are not present or

²⁴⁶ Interview 1.

²⁴⁷ Interview 16.

²⁴⁸ Interview 31.

are significantly lessened when government employees perform rulemaking work. Specifically, relying on contractors can lead to a slippery slope, where contractor work unintentionally creeps up to—and potentially even encroaches on—the performance of tasks that are inherently governmental.

Additionally, the potential for conflicts of interest—both on the individual and organizational levels—warrants special consideration in rulemaking. Rules issued by government agencies can have considerable financial and policy implications, meaning those with special access to an agency’s decision-making on a rule could inappropriately use that information for financial or personal gain in the short- or long-term. We note that this issue did not rate as highly salient in our conversations with agency officials. While we have no reason to suspect that there is widespread abuse happening on this dimension, the normative consequences are such that we flag the issue as one that both ACUS and agency officials ought to pay special attention to moving forward. Agencies should structure rulemaking contracts and manage rulemaking contractors in ways that account for potential conflicts of interest.

The findings in this section highlight a recurrent theme of this report: the critical importance of agency managers to the successful use of contractors in rulemaking. Harnessing the benefits of contractors—while simultaneously minimizing the disadvantageous aspects of contractor use—requires savvy and competent government managers who are willing to shoulder the risks and burdens to reap the rewards. This observation is consistent with broader academic arguments about the vital role of strong management in overseeing government contracts.²⁴⁹

VI. What are current agency practices for the use of contractors in rulemaking?

Among agencies that rely on contractors in rulemaking, there are a wide variety of practices regarding how to manage contractors. Most of these practices are informal and unwritten; below we lay out some of the different approaches to contractor and task management in rulemaking that respondents shared with us.

A. Written policies about contractors in rulemaking

While agencies have written policies in place about all manner of activities, our research did not uncover any instances of written agency policies about the use of contractors in rulemaking specifically. No interview subject or survey respondent definitively indicated the existence of such a policy.²⁵⁰ Instead, agency practices about what contractors do in rulemaking follow

²⁴⁹ For example, Kettl argues that “[g]overnment relationships with the private sector are not self-administering; they require, rather, aggressive management by a strong, competent government.” DONALD F. KETTL, *SHARING POWER* 6 (1993); *see also supra* note 236.

²⁵⁰ The survey asked respondents about the factors that guided decisions about tasks that a contractor took on versus an agency employee. Four respondents indicated that a “written agency policy on contracting for rulemaking” was a factor. We followed up with all four respondents; two indicated that this selection was made in error or that their understanding was incorrect upon more careful consideration. The remaining two did not respond to our follow-up inquiries.

informal norms, fall under broader agency “umbrella” policies that cover contractor use or procurement, or are of a more idiosyncratic nature. For example, one former contractor noted that it was difficult to operate in a “standard practice” because an agency’s policy about what contractors could do in rulemaking was highly variable and subject to change over time.²⁵¹

Despite the lack of official written policies, there is *widespread but incomplete* awareness of the existence of an inherently governmental function line with respect to rulemaking. The awareness is *widespread* in that many agency officials noted that contractors should not be involved in making policy decisions.²⁵² One agency official described what contractors can do as “everything up to pushing the big red policymaking button,”²⁵³ while another indicated that contractors should be “kept out of the policy piece.”²⁵⁴ Often such statements were organically volunteered by respondents, whereas other times respondents offered this information when asked more specifically about tasks that contractors should not or do not do.

Awareness of an inherently governmental function line is *incomplete* in that few respondents were able to explicitly name the terms “inherently governmental function” or “IGF” and many could not articulate a clear sense of where the “policy line” at their agency fell for rulemaking. For example, one contractor that we spoke with indicated they had not heard of the term “IGF” in the many years they had been performing rulemaking work for their agency, but that this lack of knowledge had not “interfered” with their work.²⁵⁵ Of course, the term “inherently governmental function” is a term of art; someone might not need to know the exact words to perform their job effectively. However, the lack of familiarity with the term suggests that at least some respondents might not know that there is an official line in the procurement regulations or how to decide what contractors should and should not do. On the agency side, one expert noted that the responsibility to maintain the inherently governmental function line with contractors in rulemaking rested with senior agency management, precisely because not all staff were familiar with such principles.²⁵⁶

Among respondents who were more familiar with the inherently governmental function principle, several expressed confusion with how to apply the principle to rulemaking in practice. For example, one former agency official stated that it would be appropriate for contractors to work on writing a proposed rule if all policy decisions had been made.²⁵⁷ However, this person also noted that, in practice, policy decisions were rarely settled at the outset. Rather, in this person’s nearly 30 years of rule writing experience, with the exception of one rule, the official could not think of another case where the program did not make changes based on writers’ questions and feedback. On a different point, one expert noted that using contractors in rulemaking “can get really muddy” because of the technical nature of rulemaking.²⁵⁸ For instance, if an agency contracted out for a highly technical portion of the rulemaking, it might be

²⁵¹ Interview 31.

²⁵² Interview 1; Interview 15; Interview 16; Interview 23; Interview 25; Interview 26.

²⁵³ Interview 16.

²⁵⁴ Interview 15.

²⁵⁵ Interview 25.

²⁵⁶ Interview 29.

²⁵⁷ Interview 5.

²⁵⁸ Interview 31.

difficult to have enough subject matter expertise in-house to evaluate the work and make sure it was consistent with the agency's policy decisions. Given these difficulties, a third agency official noted that more examples of what constitutes an inherently governmental function or activities that are closely associated with inherently governmental functions in the context of rulemaking would be helpful.²⁵⁹

B. Integrating contractors into an agency's workflow

While some tasks given to contractors are done at an arm's length (e.g., taking soil samples and writing a technical report), others are done side-by-side with agency staff. For the latter, the lack of written rulemaking policies combined with divergent attitudes towards the appropriateness of contractors in rulemaking means that agencies have numerous ways to incorporate—or limit—contractors into the rulemaking workflow.

For example, respondents reported different approaches to inviting contractors to rulemaking-related meetings. At an agency that relied extensively on contractors to complete rulemakings, one contractor reported that they regularly attended policy meetings related to rulemaking projects and that their input was welcomed at these meetings. This contractor noted that:

[W]e work very closely with [the agency] get access to their systems, kind of work as part of their team, attend their staff meetings and hear most of what they're saying. Having that very open collaborative process I think it is very useful because it eliminates pretty much most of the distance between client and us.²⁶⁰

In contrast, other agencies had a more limited approach to which meetings contractors could attend. For example, one agency official indicated that contractors were not invited to attend meetings with agency leadership due to issues of “trust.”²⁶¹ Another senior official noted that they could not recall ever being in a substantive meeting with a contractor present and that contractors were not allowed to brief political appointees at their agency.²⁶²

The confluence of limitations on contractor access to meetings, the compartmentalization of rulemaking by program areas, and the discrete nature of some contractor tasks means that for some agencies contractor work becomes inward-facing. In these cases, contractors tend not to represent the agency externally, either to the public or to other component units (e.g., if the agency is part of a broader department). For instance, contractors at one agency were not allowed to interact with the agency's Office of General Counsel, since it was understood that the attorney-client relationship did not extend to contractors.²⁶³ Additionally, one expert noted that contractors are barred from attending meetings related to FAR rulemakings.²⁶⁴ However,

²⁵⁹ Interview 4.

²⁶⁰ Interview 25.

²⁶¹ Interview 13.

²⁶² Interview 15.

²⁶³ Interview 21.

²⁶⁴ Interview 32; FAR Operating Guide, 21-22 (July 1, 2015), https://www.acq.osd.mil/dpap/dars/docs/far_dfars_guide/FAR_Operating_Guide_July_2015.pdf (“Attendance at team meetings is limited to Government employees. Other attendees will be allowed only on a case-by-case basis as approved by all FAR Principals and should not be present during substantive discussions of the case.”).

contractors' roles are not universally constrained to be internally-facing. As the prior section illuminated, many contractors have explicitly outward-facing roles and are given limited license to act on the agency's behalf.²⁶⁵

Assigning contractors government email addresses is another way that agencies integrate contractors into rulemaking. At one agency where contractors were integrated into the rulemaking workflow, a contractor noted that having an agency email address not only helped them to coordinate with agency officials, but also helped make them feel a part of the agency's team.²⁶⁶ Meanwhile at other agencies, officials noted that contractors were still delineated from agency staff despite having agency email addresses, either because the contractors were required to disclose their affiliation in their email signature²⁶⁷ or because the email address had a specific extension that denoted contractor status.²⁶⁸ Importantly, agency policies regarding contractor email addresses are not specific to rulemaking, but rather are part of broader agency policies regarding contractor use.

