



# Summary of Comments on Microsoft Word - User Fees Draft Recommendation for Committee 2023.10.31

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Number: 1 Author: DJROSTKE Subject: Sticky Note Date: 10/31/2023 10:5947 AM

It is a rare regulatory program that provides net benefits to the regulated entity. "collects from an entity engaged or seeking to engage in a regulated activity."



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## User Fees

### Committee on Regulation

#### Draft Recommendation for Committee | October 31, 2023

1 Federal agencies charge user fees as part of many programs. A "user fee," for purposes of  
2 this Recommendation, is any fee that an agency (1) charges for a good or service that the agency  
3 provides to the party paying the fee or (2) collects from a regulated entity to support a regulatory  
4 program that benefits the entity.<sup>1</sup> User fees serve many purposes, for example, to shift the costs  
5 of a program from taxpayers to those persons or entities whom the program benefits most  
6 directly, to supplement general revenue, or to incentivize or discourage certain behavior.

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

15 In 1987, the Administrative Conference adopted Recommendation 87-4, *User Fees*,  
16 which identified basic principles for Congress and agencies to consider in establishing user fee  
17 programs and setting fee levels. Recommendation 87-4 stated that a "government service for

<sup>1</sup> Erika Lidegran, *User Fee Programs: Design Choices and Process 7* (Oct. 1, 2023) (report to the Admin. Conf. of the U.S.).

<sup>2</sup> 31 U.S.C. § 9701.

DRAFT October 27, 2023



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18 which a user fee is charged, should directly benefit fee payers.<sup>3</sup> It also identified principles  
19 intended to efficiently and fairly allocate government goods and services.<sup>3</sup>  
20 There have been significant developments since ACUS last addressed this topic in 1987.  
21 Congress and agencies have continued to expand the collection of and reliance on user fees,<sup>4</sup> and  
22 OMB updated Circular A-25 in 2017 to update federal policy regarding fees assessed for  
23 government services, resources, and goods; provide information on which activities are subject  
24 to user fees and the basis for setting user fees; and provide guidance for implementing and  
25 collecting user fees.  
26 Today, user fee programs serve many purposes and vary significantly in their structure.  
27 Some are established by a specific statute. Such statutes may specify the fee amount, provide a  
28 formula for calculating fees, or prescribe a standard for the agency to use in establishing  
29 reasonable fees (e.g., full or partial cost recovery). Some statutory authorizations are permanent,  
30 while others sunset and require periodic reauthorization. Other programs are established by  
31 agencies on their own initiative under the IOAA or other authority. Some programs charge fees  
32 to persons or entities in exchange for a specific service or good, while others charge fees to  
33 regulated entities to support regulatory programs. Some fees are transactional, while others are  
34 paid on a periodic basis. Some fees are set to achieve economic efficiency, while others are set to  
35 promote equity or advance other values, goals, and priorities. Other statutes may also provide  
36 rules that would apply to a user fees program unless Congress specifies otherwise; one example  
37 is the Miscellaneous Receipts Act, which requires that money received by the government from  
38 any source be deposited into the U.S. Treasury.<sup>5</sup>  
39 In designing a user fee program, congressional and executive-branch policymakers must  
40 also consider possible negative consequences such as the potential for fees to adversely affect the  
41 quality of agency decision making or its appearance of impartiality; their potential to affect the  
42 behavior of private persons and entities in unintended ways; the impact of the fees on low-

<sup>3</sup> 52 Fed. Reg. 23,634 (June 24, 1987).

<sup>4</sup> Lietzau, *supra* note 1, at 3.

<sup>5</sup> 31 U.S.C. § 3302.



Number: 1 Author: DJROSTKE Subject: Sticky Note Date: 10/31/2023 10:35:08 AM  
 "Amis? Persons is a defined term in the PRA to include businesses, et al, but I would encourage a more inclusive term outside of that context.

Number: 2 Author: DJROSTKE Subject: Sticky Note Date: 10/31/2023 10:33:17 AM  
 I agree with Peter Staus. This question is central to design of user fee programs and has a significant effect on the challenges described in the paragraph above whether fees affect agency impartiality, the impact on private decisionmaking and the potentially discriminatory impact of user fees.

Number: 3 Author: DJROSTKE Subject: Sticky Note Date: 10/31/2023 10:28:57 AM  
 "and small businesses and other small entities."



