



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.¹ 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.² 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

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

² 31 U.S.C. § 9701.

DRAFT October 27, 2023



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

18 which a user fee is charged should directly benefit fee payers.” It also identified principles
19 intended to efficiently and fairly allocate government goods and services.³

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,⁴ 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.⁵

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-

³ 52 Fed. Reg. 23,634 (June 24, 1987).

⁴ Lietzan, *supra* note 1, at 3.

⁵ 31 U.S.C. § 3302.

Commented [A1]: DOT Comment: Please see the comment on “program designers” in the next paragraph.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.⁶ 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.⁷

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

⁶ 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.

⁷ 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 (rev. 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).

Commented [A1]: For Committee discussion: Should the recommendation be more specific, for example by referring to "people who would be impacted by the fee"?

Commented [A2]: DOT Comment: Does "program designers" (here and in the next sentence) refer to a different group than the "policymakers" mentioned in the previous paragraph? If not, consider using "program designers" throughout the Draft Recommendation for consistency. Several specific recommendations also refer to "program designers" in Congress and the executive branch.

The Report states: "It uses the term "decision makers" (also "planners" or "program designers") to refer to the persons making these design decisions, understanding that these individuals might be within the executive branch or within the legislative branch, depending on the situation. The term "lawmakers" in this report refers exclusively to the legislature." (p. 8)

The Report also includes a few references to "policymakers" and "policy makers" (see, e.g., p. 7).

Commented [A3]: DOT Comment: Fixing typo.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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 greater discretion 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 instructions~~prescriptions~~ on the manner in
89 which the agency may collect fees;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 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;
- 99 g. Any authorizations, limitations, or instructions-prescriptions on the uses for which
- 100 the agency may expend collected fees;
- 101 h. 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);
- 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.

Commented [A2]: From Regulation Committee:
Add Misc. Receipts Act and reference to in preamble.

Commented [A3]: From Regulation Committee:
Combine with (f) 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,



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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(s) 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.

Commented [A4]: DOT Comment: Consider noting the possibility of more than one purpose, consistent with recommendation 9.

Commented [A5]: DOT Comment: Suggest using another description to avoid possible confusion with Section 508 compliance (accessibility to people with disabilities). For instance, would "prominent" or a similar word capture the intended meaning?