Finally, the way that contractors are integrated into the social fabric and culture of an agency differs. Some rulemaking contractors sit on-site and work side-by-side with agency staff,²⁶⁹ whereas others work remotely.²⁷⁰ Some contractors felt that the agency treated them like their own staff and that the relationship between agency personnel and contractors was highly collegial.²⁷¹ However, at other agencies there were cultural barriers between contractors and agency personnel. For instance, at one agency in our interview sample, each one of the five people we interviewed independently offered that contractors were decidedly not part of the culture of their agency. While the agency did use contractors for some tasks, they were not rulemaking tasks. Even then, one person indicated that contractors were physically segmented off from agency staff and there was an implicit message that agency staff were discouraged from "cross-pollinating" in a social way with contractors.²⁷²

C. Transparency over contracted rulemaking tasks

Transparency is a core feature of the rulemaking process, but it is not evenly distributed across contractors and agency personnel. In the absence of agency policies on contractors in rulemaking, transparency over contracted tasks is handled on an ad hoc basis. We consider two types of transparency: internal transparency and external transparency. By *internal transparency*, we mean visibility within the agency as to which tasks in a rulemaking are performed by contractors versus agency personnel. By *external transparency*, we mean transparency outside of the agency to the public and other stakeholders.

²⁶⁵ For example, some contractors convene stakeholders on behalf of the agency, serve as negotiators in an agency's regulatory negotiation proceedings, and even participate in the agency's meetings with OMB.

²⁶⁶ Interview 25.

²⁶⁷ Interview 1.

²⁶⁸ Some agencies include the extension ".ctr" in contractors' email addresses. Interview 23.

²⁶⁹ Interview 25.

²⁷⁰ Interview 26; Interview 36.

²⁷¹ Interview 25; Interview 26.

²⁷² Interview 10.

Like other aspects of contracting for rulemaking, there are divergent levels of internal transparency at the agencies we contacted. At some agencies, managers, typically at the program level, are keenly aware of which tasks contractors have done and what the scope of work for a particular rulemaking contract entailed (and what it excluded).²⁷³ This was not the case universally, however; a program official at one agency noted that staff would have trouble discerning which documents in a rulemaking were prepared by contractors, as there was no obvious way to distinguish the work products.²⁷⁴

Several officials interviewed for this project noted that senior leadership is ultimately responsible for making policy choices in rulemaking and deciding how the process should be managed internally.²⁷⁵ To them, keeping oversight at the management level mitigates concerns about self-dealing from contractors, because all major policy decisions related to the rule are centralized within one tier of the agency.²⁷⁶ This form of hierarchy places extra emphasis on internal transparency; to ensure that contractors are not performing inherently governmental functions and that ethics requirements are being followed (among other considerations), management must have insight into which jobs are being done by whom. While respondents overseeing the day-to-day interactions with contractors expressed confidence in their own oversight, we observed that at senior leadership levels there was generally less visibility into how a rule was put together. Instead, we heard from more senior leaders that knowing what tasks had been performed by a contractor was “below my level.”²⁷⁷

Generally speaking, our interviews and our informal review of agency rulemaking materials suggest that contractor contributions to rulemaking have limited external transparency. However, the extent of visibility can vary by the type of task at hand. For example, while comment analysis is often a task performed by contractors, interviewees explained that the contractor’s role is not usually disclosed in the final rule.²⁷⁸ Agency officials noted that while contractors may provide an agency with a matrix of comments or some other form of comment summary, this analysis is reviewed by agency staff and is not a final agency product. In the case of rule text drafting, officials similarly noted that contractors’ role is also not discernible, even in an instance where the contractor wrote the first draft of a proposed rule.²⁷⁹ However, respondents were again careful to highlight the agency’s role in overseeing contractors’ work—redrafting text where necessary or revisiting the underlying comments to make sure the core issues were reflected in a comment summary.²⁸⁰

²⁷³ Interview 1.

²⁷⁴ Interview 15.

²⁷⁵ Interview 15.

²⁷⁶ There are potential problems with managing risk in this way. Verkuil describes how this strategy can backfire if agency officials simply rubber-stamp contractor work product. The risk is particularly acute “in those [agencies] strapped for decision personnel [where] the temptation to let the contractors do the thinking for them may be too hard to resist.” PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 46 (2007).

²⁷⁷ Interview 4; Interview 13; Interview 15.

²⁷⁸ Interview 1; Interview 22.

²⁷⁹ Interview 3.

²⁸⁰ Interview 1; Interview 14; Interview 15; Interview 17.

One task where there is sometimes greater transparency—internally and externally—is contractor assistance with regulatory impact analysis (RIA).²⁸¹ Contractors who work on RIAs might be academics or industry experts who are known in their respective fields and as one agency official put it, “it never occurred to us not to” disclose the work that these outside experts did.²⁸² Another official suggested that divulging who worked on an RIA is in keeping with academic standards about co-authorship and while disclosure was “not a legal requirement,” it seemed like the right thing to do.²⁸³ Finally, a third official indicated that being transparent about who worked on an RIA (and their associated levels of expertise) could actually enhance public perceptions of the legitimacy and quality of the agency’s analysis.²⁸⁴

Transparency over contractor use in RIA need not be burdensome or overly formal. Figure 2 below shows an example of an agency, the Office of the Inspector General at the Department of Health and Human Services (HHS), disclosing that a proposed rule’s RIA relied on analyses from two actuarial firms, in addition to analysis conducted by another unit in its department, the Center for Medicare and Medicaid Services’ Office of the Actuary. Both contracted firms—Milliman and Wakely Consulting Group—are mentioned by name and each firm’s analysis is discussed extensively in the RIA section of the proposed rule. Additionally, the agency posted both contractor’s analytical reports as “supporting material” in the proposed rule’s docket on Regulations.gov and solicited comment on the contractors’ assumptions.²⁸⁵

²⁸¹ Interview 3; Interview 18; Interview 19.

²⁸² Interview 19.

²⁸³ Interview 3.

²⁸⁴ Interview 19.

²⁸⁵ Wakely Consulting Group, *Estimates of the Impact on Beneficiaries, CMS, and Drug Manufacturers in CY2020 of Eliminating Rebates for Reduced List Prices at Point-of-Sale For the Part D Program*, www.regulations.gov Document ID: HHSIG-2019-0001-0003 (Aug. 30, 2018); Milliman, Inc., *Impact of Potential Changes to the Treatment of Manufacturer Rebates*, www.regulations.gov Document ID: HHSIG-2019-0001-0002, (Jan. 31, 2019).

Figure 2. Example of Contractor Disclosure in Proposed Rule RIA

beneficiary and government spending on Part D plan premiums and cost sharing, the Department engaged CMS's Office of the Actuary (OACT) and two independent actuarial firms with experience working with Part D plan bid preparation to assess the potential effects on both premiums and out-of-pocket expenses under various assumptions.³⁸ These analyses are discussed in greater detail in the Regulatory Impact Analysis, and we seek feedback on the various approaches to estimating the potential costs and benefits of this regulation.

³⁸ These analyses were conducted by Milliman and Wakely Consulting Group. We will refer to them by firm name in later sections for clarity.

Notes: Screenshot of HHS's proposed rule on safe harbor regulation concerning prescription pharmaceutical discounts (RIN 0936-AA08; 84 FR 2340 February 6, 2019; text highlighting added for emphasis). This text discloses that the agency relied on the analyses of two actuarial firms to explore the potential impacts of the proposed policy changes. Both the Milliman and Wakely Consulting Group analyses were discussed in the text of the proposed rule and both analyses were included in the proposed rule's docket on Regulations.gov.

Agencies disclosing contractors' roles in performing specific tasks is not the only form of transparency over contractors in rulemaking. One expert noted that, on the front end, competition over a contract to perform a rulemaking task is a form of transparency.²⁸⁶ And, on the back end, the Federal Procurement Data System and USASpending.gov (the more user-friendly interface for public procurement data) provide some information about which firms receive federal contracts. However, the FPDS is a spending database and it does not include contract-related documents (e.g., the scope of work for a contract, task orders, etc.). Additionally, as we explained earlier in Section II, this system does not provide detailed information about the nature of services performed under a contract (e.g., the name of the rule, rulemaking tasks). This makes

²⁸⁶ Interview 29.

it difficult to discern rulemaking contracts from other types of professional services in the system.²⁸⁷

Enhanced external transparency around contractors in rulemaking is not necessarily an unmitigated good. Publicly disclosing that the text of a proposed rule was drafted by a contractor or a comment analysis initially compiled by a contractor, for example, might needlessly undercut the legitimacy of an agency's rulemaking enterprise.²⁸⁸ Raising these kinds of concerns may often not be warranted, particularly if the agency has good contractor oversight practices in place.

Relatedly, one expert noted that transparency around specific contractor tasks in the rulemaking process might invite frivolous or otherwise unwarranted legal challenges to a rule.²⁸⁹ Further, the expert worried that it might not be journalists who mine the data in practice, but rather competitor firms eager to disrupt an awarded contract by undermining the rule. The expert preferred to keep these kinds of competitive disagreements to the bid protest venue rather than having them spill over into APA review of agency rules. As ACUS and the government weigh options for external transparency, unintended consequences like this should be considered.