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43 income people and members of historically underserved communities; or the agency's revenue  
 44 stability.  
 45 Given expanded reliance on user fees, the development of new models for user fee  
 46 programs, and updated guidance on user fees from OMB, the Conference decided to revisit the  
 47 subject. This Recommendation represents the Conference's current views on the objectives,  
 48 design, and implementation of user fee programs by Congress and agencies.<sup>6</sup> In particular, this  
 49 Recommendation encourages congressional and executive-branch program designers to engage  
 50 meaningfully with ~~interested~~potentially impacted persons when they design, implement, and  
 51 review user fee programs. The Conference has consistently emphasized the potential for public  
 52 engagement to help program designers obtain more comprehensive information, enhance the  
 53 legitimacy of their decisions, and increase public support for their decisions.<sup>7</sup>

Commented [A1E]: For Committee discussion: Should the word "interested" be replaced by "potentially impacted" referring to "People who would be impacted by the fee?"

RECOMMENDATION

General Considerations

- 54 1. Program designers in Congress and the executive branch should identify the purpose(s) of
- 55 an agency's user fee program, such as shifting the costs of a program from taxpayers to
- 56 those persons or entities whom the program benefits most directly, supplementing general
- 57 revenue, or incentivizing or discouraging certain behavior, and design statutes and rules
- 58 to serve such purpose(s). Program designers should also consider whether such
- 59 purpose(s) support or oppose the imposition of user fees and related waivers, exemptions,
- 60 or reduced rates.
- 61 2. When establishing a user fee-funded program, designers should consider whether any
- 62 feature of the program might inadvertently affect agency decision making or be perceived

<sup>6</sup> This Recommendation does not address whether agencies may or should draw on user fee receipts absent congressional authorization or outside the process for congressional appropriations, nor does it address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.

<sup>7</sup> Cf. Admin. Conf. of the U.S. Recommendation 2018-7, *Public Engagement in Agency Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); see also Admin. Conf. of the U.S., Office of the Chair, Statement of Principles for Public Engagement in Agency Rulemaking (ev. Sept. 1, 2023); Admin. Conf. of the U.S., Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, 88 Fed. Reg. 42,680 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021).



Number: 1	Author: DJROSTKE	Subject: Sticky Note	Date: 10/31/2023 10:46:56 AM
Give the introductory clause "Congress should specify" it doesn't make sense for Congress to then state a preference.			
Number: 2	Author: DJROSTKE	Subject: Sticky Note	Date: 10/31/2023 10:43:46 AM
Give the introductory clause "Congress should specify" it doesn't make sense for Congress to then state a preference.			
Number: 3	Author: DJROSTKE	Subject: Sticky Note	Date: 10/31/2023 10:41:47 AM
As this act is already enacted, does the recommendation need to exclude it. Should not these recommendations apply to future user fee programs within these covered agencies?			
Number: 4	Author: DJROSTKE	Subject: Sticky Note	Date: 10/31/2023 10:38:02 AM
Committee on style: "persons," "people," or "individuals"?			
Number: 5	Author: DJROSTKE	Subject: Sticky Note	Date: 10/31/2023 10:37:26 AM
, when agencies may use funds collected without appropriation.			
Number: 6	Author: DJROSTKE	Subject: Cross-Out	Date: 10/31/2023 10:42:45 AM
Number: 7	Author: DJROSTKE	Subject: Cross-Out	Date: 10/31/2023 10:44:11 AM
Number: 8	Author: DJROSTKE	Subject: Cross-Out	Date: 10/31/2023 10:44:52 AM
Number: 9	Author: DJROSTKE	Subject: Cross-Out	Date: 10/31/2023 10:44:25 AM
Number: 10	Author: DJROSTKE	Subject: Cross-Out	Date: 10/31/2023 10:47:37 AM



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- 63 as creating a conflict of interest at the agency, especially in novel user fee structures and
- 64 instances in which an agency collects user fees from entities that it regulates, and whether
- 65 any steps should be taken to mitigate those effects.
- 66 3. Program designers should also consider whether a user fee may have a negative or
- 67 beneficial effect on the behavior of individuals and entities subject to that fee as well as
- 68 the potential public benefits and costs.

