



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

FY 2023 CONGRESSIONAL BUDGET JUSTIFICATION

March 28, 2022

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY..... - 3 -

II. ABOUT THE ADMINISTRATIVE CONFERENCE - 4 -

A. HISTORY AND PURPOSE..... - 4 -

B. STRATEGIC PRIORITIES AND GOALS - 5 -

C. ORGANIZATION - 6 -

III. RECENT ACCOMPLISHMENTS - 7 -

A. HIGHLIGHTS..... - 7 -

B. PROGRAMMATIC IMPACT - 12 -

C. RECOMMENDATIONS - 14 -

D. ASSISTANCE TO CONGRESS..... - 16 -

E. MODEL RULES..... - 18 -

F. SOURCEBOOKS - 19 -

G. REPORTS..... - 20 -

H. OTHER RESOURCES..... - 21 -

I. DATABASES AND INFORMATION COLLECTIONS..... - 22 -

J. PUBLIC FORUMS..... - 23 -

K. ASSISTANCE TO FEDERAL AGENCIES - 26 -

IV. PROJECTS UNDERWAY - 27 -

A. PROJECTS ANTICIPATED TO RESULT IN RECOMMENDATIONS..... - 27 -

B. FORTHCOMING STUDIES AND SOURCEBOOKS..... - 29 -

V. BUDGET STATUS & REQUEST - 30 -

A. PROPOSED APPROPRIATIONS LANGUAGE FOR FY 2023..... - 30 -

B. BUDGET AUTHORITY AND STAFFING BY ACTIVITY - 30 -

C. ACUS ORGANIZATION CHART - 31 -

D. FINANCIAL SUMMARY - 32 -

E. RECENT APPROPRIATIONS HISTORY - 33 -

F. FY 2023 REQUEST - 34 -

VI. CONCLUSION..... - 40 -

Appendix A: Council Members - 41 -

Appendix B: Government Members - 43 -

Appendix C: Public Members..... - 45 -

Appendix D: Liaison Representatives, Senior Fellows, and Special Counsels - 46 -

Appendix E: Recommendations and Statements Adopted 2010 – 2021 - 50 -

I. EXECUTIVE SUMMARY

The President's budget for FY 2023 requests \$3.465 million for the Administrative Conference of the United States (ACUS). ACUS submits this justification in support of the administration's request. \$3.465 million will enable ACUS to undertake a full slate of projects aimed at improving, in the words of the agency's enabling statute, "the efficiency, adequacy, and fairness of administrative procedure" (5 U.S.C. § 594) and will enable ACUS to continue working with the President, agencies, Congress, and the judiciary to implement its recommendations.

ACUS is a unique, executive-branch agency whose principal mission is to recommend improvements in agency rulemaking, adjudication, and other administrative processes to the president, federal agencies, Congress, and the Judicial Conference of the United States. Congress has enacted a number of ACUS recommendations into law, and agencies and courts have adopted or relied upon many others.

ACUS also provides for the exchange of information among agencies, publishes sourcebooks of enormous value to both the government and the public, produces reports designed to improve agency regulatory programs, and provides nonpartisan advice to agencies and Congress. As the former Chairman and Ranking Member of the House Judiciary Committee emphasized, "there is no other independent, non-partisan agency" on which "Congress can call . . . to evaluate ways to improve the regulatory process."

ACUS has a demonstrated record, as no other agencies do, of improving the efficiency, adequacy, and fairness of federal administrative programs for the benefit of the American public. As the former Ranking Member of the House Judiciary Committee noted, the agency's "excellent work" has ensured that "our Nation's federal administrative procedures are not only looked to as a standard around the world, but constantly in the course of additional improvement."

ACUS took substantial steps in 2021 to study and improve the procedures that agencies use to carry out federal administrative programs. In addition to issuing ten recommendations to improve federal administrative processes, ACUS helped:

- Advance equity and improve access to justice for underserved communities;
- Support agency adjudication during the COVID-19 pandemic;
- Explore fair and effective uses of technology in administrative processes;
- Provide vital information to Congress about agency programs;
- Encourage the public availability of significant agency materials;
- Promote public participation in the rulemaking process;
- Improve the fairness and accuracy of agency adjudication; and
- Ensure the integrity and effectiveness of federal programs.

The requested budget of \$3.4 million will enable ACUS to undertake an active research and outreach program aimed at further improving federal administrative procedures and encouraging participation, collaboration, and innovation in the operation of federal programs.

II. ABOUT THE ADMINISTRATIVE CONFERENCE

A. HISTORY AND PURPOSE

Following bipartisan endorsement of the work of two temporary administrative conferences during the Eisenhower and Kennedy administrations, Congress enacted the Administrative Conference Act in 1964. The Act codified the structure of these conferences, which emphasized collaboration among a wide array of federal agencies, reliance on administrative law and regulatory experts from the private sector (including prominent academics), and the participation of public members representing diverse views. This collaborative effort is designed to produce consensus-based, nonpartisan recommendations for improving federal administrative processes, which affect every sector of our national economy and the lives of American citizens.