D. Discussion

Among the agencies we studied, practices around contractors in rulemaking are not standardized or written down. This absence of formalization means that the way contractors interact with agencies varies meaningfully across agencies, resulting in different approaches to handling all manner of contractor interactions from their exposure to officials within the agency to whether contractors are invited to the holiday party. Practices can also vary across rules within the same agency. Variation among agencies is to be expected and, in and of itself, it is not problematic. However, in the context of inherently governmental functions, this kind of variation introduces risk for at least two reasons.

First, agency officials may not be well positioned to spot or prevent potential violations of the inherently governmental standard. As this section documented, at the staff level there is widespread but incomplete understanding of the term inherently government function and what it means in the context of rulemaking. At the same time, the lack of internal transparency surrounding rule production means that agency leaders, who are expected to be responsible for

²⁸⁷ The Project on Government Oversight (POGO) has proposed transparency reforms to the government's procurement spending database that would partially address some of the issues raised here. Specifically, POGO recommends that the database should be improved "so it becomes the one-stop shop for all federal spending information. This means including actual copies of contracts, delivery or task orders, modifications, amendments, other transaction agreements, grants, and leases." Scott Amey, *Best Practices for Federal Spending*, Testimony before the H. Comm. on Science, Space and Technology, Subcomm. on Investigations and Oversight and Subcomm. on Energy (Oct. 21, 2021), <https://www.pogo.org/testimony/2021/10/pogo-testimony-best-practices-for-federal-spending>. This would likely be a very resource-intensive change. Rulemaking contracts are only one slice of the service contract reporting that would need to be overhauled to achieve this goal. As such, while the change would vastly improve transparency, calling for broad changes to the FPDS or Usaspending.gov is beyond the scope of this report.

²⁸⁸ Verkuil notes that contractors may enjoy less deference in judicial review, potentially putting government interests at greater risk. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 109-11 (2007).

²⁸⁹ Interview 29.

maintaining the inherently governmental line, do not always have sufficient insight into which tasks agency staff are performing and which tasks contractors are performing.²⁹⁰ This problem is exacerbated by senior leaders who adopt an attitude that who does what in a rulemaking is a detail that is “below my paygrade.”

Second, when it comes to rulemaking, contractor roles are not always as clearly delineated as one might hope. In some cases, contractors can be deeply enmeshed with an agency, functioning for many intents and purposes as agency staff. Meanwhile, in other cases, interviewees noted that contractor roles can creep—starting with one smaller task and then over time growing to encompass more and larger tasks.²⁹¹ These kinds of entanglements can become problematic in rulemaking when the policy decisions associated with a rule—a part of rulemaking that is definitionally inherently governmental—are not settled matters from the outset. Unfortunately, the nature of rulemaking means that it can be very difficult, and perhaps at times impossible, to neatly segment off the policy aspect of the rule from its production. For example, someone drafting a rule preamble or a regulatory analysis might reasonably ask questions or make suggestions that ultimately result in a policy being tweaked or changed in some way. The implications of this feedback are different if the person in question is a contractor rather than an agency employee.

These two points suggest that agencies might be well served to adopt written policies regarding appropriate contractor roles in and contractor management strategies for rulemaking. A policy like this might accomplish multiple goals simultaneously. By taking a clear stand on what the term inherently governmental function means in the context of rulemaking, this document could serve as an educational resource for staff with limited knowledge about the principle and what it means for rulemaking. Additionally, the policy could function as an internal management control to help agency leaders preserve the inherently governmental function line in the rulemaking arena.

This section has also raised the question of what obligations an agency should have in terms of disclosing contractors’ rulemaking contributions outside of the agency. Currently, external transparency is limited and ad hoc, making it hard for anyone outside the agency to have insight into contractor roles. We see value in encouraging disclosure around contractors in rulemaking, but we are cautious about encouraging transparency for transparency’s sake. Sunlight may not be the best disinfectant given the potential for unintended consequences.

In our estimation, the costs of creating a system where all contractor rulemaking roles are publicly disclosed for all rulemakings outweigh the benefits. Instead, we urge a bespoke approach, where agencies consider where external disclosure of contractors’ rulemaking contributions is both feasible and in the public interest. By feasible, we mean that an agency would be able to clearly articulate the contractor’s role without excessive cost to the agency and that disclosing the contractor’s role would not compromise the contractor’s confidential business information in some way. By in the public interest, we mean that disclosing a contractor’s role

²⁹⁰ This finding is consistent with earlier research. *E.g.*, Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 873 (2000) (noting lack of internal transparency about which materials were prepared by contractors).

²⁹¹ Interview 1; Interview 21.

would not unduly undermine the agency’s position or invite unwarranted or frivolous lawsuits. One practice that threads this needle, for example, is making contractor-drafted inputs into a regulatory impact analysis available in the docket on Regulations.gov. Importantly, we see value in agencies standardizing external disclosure practices across their rulemaking projects, ideally as part a broader written policy concerning contractors in rulemaking. This will help the public know what to expect in agency materials.

VII. What other avenues do agencies use to enhance capacity?

This report has summarized how some agencies use contractors to enhance their capacity, as “basically staff augmentation”²⁹² or to access a specific technical skill. However, as explained above, agencies have a wide range of reasons counseling for and against the use of contractors for any given task. From the perspective of one respondent: “this is all about . . . how do you get the work done right” given that there are “lots of different resources.”²⁹³

In the course of speaking with participants in this project, a recurring theme was that agencies have options to expand their capacity in addition to or instead of using contractors. For example, one respondent, an attorney, noted that when they give advice to internal clients about procurement decisions, they begin by asking about the client’s goals and authorities.²⁹⁴ Depending on the responses, they might counsel the client towards the use of a grant, cooperative agreement, or a contract.²⁹⁵

In this section, we offer brief summaries of the different methods to enhance agency capacity that respondents shared with us. Together these sorts of strategies—some of which come from rulemaking examples while others are more general—form what one respondent described as “rich human capital planning”²⁹⁶ that can help an agency achieve its mission while operating within constraints.

A. Pay agency employees overtime for surge work

Some respondents explained that overtime or compensatory time for full-time staff are their agencies’ strategies for surge capacity. One noted they spent their Christmas holiday working on a time-sensitive rule.²⁹⁷ Another explained that when managers authorized overtime, staff would work late nights and through the weekend, and that this was the normal approach to deal “with

²⁹² Interview 1.

²⁹³ Interview 16.

²⁹⁴ Interview 4.

²⁹⁵ Interview 4. Although it did not come up in our research, public-private partnerships might be yet another way to structure certain programs to leverage the private sector. An ACUS project from 2018 offers several resources on these topics. Admin. Conf. of the U.S., *Public-Private Partnerships Project*, <https://www.acus.gov/research-projects/public-private-partnerships>.

²⁹⁶ Interview 33.

²⁹⁷ Interview 23.

the onslaught” of a big rule.²⁹⁸ While overtime and compensatory time might be reasonable ways to deal with surge needs, they are unlikely to be good solutions for long-term capacity needs.

B. Hire full-time staff

An obvious solution for an agency facing labor needs is to hire more agency employees. This is a seemingly straightforward strategy, and many respondents explained that they had been able to hire sufficient staff. However, other respondents perceived roadblocks to hiring, even when a need was present. “Hiring is hard,” shared one respondent.²⁹⁹ It might take many months to hire a full-time staff member.³⁰⁰ There might also be a cap on how many staff an agency can employ.³⁰¹ Also, budget tactics like the sequester “made us more cautious” about hiring full-time staff because of funding instability.³⁰²

C. Hire temporary staff

Agencies may also supplement their regular staff with short-term employees. This could include hiring term employees; bringing staff in from other programs, agencies, or departments, as well as from outside the federal government; rehiring retired employees; and hiring experts or consultants using a pathway other than a contract.

1. Term employees

One approach is to create positions that cover a fixed period of time. The U.S. Digital Service, for example, “operates on a tour-of-service model with a maximum term of four years” and most people serving for one or two years.³⁰³ In addition to the academic fellowships noted below, the Securities and Exchange Commission hires fellows to serve as financial economists as term employees for 2 to 4 years.³⁰⁴ These hires do not carry the long-term budget considerations of a regular full-time equivalent employee, and therefore may be helpful to meet short-term needs.

2. Executive branch rotations

One recurring strategy was to enhance capacity by borrowing staff from other offices. This involves temporarily reassigning personnel from one program to another, either within the same agency or from a different agency.

Several respondents shared that their offices either sent staff out to help other programs, or received that kind of support from other programs.³⁰⁵ As an example, one program with expertise handling large volumes of comments sent staff to help a program that received a large number of comments in response to a request for information.³⁰⁶ Another respondent noted that staff from

²⁹⁸ Interview 9.

²⁹⁹ Interview 18; Interview 19.

³⁰⁰ Interview 21.

³⁰¹ Interview 18.

³⁰² Interview 21.

³⁰³ U.S. DIGITAL SERVICE, *Apply to USDS*, <https://www.usds.gov/apply>.

³⁰⁴ U.S. SECURITIES AND EXCHANGE COMMISSION, *DERA Careers*, <https://www.sec.gov/dera/dera-careers>.