Considerations for Congress

- 69 4. When Congress enacts a specific statute, separate from the Independent Offices
- 70 Appropriations Act, authorizing an agency to collect user fees, it should specify, as
- 71 applicable:
  - 72 a. The manner for setting fee levels. Congress should determine ~~whether it is~~
  - 73 preferable to specify the amount of the fee, with or without adjustment for
  - 74 inflation, or a formula for calculating it, or alternatively ~~whether it is preferable to~~
  - 75 give the agency ~~these directions to~~ determine the appropriate fee (e.g., to
  - 76 achieve a particular purpose or to recover some or all of the costs of providing a
  - 77 good or service or administering a program);
  - 78 b. Any circumstances in which the agency may or must not charge a fee or,
  - 79 conversely, may or must waive or reduce the fee amount. Congress should
  - 80 determine whether ~~it is preferable to~~ collect the same fee from all users (e.g., for
  - 81 reasons of fairness or administrative efficiency) or, alternatively, whether
  - 82 reducing or eliminating fees for certain users would promote equity, reduce
  - 83 barriers to market entry, incentivize desirable behavior, or produce some other
  - 84 socially beneficial outcome;
  - 85 c. Any required minimum process for setting or modifying fees, either the notice-
  - 86 and-comment rulemaking process set forth in 5 U.S.C. § 553 or an alternative
  - 87 process, including requirements for public engagement;
  - 88 d. Any ~~authorizations, limitations, or prescriptions~~ on the manner in
  - 89 which the agency may collect fees;



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- 90 e. Any required process for enforcing the obligation to pay user fees and any
- 91 penalties for failure to pay required fees;
- 92 f. The availability of collected fees: Congress should determine whether the fees
- 93 collected by the agency should be deposited in the U.S. Treasury, consistent with
- 94 the Miscellaneous Receipts Act, 31 U.S.C. § 3302, and available to the agency
- 95 only after appropriation, or whether there is a reason to depart from this default
- 96 rule. If Congress considers other alternatives, such as allowing funds to be
- 97 directly available to the agency for program expenditures, it should also consider
- 98 the potential perception of bias and conflicts of interest<sup>1</sup>
- 99 g. Any authorizations, limitations, or ~~restrictions~~ <sup>Commented [A2]: From Regulation Committee:</sup>
- 100 the agency may expend collected fees;
- 101 h. <sup>Commented [A3]: From Regulation Committee:</sup> Any limitations on the period during which the agency may expend collected fees;
- 102 Congress should determine whether, for reasons of revenue stability, collected
- 103 fees should remain available to the agency until expended or, alternatively,
- 104 whether, for reasons of oversight, fees should only be available for a limited
- 105 period (e.g., a specific multi-year period or until a set expiration date)<sup>2</sup>
- 106 i. Any requirement that the agency periodically review its user fees and any
- 107 required method(s) for doing so (e.g., comparing fee amounts with corresponding
- 108 costs or recalculating fees based on new developments and information); and
- 109 j. Whether the authority granted under the statute sunsets.
- 110 5. Whenever Congress decides to create a new statutory user fee program, it should reach
- 111 out to relevant agencies for technical assistance early in the legislative drafting process
- 112 and it should consider stakeholder input.

<sup>1</sup>Commented [A2]: From Regulation Committee: Add Misc. Receipts Act and reference to it in preamble.

<sup>2</sup>Commented [A3]: From Regulation Committee: Combine with 10 above?

**Considerations for Agencies**

- 113 6. Whenever an agency establishes a new user fee program or sets fees under an existing
- 114 program, it should do so consistent with 5 U.S.C. § 553, unless Congress has specified
- 115 otherwise. Opportunities for public participation should reflect the considerations
- 116 addressed in Recommendations 2018-7, *Public Engagement in Rulemaking*, 2021-3,



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117 *Early Input on Regulatory Alternatives, and 2023-2, Virtual Public Engagement in*  
118 *Agency Rulemaking, including the time and resources available to the agency to conduct*  
119 *such public participation opportunities.*  
120 7. When engaging with the public regarding user fees, agencies should clearly communicate  
121 to the public the purpose of its user fee program. Agencies should be transparent with the  
122 public, which can be accomplished through, among other things, identification of and  
123 engagement with stakeholders, public participation at early stages such as during cost and  
124 demand forecasting and the budget formulation process, and providing information on the  
125 agency's user fee program, budget proposals, and fee setting process.  
126 8. Agencies should maintain an easily-accessible page on their websites describing all of  
127 their user fee-funded programs, identifying and explaining the fees, and providing links  
128 to supporting documentation, such as the governing sections of the *United States Code*  
129 and the *Code of Federal Regulations*, and recent notices in the *Federal Register*.  
130 9. Agencies should conduct regular reviews, consistent with Recommendation 2021-2,  
131 *Periodic Retrospective Review*, of their user fee programs to ensure the programs are  
132 meeting their purposes and that the fees are adequate. Agencies should also assess other  
133 resulting consequences or effects of the programs, such as those described in Paragraphs  
134 2 and 3.