³⁰⁵ Interview 3; Interview 16.

³⁰⁶ Interview 3.

field or regional offices might come for a few months to cross-train and help with regulatory projects.³⁰⁷ Another shared that staff came from a different Cabinet department to help set up a program that was similar to their own.³⁰⁸ One idea that came up in an interview was sending a seasoned economist to supervise a contractor producing an RIA at another agency, or simply to provide a trained outsider’s perspective to help a less experienced agency draft an RIA.³⁰⁹

3. External rotations and fellowship programs

Another authority that agencies can use for rotations or fellowship is the Intergovernmental Personnel Act (IPA). Under the IPA, federal agencies can temporarily accept the services of employees of institutions of higher education or “other organizations,” a term that includes employees from State or local governments, including Tribal organizations; associations of State or local public officials; any nonprofit organization which has as one of its principal functions the offering of professional advisory, research, educational, or development services, or related services, to governments or universities concerned with public management; or a federally funded research and development center (FFRDC).³¹⁰ One respondent noted that their agency receives support from state government detailees under this authority.³¹¹

One instantiation of these programs brings academics into government. The Securities and Exchange Commission’s (SEC) Division of Economic and Risk Analysis, for example, hosts visiting fellows to serve as financial economists for one year with the possibility of extension.³¹² The FDA participates in a rotational program with universities and industry for Doctor of Pharmacy graduates.³¹³ Another example is the Oak Ridge Institute for Science and Education (ORISE) program for fellows. This STEM-focused fellowship connects “college students, recent graduates, postdocs, and faculty to STEM internship and fellowship programs” at the U.S. Department of Energy and “more than a dozen other federal agencies.”³¹⁴ One respondent explained that their agency might turn to an ORISE fellow for policy analysis that could ultimately feed into regulatory work.³¹⁵

These kinds of programs, whether they are ongoing and formal like those listed above or informal and based on word-of-mouth,³¹⁶ can help both academics and agency staff keep their skills and knowledge up to date, and agencies can “rely on that expertise considerably.”³¹⁷ One

³⁰⁷ Interview 5.

³⁰⁸ Interview 16.

³⁰⁹ Interview 31. While this holds some promise, one interviewee noted that agency rulemaking can be highly technical such that a generalist economist, or one with a different specialty area, might struggle. *Id.*

³¹⁰ 5 U.S.C. §§ 3371-3375; 5 C.F.R. Part 334.

³¹¹ Interview 16.

³¹² U.S. SECURITIES AND EXCHANGE COMMISSION, *DERA Careers*, <https://www.sec.gov/dera/dera-careers>.

³¹³ U.S. FOOD AND DRUG ADMIN., *Regulatory Pharmaceutical Fellowship*, <https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/regulatory-pharmaceutical-fellowship>.

³¹⁴ OAK RIDGE INSTITUTE FOR SCIENCE AND EDUCATION, *STEM Internships and Fellowships*, <https://orise.orau.gov/internships-fellowships/index.html>.

³¹⁵ Interview 19.

³¹⁶ Informal arrangements might include a setup where an agency does not bring on fellows under a structured, cyclical program, but rather on a more ad hoc or as-needed basis.

³¹⁷ Interview 9; Interview 11. Another respondent explained that such fellowships can facilitate a continuous exchange of ideas to keep staff sharp and aware of the research frontier. Interview 12.

respondent explained that after their fellowship was complete, they continued for a period of time as a contractor to review documents as needed, as well.³¹⁸

A 2010 report from the Office of Personnel Management documented how infrequently IPAs were used at that time.³¹⁹ Guidance from OPM and other programs like the General Services Administration’s Office of Evaluation Sciences has likely improved uptake of this option since then, though summary statistics are not available.³²⁰ Additionally, agencies are not necessarily on their own to locate support. The Partnership for Public Service recently launched a program designed to match those outside of government with IPA opportunities in the federal government.³²¹ Initiatives like this help make it easier for agencies and potential IPA employees to find each other.

4. Retired employees

Several respondents noted the practice of hiring back retired federal workers. A special hiring authority exists to permit agencies to hire back retirees who then become “reemployed annuitants.”³²² Prior to a statutory change in 2012, a retired federal worker could not simultaneously draw their pension and receive a salary from the federal government.³²³ While retired workers could be rehired, the pension amount would be offset by a salary reduction—a significant disincentive.³²⁴ Although Congress granted some waivers, it ultimately changed the law to allow “dual compensation” in certain circumstances, such as “for employees in positions for which there is exceptional difficulty in recruiting or retaining qualified employees.”³²⁵

Under this program, the agency pays the employed annuitant like a regular employee. From the perspective of one reemployed annuitant, this option allowed the agency to benefit from the employee’s rulemaking skills and allowed the employee to continue drawing a salary and doing the “fun stuff” for a short period of time, while stepping back from the management responsibilities that came with their seniority when they were a regular employee.³²⁶ They also

³¹⁸ Interview 11 and follow-up email correspondence with interviewee.

³¹⁹ U.S. OFF. OF PERSONNEL MGMT., REPORT TO CONGRESS ON NURSING FACULTY AND THE INTERGOVERNMENTAL PERSONNEL ACT MOBILITY PROGRAM: THE FORUM, FINDINGS, AND RECOMMENDATIONS 7 (Apr. 2010), <https://www.opm.gov/policy-data-oversight/hiring-information/intergovernment-personnel-act/nursing.pdf>.

³²⁰ E.g., U.S. OFF. OF PERSONNEL MGMT., *Intergovernment Personnel Act, Policy, Data, Oversight*, <https://www.opm.gov/policy-data-oversight/hiring-information/intergovernment-personnel-act>; U.S. GENERAL SERVICES ADMIN., *Office of Evaluation Sciences, Intergovernmental Personnel Act Toolkit: Internal Guide for IPAs* (Fall 2020), <https://oes.gsa.gov/assets/files/ipa-toolkit-oes.pdf>.

³²¹ PARTNERSHIP FOR PUB. SERV., *IPA Talent Exchange Program*, <https://ourpublicservice.org/ipa-talent-exchange>.

³²² Interview 16; U.S. OFF. OF PERSONNEL MGMT., CSRS AND FERS HANDBOOK, CHAPTER 100 REEMPLOYED ANNUITANTS (Oct. 2013), <https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c100.pdf>. Former employees can also be rehired as contractors (Interview 20), in the manner described throughout this report. However, some respondents raised ethical issues with this rehiring of former employees as contractors, as it has the potential to create a “revolving door” scenario and to invite perceptions of pay inequity between current agency personnel and the individual(s) who has left the agency. Interview 20; Interview 36.

³²³ Moving Ahead for Progress in the 21st Century Act (MAP-21) § 100121, Pub. L. No. 112-141, 126 Stat. 405 (July 6, 2012).

³²⁴ Interview 6.

³²⁵ KATELIN P. ISAACS, CONG. RSCH. SERV., R43755, PHASED RETIREMENT: IN BRIEF 2 (Oct. 8, 2014). Phased retirement is another option. *See generally id.*

³²⁶ Interview 5.

noted that an agency might be more comfortable sharing confidential information with rehired employees rather than contractors.³²⁷ Another respondent noted that as a reemployed annuitant they felt more free to give their unvarnished opinions and push the agency to try new perspectives and approaches.³²⁸

On the one hand, this approach can be a way to hire back someone whose expertise is valued, who does not need to learn the basics, and who can come back if inadequate succession planning left a problematic gap.³²⁹ On the other hand, these arrangements made some respondents uncomfortable. In particular, they worried about the perception of a retiree drawing their federal pension while also earning additional income, such that it might look “like a setup from the beginning.”³³⁰ Also, junior staff, who might have been eager to step up into more senior roles, might feel displaced by returning, more senior colleagues.³³¹

5. Experts or consultants

Agencies can also hire individuals as experts or consultants under a special program that makes them “essentially” a government employee.³³² As explained by the Office of Personnel Management, agencies can retain experts or consultants for up to one year or on an intermittent basis.³³³ Although our interviews did not surface instances of agencies using this specific authority for rulemaking support, it is a promising potential avenue for capacity enhancement when an agency needs short-term access to particular expertise.

D. Obtain informal assistance

Turning to a method that is less formal than hiring, several respondents noted that they might informally consult over email, by phone, or in person with government colleagues who have relevant expertise.³³⁴ While such consultation with peers does not rise to the level of a part- or full-time assignment, it remains an important, informal avenue to supplement in-house capacity.

Informal support might also include extended engagements when one part of an agency with particular expertise “steps in” to support another part of agency, for example with the production of an RIA.³³⁵ For example, one program might temporarily and partially “lend” staff to another program to help out with comment processing or document drafting and review. One respondent described this kind of arrangement as “almost like a detail” and as especially useful for a rulemaking project that is time-sensitive or high-profile.³³⁶

³²⁷ Interview 5.

³²⁸ Interview 6.

³²⁹ Interview 20.

³³⁰ Interview 20.

³³¹ Interview 20.

³³² Interview 16.

³³³ U.S. OFF. OF PERSONNEL MGMT., *Fact Sheet: Expert and Consultant Pay*, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/expert-and-consultant-pay/>; 5 U.S.C. § 3109.

³³⁴ Interview 7; Interview 24.

³³⁵ Interview 19.

³³⁶ Interview 19.

Another method of informal assistance can come from the OMB and interagency review processes under Executive Order 12,866.³³⁷ One respondent explained that their agency’s regulations benefited from expertise shared as a result of White House, OMB, and interagency review.³³⁸ Another respondent noted that when their agency updates its guidelines for economic analysis of rules, they will send it to OIRA economists to solicit their feedback on it.³³⁹

E. Borrow another agency’s contract

One respondent explained that an agency can allow other agencies to take advantage of their existing contractors.³⁴⁰ This might be especially helpful if the agency does not have time to begin a new contract for their work and the contractor’s skills are a good match for the agency’s needs. Under an interagency agreement, one agency can transfer funds to the agency with the contract, including some funding to offset the administrative burden of the contracting agency. The contracting agency then issues a task order under its contract but for the other agency’s purposes, and the contracting agency serves as a “middle man” throughout. Other than the GSA Schedules,³⁴¹ which are a series of contracts that GSA sets up for government-wide use, there is no central database of contracts that agencies can borrow from peer agencies in this manner. Instead, the arrangements are driven by informal networks. The contracting agency might be especially willing to facilitate a transaction like this if it has a particular interest in getting the task done.

F. Rely on Federally Funded Research and Development Centers

Some respondents mentioned that having a Federally Funded Research and Development Center (FFRDC) can be especially useful for rulemaking projects.³⁴² FFRDCs are a special kind of entity that is sponsored by a government agency but operated by a contractor.³⁴³ Under the FAR, FFRDCs cater to a “special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources.”³⁴⁴ They are required “to operate in the public interest with objectivity and independence, to be free from organizational conflicts of interest, and to have full disclosure of its affairs to the sponsoring agency.”³⁴⁵ One respondent explained that pre-decisional information about their agency’s rules could be used for financial gain, and as such should not be shared with contractors, but could be shared with the agency’s FFRDC because of the protections in place.³⁴⁶

³³⁷ Interview 31.

³³⁸ Interview 9.

³³⁹ Interview 23.

³⁴⁰ Interview 16.

³⁴¹ The Federal Supply Schedule is an online catalog where federal agencies can purchase a standardized set of products and services in a streamlined manner. The schedule is maintained by GSA and can be accessed at <https://www.gsaadvantage.gov>.

³⁴² Interview 21.

³⁴³ FAR 35.017 et seq.; *see generally* MARCY E. GALLO, CONG. RSCH. SERV., R44629, FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTERS (FFRDCs): BACKGROUND AND ISSUES FOR CONGRESS (Apr. 3, 2020).

³⁴⁴ FAR 35.017(a)(2).

³⁴⁵ *Id.*

³⁴⁶ Interview 22.

As part of their unique status, FFRDCs have “access, beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to employees and installations equipment and real property.”³⁴⁷ This special access should not be used by the FFRDC “to compete with the private sector,” but the FFRDC is allowed to work for an entity other than its sponsor agency “when the work is not otherwise available from the private sector.”³⁴⁸

As GAO has explained, FFRDCs receive multi-year awards from sponsoring agencies following competitions,³⁴⁹ some of which are recompeted at the end of that term and some of which are extended through a sole source process without competition.³⁵⁰ These longer-term arrangements can be more stable but can also suffer from concerns about lack of competition, mission creep—FFRDCs were intended to help with research and development, the boundaries of which can blur in practice—and other challenges.³⁵¹

Not all agencies have an associated FFRDC, but those respondents whose agencies did have one and who had used them for rulemaking expressed considerable confidence in them. They “are here for the mission and for the long run.”³⁵² One respondent explained that FFRDC staff are “staff extenders” for their agency.³⁵³ Their agency has an internal committee to oversee the tasks assigned to the FFRDC, which will sometimes recommend that the agency go with a regular contractor if the FFRDC is not needed to complete the work because, for example, it is not confidential.³⁵⁴ Because the relationships are long-term, a ramp-up period means that later there can be a “core set of individuals who can do the bulk of the work.”³⁵⁵ The FFRDC can subcontract to add particular expertise where needed, but the choice of subcontractor was reviewed by agency staff.³⁵⁶ These personnel changes could go more quickly than in the federal government, with the FFRDC able to bring new expertise online in three months.³⁵⁷ Like other contractors, specific task orders govern the assignments.³⁵⁸ The tasks are not as limited as with

³⁴⁷ FAR 35.017(a)(2).

³⁴⁸ *Id.*

³⁴⁹ As an example, the MITRE Corporation operates several FFRDCs. This includes the National Security Engineering Center, which works with the Department of Defense and the Intelligence Community; the Center for Advanced Aviation System Development, which works with the Federal Aviation Administration; the Center for Enterprise Modernization, which works with Department of the Treasury and the Department of Veterans Affairs; the Homeland Security Systems Engineering and Development Institute, which works with the Department of Homeland Security; the CMS Alliance to Modernize Healthcare, which works with the Centers for Medicare and Medicaid Services; and the National Cybersecurity FFRDC, which works with National Institute of Standards and Technology (NIST). MITRE CORP., *We Operate FFRDCs*, <https://www.mitre.org/centers/we-operate-ffrdcs>.

³⁵⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-458, FEDERAL WORKFORCE: OPPORTUNITIES EXIST TO IMPROVE DATA ON SELECTED GROUPS OF SPECIAL GOVERNMENT EMPLOYEES (2016).

³⁵¹ *Id.*; CYNTHIA BROWN, CONG. RSCH. SERV., LSB10183, ADVISING THE PRESIDENT: RULES GOVERNING ACCESS AND ACCOUNTABILITY OF PRESIDENTIAL ADVISORS (Aug. 6, 2018).

³⁵² Interview 21.

³⁵³ Interview 22.

³⁵⁴ *Id.*

³⁵⁵ Interview 21.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

other contractors, because this respondent’s understanding was that the FFRDC was permitted to do inherently governmental work.³⁵⁹

While FFRDCs began as a way to bring scientific and technical expertise to the government in wartime, their missions have expanded over time.³⁶⁰ The application of FFRDCs to rulemaking is an interesting development that would benefit from additional consideration.

G. Discussion

This section describes different methods to bring outside expertise into the government. There are likely other options that did not emerge through our interviews. For example, special government employees are another category of short-term appointments.³⁶¹ And advisory committees convened under the Federal Advisory Commission Act, or other gatherings of experts like the Technical Expert Panels convened by the Centers for Medicare and Medicaid Services,³⁶² can also bring specific expertise to the government.

These various avenues for capacity enhancement demonstrate that there are a wide range of options for agencies to consider as they plan for future workforce and expertise needs. Undoubtedly, not all of these options will be appropriate or applicable for every agency or program’s situation. The larger finding is that, while agencies sometimes rely on contractors for rulemaking tasks, there are also other sources of extra capacity and expertise that they can and do use.

Additionally, this examination points to areas where common capacity needs might be met by pooling resources across agencies. For instance, one set of respondents expressed enthusiasm about the idea of having a cadre of well-trained economists who could work government-wide on the economic analysis of rules.³⁶³ A rotation program that “everyone will do eventually,” and that everyone will benefit from eventually, could encourage agencies to lend out valuable employees for short-term assignments.³⁶⁴

VIII. Proposed recommendations

This report has provided a descriptive account of contractors in rulemaking: how they are perceived, what they do, and what agency practices dictate their use. It has also detailed other

³⁵⁹ *Id.*

³⁶⁰ MARCY E. GALLO, CONG. RSCH. SERV., R44629, *FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTERS (FFRDCs): BACKGROUND AND ISSUES FOR CONGRESS 1-3* (Apr. 3, 2020).

³⁶¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-458, *FEDERAL WORKFORCE: OPPORTUNITIES EXIST TO IMPROVE DATA ON SELECTED GROUPS OF SPECIAL GOVERNMENT EMPLOYEES* (2016); CYNTHIA BROWN, CONG. RSCH. SERV., LSB10183, *ADVISING THE PRESIDENT: RULES GOVERNING ACCESS AND ACCOUNTABILITY OF PRESIDENTIAL ADVISORS* (Aug. 6, 2018).

³⁶² CTRS. FOR MEDICARE & MEDICAID SERVS., *Technical Expert Panels*, <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/MMS/Technical-Expert-Panels>.

³⁶³ Interview 31.

³⁶⁴ *Id.*

ways that agencies enhance their capacity beyond using contractors. Recounting these factors gives rise to many normative and practical considerations; below we outline areas that merit either additional action or additional research. By way of conclusion, we propose six recommendations that build on the report's findings.

A. Taking stock of contractors in rulemaking

A key takeaway from this report is that views about the proper role of contractors in rulemaking vary widely. At some agencies, contractors are an indispensable part of the rulemaking process; meanwhile, at others they play a negligible or even nonexistent role when it comes to rules. As Section V explained, there are many reasons for these divergent practices, yet across agencies it is clear that no one entity or policy bears full responsibility for how contractors are used in rulemaking.

Rulemaking follows a team production approach; agency leaders set broad policy directions, procurement officials navigate the specifics of rulemaking related contracts, regulatory offices coordinate and support rulemaking, program personnel work on programmatic aspects of rules, agency attorneys provide legal review, agency economists produce or otherwise assist with regulatory impact analysis, and so on. This fragmented approach makes it so that no one party is necessarily aware of or responsible for which contractors are doing what for which rules—and whether the agency-contractor balance in rulemaking activities makes sense from the broader perspective of the agency's workforce structure and needs.

In light of this, we make the following recommendation:

Recommendation #1: All rulemaking agencies should take stock of if and how contractors contribute to their rulemaking processes.

This recommendation is targeted at all agencies that issue rules, not just agencies that regularly issue rules or actively use contractors in rulemaking. Among respondents in agencies that did not or only sporadically used contractors, many could not articulate a compelling rationale for why their agency avoided or otherwise did not use contractors. While contractors are by no means necessary in rulemaking, agencies may stand to benefit from an evaluation of what bringing contractors into the rulemaking fold might mean. Upon consideration, these agencies may decide to continue to refrain from using contractors, but doing so should, in our view, be the result of an active policy decision rather than having past practices, general skepticism about contractors, or inertia guide decision-making.

Among agencies that actively use contractors in rulemaking (or those that decide, upon consideration, that greater engagement is worth pursuing), this recommendation suggests a careful evaluation of how the agency could and should be employing contractors. Specifically, we encourage consideration of the following questions:

- Does the agency's mission, scope of rulemaking activities, or rulemaking content counsel towards special caution with respect to using contractors for rulemaking? For example,

what kind of potential organizational or individual conflicts of interest might be implicated by the subject matter of a rule being considered for contractor involvement?

- Which rulemaking functions do contractors perform at the agency?
- What factors, internal and external to the agency, contributed to past engagements being viewed as successful or problematic?
- What management controls are in place, both at the front end and during the performance of a contract, to ensure contractors are appropriately used in rulemaking? Is the agency using contractors for functions like rule drafting or editing that involve the exercise of discretion and therefore warrant special management controls?
- With respect to contractors in rulemaking, how does the agency implement ACUS's contractor ethics recommendations?³⁶⁵
- How does the agency's funding structure inform its level of reliance upon contractors for rulemaking tasks? If contractors have been functioning side-by-side with agency staff for extended periods, might it better serve the public interest to hire additional agency staff?
- For contracted rulemaking functions that may be performed across programs (or agencies within a department), what structures are in place that might enable or inhibit peer programs (or agencies) to take advantage of an existing contract?

This is a non-exhaustive set of suggestions and our hope is that any agency "stock taking" of contractors in rulemaking would be a holistic and comprehensive exercise.

B. Considering the range of options to enhance capacity

This report has also shown the wide range of ways that agencies bolster their internal expertise and capacity. It is clear that, while contractors can play a role in some rulemaking activities, agencies are not limited to using contractors to address expertise or capacity needs. We note that while these various techniques might not be appropriate for all agencies or all tasks, they form a menu of sorts that agencies should be aware of as they do their human capital planning.

Recommendation #2: When evaluating resource needs for ongoing or upcoming rulemaking projects, agencies should consider the array of options to enhance capacity and expertise.

As we have documented in detail, these options include paying overtime, approving compensatory time, hiring more full-time staff, hiring temporary staff—including term employees, borrowing staff from elsewhere in the executive branch, using the Intergovernmental Personnel Act or other fellowship programs to bring people in from outside of government, rehiring retired employees, or hiring experts or consultants. The menu also includes obtaining

³⁶⁵ Recommendation 2011-3, *supra* note 38, at 48792.

informal assistance from peers, borrowing another agency's contract, or building a relationship with a Federally Funded Research and Development Center.

To get started, the agency might consider the following questions:

- What other forms of workforce capacity enhancement (see Section VII) is the agency already using to support rulemaking? How have these approaches helped to meet the agency's needs?
- Which of these methods does the agency not use, and why?
- Is the agency producing rules in an optimal manner given its unique set of challenges and opportunities?

C. Developing written policies for contractors in rulemaking

Two additional takeaways of this report inform our next recommendation. First, our research indicates that agencies have not developed written policies for contractors in rulemaking. Second, in the absence of more formal policy, attitudes can fill the vacuum and play a significant role in determining when contractors are used and the type of agency access they have within a particular rulemaking project.

Together, these two findings suggest that a lack of standardization can lead to uneven use and management of contractors across rulemaking projects. This has the potential to be particularly acute in agencies that heavily rely on contractors to complete rulemaking tasks. Because having a written policy could improve the rulemaking process and mitigate potential risks, we include it in our next recommendation:

Recommendation #3: As appropriate, agencies should consider adopting written policies for using contractors in rulemaking.

When developing written policies for rulemaking, agencies should grapple with which rulemaking tasks are inherently governmental and which are closely associated with inherently governmental functions, and also commit to how they will handle issues around transparency. Specifically, agencies are advised to consider the following questions:

- Given the policy context of the agency's rulemakings and the policymaking processes that are in place, which tasks does the agency consider to be inherently governmental? Which tasks are considered closely associated with inherently governmental?
- What management controls are in place to ensure that only agency employees are conducting inherently governmental rulemaking tasks?
- Which types of rulemaking-related meetings should contractors be invited to? From which meetings should they be excluded as a matter of practice?

- How will the agency monitor compliance with a written policy for contractors in rulemaking?
- Consistent with the next recommendation, what are the agency's policies for internal and external transparency of contractor use for different rulemaking tasks?
- Would additional written guidance or an agency-specific supplemental FAR provision help standardize and improve ethics requirements to minimize potential for organizational and personal conflicts of interest? Are there other provisions that could help agencies cope with the potential for these conflicts?
- In what situations should agency personnel seek out other avenues for rulemaking support instead of contractors? Which forms of support are available at the agency and how can they be used?
- How might training plans better incorporate procurement law and policy, e.g., inherently governmental functions and those that are closely associated with inherently governmental functions?
- How is OFPP's checklist for closely associated functions deployed in practice to ensure adequate management controls not just at the beginning of a contract, but throughout?

D. Optimizing transparency

As this report has shown, there are opportunities to improve disclosure of contractor involvement in rulemaking. Internal and external transparency serve different and important purposes, each of which should be carefully considered. Increased internal transparency would likely strengthen agency oversight of contractors and improve decision-makers' awareness of how contractors may influence materials developed internally. The virtues of external transparency trade off against unintended consequences of additional disclosures; agencies are advised to consider these trade-offs and home in on areas where additional external transparency serves the public interest. These values are reflected in the fourth recommendation:

Recommendation #4: Agencies should bolster internal transparency about contractor involvement. With respect to external transparency, agencies should consider disclosing contractor involvement when such disclosure serves the public interest on balance.

The following points may help agencies determine the right balance of transparency:

- What internal transparency mechanisms are in place to ensure that agency managers and leaders have visibility into which tasks were performed by contractors?

- Which contractor-performed tasks, if any, should be externally disclosed in the rulemaking process? Technical or other expert reports that form part of the rulemaking record, for example, should be placed in the docket to the extent practicable, while disclosure of day-to-day writing or project management support may vary. For the latter, internal management controls might be a superior way to ensure proper accountability.
- When and how should contractor-prepared materials be disclosed? For example, should contractor-produced reports include contractor contact information and logos? Should the agency upload a separate document to the Regulations.gov docket disclosing contractor involvement? If so, for which tasks? Is it feasible to include relevant contracting or procurement-related tracking numbers?

E. Reevaluating rulemaking applications of “inherently governmental”

As noted above, current procurement policy does not offer much guidance that is tailored to rulemaking activities. The existing guidance indicates that legislative drafting is an inherently governmental function, but that regulatory drafting is “closely associated” with inherently governmental work. In practice, rulemaking requires considerable labor; it includes analytical tasks (like RIA), the compilation of a factual record, and the need to manage and read comments (potentially numbering into the millions), among other tasks. Legislative drafting does not generally have this same workload. Yet, legislative drafting culminates in law that is binding on the American people—and so does regulatory drafting. In terms of the substantive function, then, the distinction between legislative drafting and regulatory drafting is, arguably, a distinction without meaningful difference.

When it comes to rulemaking activities, agencies are largely left to navigate the application of the inherently governmental function test on their own and to parse the appropriate line for those tasks that are closely associated with inherently governmental functions. In practice, as we detailed in Section VI, this has led to a situation where agency understandings of inherently governmental functions are *widespread but incomplete*.

The conversations we had with agency officials and experts through the course of this project underscored the fact that each agency’s rulemaking apparatus is unique. When it comes to writing rules, each agency faces different challenges and opportunities. At the same time, many of the questions raised in this report about the appropriate ways to use contractors in rulemaking are common across agencies. And at least one participant suggested that having more examples of what constitutes an inherently governmental function or activities that are closely associated with inherently governmental functions in the context of rulemaking would be helpful.³⁶⁶

OMB is well-positioned to evaluate these issues and their connection with inherently governmental and closely associated functions, as laid out in this fifth recommendation:

³⁶⁶ Interview 4.

Recommendation #5: OMB should evaluate whether, in light of this report's findings, additional clarification and guidance surrounding rulemaking tasks that are closely associated with inherently government functions is warranted.

Drawing on its own procurement expertise in OFPP and its regulatory expertise in OIRA, OMB might consider whether the contractor-performed tasks inventoried in this report fall within broader understandings of inherently governmental functions and whether current agency practices align with broader procurement best practices. Specifically, and in light of the many ways contractors are used in rulemaking, OMB could revisit the 2011 policy guidance describing functions closely associated with rulemaking.

F. Additional considerations and future research

The descriptive findings in this report highlight just how much remains unknown about the role of contractors in rulemaking. These gaps in our knowledge raise important and substantive questions. We view this report as an entrée into a larger research agenda exploring the nuances associated with the patterns we have identified, as outlined in the sixth and final recommendation:

Recommendation #6: ACUS should commission additional research addressing important outstanding questions about contractors in rulemaking, and draw upon the expertise of its membership to consider how the following ideas could be shaped into meaningful recommendations.

We note five strands of research ripe for additional development and consideration:

1. Contract structure and management. Contracts for rulemaking services are noteworthy because aspects of these services can be classified as “closely associated” with inherently governmental functions. Additionally, rulemaking involves many steps and iterative work, posing potential challenges in crafting and overseeing contracts for rulemaking services. How might agencies optimally structure rulemaking contracts in light of these special challenges? What are best practices for communicating with and managing rulemaking contractors?
2. Extent of contractor rulemaking support at some agencies. As this report has noted, some agencies rely on contractors in rulemaking in a regular and extensive fashion. Do these situations arise organically, or are they the result of intentional agency design choices? Anecdotal evidence suggests the former, when perhaps a contractor obtains a contract for one discrete function (e.g., comment analysis, data analysis) and over time the work expands to many functions.³⁶⁷

Where rulemaking contractors function more like staff, this raises an additional set of questions about whether the agency has retained sufficient governance and oversight capabilities. What are the root causes of extensive reliance on contractors in agency

³⁶⁷ Interview 1; Interview 21.

rulemaking? In agencies facing this situation, is rulemaking unique or does the imbalance extend to other agency functions? Do certain contract structures give rise to this phenomenon? Is the public interest put at particular risk in these scenarios?

3. Rulemaking support from FFRDCs. Interviewees highlighted FFRDCs as a promising source for rulemaking support. For agencies that have a steady regulatory workload, an FFRDC might be worth considering to serve as rulemaking “staff extenders”³⁶⁸ where hiring is not feasible. More research is needed, however, to understand what rulemaking activities are appropriate for FFRDCs as opposed to regular contractors, because use of this special entity is constrained by law.
4. Cross-cutting rulemaking support. Many agencies contract for the same kinds of support in rulemaking and a standing contract, organized through GSA or another agency, might help streamline access to these services and enhance capacity governmentwide. Are there areas where having government-wide rulemaking service providers might enhance government capacity? For instance, many agencies use contractors for comment analysis support; are there ways to improve the process by which agencies access these services so that each agency does not need to establish its own contract? Relatedly, as discussed in Section VII, regulatory impact analysis is another area where agencies frequently seek contractor support; would having a cadre of well-trained government economists who could work on a rotational basis across agencies improve analytical quality? Or are there other ways that agencies could supplement this capacity?
5. Procurement-related transparency reforms. This research has highlighted the disconnect that exists between public procurement systems and the individual contracts that allow contractors to assist agencies in rulemaking (among other services). In theory, public spending and procurement databases could be tied to rulemaking contracts in concrete ways that could assist in oversight and planning, but this is not possible right now. Which databases or other resources should agencies and the public rely on for this purposes? What kinds of reforms might facilitate use of these databases to track contractors’ roles in rulemaking? How can these data be used to further enhance internal and external transparency in rulemaking without overly burdening agency workflows? Is there a way to structure the data to allow agencies to be aware of and potentially borrow other agencies’ rulemaking contracts? Would a requirement that agencies disclose their general contracting practices, including the safeguards they have in place, increase procurement-related transparency? If so, which practices should be included in the disclosure?

³⁶⁸ Interview 22.

IX. Appendix: Methodology for the Report

A. Overall approach

The rulemaking outputs of federal agencies vary considerably, both in terms of volume and type of rules. Given this variation, we anticipated considerable diversity in the use of contractors to support the creation of those outputs. Our research design attempts to capture this diversity with the goal of assessing both the *depth* of use of regulatory contractors within agencies and the *breadth* of regulatory contracting practices across agencies. To that end, we relied on interviews and a survey to gather information to evaluate contractor use in rulemaking.³⁶⁹ We supplemented these techniques with our own research of the scholarly literature as well as government websites, including the Federal Procurement Data System-Next Generation, agency rulemaking dockets on Regulations.gov, and individual agency websites.

We conducted 36 interviews with agency oversight officials, experts, rulemaking officials (current and former), and contractors; these interviews constituted the crux of the project. Because we encouraged respondents to invite knowledgeable colleagues to accompany them to the interviews, our interviews spanned 45 individuals. These interviews were semi-structured, meaning that we prepared a set of standard questions for each type of interviewee and then used these questions as a starting point for each interview. As appropriate, we asked follow-up questions during the interviews, particularly when an interviewee mentioned a new topic that we had not yet encountered or made a comment that in some way conflicted with our understanding of that agency's practices.

We discuss the recruitment practices associated with each phase of the project in the sections that follow. Most interviews were approximately 60 minutes long, with some shorter and many longer; all except one were completed in one session. All were conducted virtually via Zoom or by phone.

To encourage candor, all survey and interview subjects were given promises of confidentiality, such that direct quotes would not be attributed to them individually or to their agency without their explicit permission. Accordingly, in the body of the report we refer to subjects in general terms (e.g., referencing them by the type of agency with which they were associated), and do not provide additional identifying information unless we were explicitly given permission to do so by the respondent. To further protect respondent confidentiality, we use gender neutral pronouns throughout the report to refer to participants in the report.

1. Oversight and expert interviews

From July 2021 to January 2022, we conducted eight interviews with 12 agency oversight officials and scholars with expertise in contracting and procurement. The purpose of these interviews was to ascertain the history of federal policy with respect to regulatory contracting, as well as the scope of current agency regulatory practices and any potential issues or problems about which overseers and other experts might be aware. Our recruitment strategy was to target

³⁶⁹ The interview and survey protocols were reviewed and approved by the University of Virginia's Institutional Review Board (UVA IRB-SBS #4467).

high-profile individuals with domain-specific knowledge, relying in some cases on our own personal networks and in other cases on suggestions from ACUS staff and members. For oversight officials, we interviewed individuals at agencies with cross-cutting oversight authority with respect to procurement and/ or rulemaking, such as the Government Accountability Office, the General Services Administration, and the Office of Management and Budget. We also met with scholars with expertise in rulemaking, contracting, and procurement.

2. Survey

The survey portion of this project gauged the breadth of contractor involvement in rulemaking across a wide swath of agencies. Specifically, we sought access to individuals with a current working knowledge of the different potential roles contractors had taken on for rulemakings within their agency; our intent was to gather information from “front line” rulemaking personnel on recent rulemakings. To do this, we identified all regulatory contacts listed for “completed actions” on the *Unified Agenda of Regulatory and Deregulatory Actions* (“Unified Agenda”) for a recent term.³⁷⁰ This yielded a list of 324 contacts in 47 unique agencies.³⁷¹

On September 8, 2021, we fielded an online Qualtrics survey, the “2021 Survey on the Role of Contractors in Rulemaking,” via email to the 324 contacts.³⁷² The survey addressed contractor roles with respect to the specific rule for which the individual was the named contact and took between 7 to 10 minutes to complete; Section IX(B) of the report contains the survey instrument. To further encourage respondents to complete the survey, we followed up with email reminders one week, two weeks, and three weeks after our initial email. We received 51 responses to the survey, of which 38 were complete, for a response rate of 12.5%.³⁷³

The survey asked respondents whether they would be willing to provide additional input into the project. We used this question to recruit several additional respondents for the rulemaking official interviews, as discussed below.

3. Rulemaking official interviews

The interviews allowed us to plumb the depth of agency choices about contractor use in rulemaking. From August to December 2021, we conducted 24 interviews with 27 agency rulemaking officials and four interviews with six agency contractors engaged in rulemaking work. These semi-structured interviews aimed to elicit the nature of contracting relationships at the agency, as well as current agency policies regarding both rulemaking and contracting. Most

³⁷⁰ The Unified Agenda is a semiannual report on agency rulemakings; each entry in the report includes contact(s) at the agency who were involved with the development of that rule. We selected a recent edition of the Unified Agenda, but we do not disclose which term we used so as to further protect respondents’ confidentiality. We excluded completed actions that had a final action status of “Withdrawn” from our sample, since these rules did not undergo the full regulatory development cycle.

³⁷¹ In some cases, more than one person was listed as the regulatory contact. When this happened, we randomly selected one of the individuals listed to reduce overall respondent burden. We excluded contacts that had no associated email address.

³⁷² We closed the survey on October 6, 2021. Prior to fielding the survey, ACUS gave advance notice of the survey to ACUS representatives for the 47 agencies included in the survey.

³⁷³ In calculating the response rate, we exclude from the denominator 20 respondents for whom we received email bouncebacks. We use the number of complete responses (38) for the numerator.

of our interviewees were program staff (including some Contracting Officer Representatives or CORs), although we also spoke with individuals in general counsel offices, centralized regulatory development offices, budget planning offices, and economic analysis divisions, among others.³⁷⁴ Our subjects included current officials, as well as several retired rulemaking officials. The interviews spanned six agencies, including three Cabinet-level departments, two independent agencies within the executive branch, and one independent regulatory commission; we chose some of these agencies because they were active in producing rules and others because they were less active. We were referred to the six contractors we interviewed by ACUS or agency interviewees, who suggested these individuals as highly knowledgeable about a particular area of contracting for rulemaking.

We began by contacting the ACUS member for each selected agency. Initial interview participants were identified by their respective ACUS member as a person familiar with rulemaking (and, potentially, contracting relating to that topic). Subsequent interviewees were selected via a chain referral technique.³⁷⁵ As previously noted, we also used the survey to identify additional respondents. We conducted between one and seven interviews at each agency, stopping when we reached a saturation point, wherein interviewees were providing repetitive information consistent with what we had already learned. However, in two cases we interviewed only one person at an agency.

³⁷⁴ We note also that our design did not focus on contracting officers or contracting officer representatives within agencies. While these important roles deserve further study, our aim in this report was to connect with agency staff who are close to the rulemaking process. Additional research is merited to connect the findings of this report to the procurement apparatus within agencies.

³⁷⁵ This is in keeping with ACUS guidance on the use of interviews for its projects. See Jennifer Nou & Gregory Huber, *Qualitative Research Methods: A Guide for ACUS Consultants* (2019), available at [https://www.acus.gov/sites/default/files/documents/ACUS%20Consultant%20Guide%2012%2010%202019%20FIN AL.pdf](https://www.acus.gov/sites/default/files/documents/ACUS%20Consultant%20Guide%2012%2010%202019%20FINAL.pdf).

B. Survey instrument

2021 Survey on the Role of Contractors in Agency Rulemaking



Purpose of the Study: Welcome to the 2021 Survey on the Role of Contractors in Agency Rulemaking. This survey is part of a project for the Administrative Conference of the United States (ACUS), which is exploring how agencies use contractors in the rulemaking process. The purpose of the study is to gather information on the wide set of rulemaking tasks that contractors perform for federal agencies and how agencies make decisions about these tasks. The project is descriptive in nature—it will not explore legal questions like whether a specific task was appropriately assigned to a contractor. For more information about the project, please visit the ACUS project webpage: <https://www.acus.gov/research-projects/contractors-rulemakings>.

Voluntary Participation: You have been selected to participate in this study because you were listed in a recent *Unified Agenda of Regulatory and Deregulatory Actions* as the regulatory contact for a rulemaking at your agency. The ideal respondent is an agency official with firsthand knowledge of the agency practices with respect to the rule identified. If another official at your agency is better suited to answer these questions, you can share the survey link with them; the link is not unique. Your participation is voluntary.

Time Required: This survey should take 7 to 10 minutes to complete.

Timeline: We would be very grateful if you could complete the survey by October 6, 2021.

Risks and Benefits: There are no anticipated risks in this study. There are no direct benefits to you for participating in this research study. You will receive no payment for participating in the study.

Confidentiality of Responses: In the project report for ACUS, survey responses will not be connected to particular agencies unless you give explicit permission at the end of this survey. The report will never name individual respondents. Rather, the project report will use survey responses to provide aggregated information about agency practices. For example, the report will summarize recommended best practices (but not which agency they come from).

Whom to Contact with Questions:

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To obtain more information about the study, ask questions about the research procedures, express concerns about your participation, or report illness, injury or other problems, please contact: Tonya R. Moon, Ph.D. Chair, Institutional Review Board for the Social and Behavioral Sciences One Morton Dr Suite 500 University of Virginia, P.O. Box 800392 Charlottesville, VA 22908-0392 Telephone: (434) 924-5999 Email: irbsbshelp@virginia.edu Website: <https://research.virginia.edu/irb-sbs> Website for Research Participants: <https://research.virginia.edu/research-participants> UVA IRB-SBS #4467.

Please click on the arrow in the lower right to begin.

Intro questions

We are contacting you because you were listed as a point of contact in the Unified Agenda for the following rule that was recently issued by your agency: "\${e://Field/Title}"(RIN \${e://Field/RIN}).

Are you familiar with this regulation and how it was created within your agency?

Yes

No

You have indicated that you are not familiar with this regulation and how it was created within your agency. If another official at your agency is best suited to answer these questions, we would appreciate it if you would share the survey link with them.

Please select the name of your agency.

What is your title? Please also include the office in which you work.

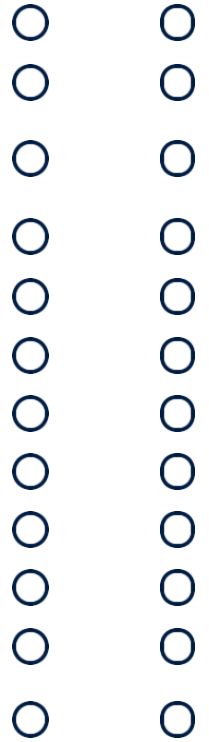
Consider the following activities related to the production of the rule titled: "{\$e://Field/Title}" (RIN {\$e://Field/RIN}). For each of the following activities indicate the level of contractor involvement.

“Contractor” refers to the person or entity with whom the agency contracted. If multiple people worked under the same contract, please record that as one contractor.

Select N/A if a particular step did not apply to this rulemaking.

	No contractor	One contractor
Preliminary or other research (e.g., literature review)	<input type="radio"/>	<input type="radio"/> <input type="radio"/>
Technical or other scientific testing used as inputs in the rulemaking process	<input type="radio"/>	<input type="radio"/>
Stakeholder or other public outreach (e.g., meetings, fact-sheet preparation, press release drafting)	<input type="radio"/>	<input type="radio"/> <input type="radio"/>
Drafting all or part of the Paperwork Reduction Act statement	<input type="radio"/>	<input type="radio"/> <input type="radio"/>
Drafting all or part of the Regulatory Impact Analysis	<input type="radio"/>	<input type="radio"/> <input type="radio"/>
Drafting all or part of the Regulatory Flexibility, federalism, or other analyses	<input type="radio"/>	<input type="radio"/> <input type="radio"/>
Drafting all or part of the Statement of Basis and Purpose	<input type="radio"/>	<input type="radio"/> <input type="radio"/>
Drafting all or part of other portions of the preamble	<input type="radio"/>	<input type="radio"/>
Drafting all or part of internal agency decision memos	<input type="radio"/>	
Processing and management of some or all public comments	<input type="radio"/>	
Drafting all or part of the proposed rule regulatory text	<input type="radio"/>	
Drafting all or part of the final rule regulatory text	<input type="radio"/>	
	<input type="radio"/>	
	<input type="radio"/>	

More than one
contractor N/A



	No contractor	One contractor	More than one contractor	N/A
Management of all or portions of internal agency drafting and review	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Management of all or portions of OMB / OIRA review	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Management of interagency collaborations or interagency working groups	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please explain) <input type="text"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

With respect to the rule titled "{\$e://Field/Title}" (RIN {\$e://Field/RIN}), what factors guided decisions about tasks that a contractor took on versus an agency employee? Check all that apply:

Written agency policy on contracting

Unwritten agency policy on contracting

Written agency policy on contracting for rulemaking

Unwritten agency policy on contracting for rulemaking

Consideration of inherently governmental functions

Adequacy of agency resources

Past practices

Need for expertise

Ethical considerations

Other (please explain)

Don't know

If available, please provide a web link for the written agency policy on contracting for rulemaking.

Evaluative block

Is there anything else you would like us to know about the role of contractors in rulemaking at your agency?

Would you be willing to talk with us in more detail about your responses?

Yes

No

Please provide your name and contact information (email and phone number).

Who else should we contact, at your agency or elsewhere, to learn more about the role of contractors in the rulemaking process? If you can, please provide name, organization, and contact information (email and/or phone number).

Are you willing to have your responses attributed to your agency in the report? The default is that your responses will not be connected to your agency in the report to ACUS.

Yes

No

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