Since its establishment in 1968, ACUS has adopted hundreds of recommendations, each of them based on careful study and the informed deliberations of its members in an open process that encourages public input. Congress has enacted a number of ACUS recommendations into law, and agencies and courts have adopted or relied upon many others.

Recommendations are designed, in the words of the Administrative Conference Act, to help federal agencies “protect private rights,” carry out regulatory activities “expeditiously in the public interest,” “promote more effective participation and efficiency in the rulemaking process,” “reduce unnecessary litigation in the regulatory process,” “improve the use of science” in the regulatory process, and “improve the effectiveness of laws applicable” to that process (5 U.S.C. § 591). All recommendations are published in the *Federal Register* and online at www.acus.gov.

ACUS also provides for the exchange of information among agencies, publishes sourcebooks of enormous value to both the government and public, provides nonpartisan advice to agencies and Congress, and issues reports designed to improve agency regulatory programs. Agencies frequently consult and rely on these materials to improve their administrative processes.

ACUS’s oversight committees in Congress have expressed strong bipartisan support for its work. Several members of Congress acknowledged ACUS’s value and contributions during the floor debate preceding passage of the bipartisan Open Book on Equal Access to Justice Act. One member characterized ACUS as “a highly respected nonpartisan agency” and noted the key role it “has historically played in helping Congress identify inefficiencies among the Federal agencies.”

Congress calls upon ACUS to conduct research on issues of great importance. The John D. Dingell, Jr. Conservation, Management, and Recreation Act, for example, requires ACUS to maintain an online database of attorney’s fees awarded in litigation against the federal government and submit an annual report to Congress on the amount of fees awarded during the

preceding fiscal year. ACUS released its first report and data for FY 2019 in March 2020 and has continued to release new data and reports annually.

The Strengthening Protections for Social Security Beneficiaries Act of 2018 required ACUS to prepare a report for the Social Security Administration with recommendations to improve the program under which SSA appoints legal representatives for beneficiaries who cannot manage their own finances. ACUS submitted its report to SSA in June 2020.

Recognizing the value of ACUS’s work, a bipartisan group of six senators on the Senate Judiciary Committee recently requested that the U.S. Patent and Trademark Office engage and fund ACUS to study whether and how to establish a small claims tribunal for patent cases. Working with USPTO, ACUS will begin work on the study in FY 2022.

Members of the federal judiciary from diverse perspectives, too, have expressed strong support for ACUS. Both Justice Breyer and the late Justice Scalia testified before a congressional committee in 2010 in support of ACUS’s authorization. During his testimony, Justice Scalia called ACUS one of the federal government’s “best bargains for the buck.”

B. STRATEGIC PRIORITIES AND GOALS

Mission

ACUS brings together experts from the public and private sectors to advise the President, Congress, federal agencies, and the federal judiciary. These experts collaborate to design recommendations seeking to maximize fairness and efficiency in the administration of government programs.

Strategic Goals

Participation	ACUS will expand citizen participation in the regulatory process through increased use of interactive communications technologies and creative means of outreach, to provide essential information to government officials and to inform the public.
Collaboration	ACUS will study and promote the most responsive and efficient means of sharing authority and responsibility among the federal government, state and local governments, contractors, grantees, and citizens. This will include exploration of new models of collaborative governance as well as a more effective division of responsibility between government and the private sector.
Innovation	ACUS will seek new ideas that advance the core values of fairness and efficiency and will study existing government programs to identify what works, what doesn’t, and what’s promising. Research will address the use of science, ensuring data quality, and performance evaluation.

Education	ACUS will bring together senior federal officials and outside experts to identify best practices and will advise agencies on revising their rulemaking and hearing processes, technology, and management systems to deliver better results. The Conference will be a central resource for agencies by compiling and publishing data and guidance on solving mutual problems.
------------------	--

Vision and Values

Under its statutory authorization, ACUS is responsible for studying “the efficiency, adequacy, and fairness of administrative procedure” (5 U.S.C. § 594). These three procedural values, which reflect legal and social science performance measures, guide ACUS’s work.

Efficiency	This value derives from economics and looks at how procedures employed by agencies achieve the public purposes the regulations are intended to serve. The question is whether the agency procedures and management techniques reflect optimum resource allocations, not whether the benefits of the underlying substantive regulations exceed their costs.
Adequacy	This value borrows from the disciplines of psychology and political science and looks at the effectiveness of regulatory techniques from the public’s perspective, including such factors as trust, transparency, and participation.
Fairness	This value derives from law and employs principles embedded in the Administrative Procedure Act and the Due Process Clause of the Constitution’s Fifth Amendment.

C. ORGANIZATION

ACUS carries out its mission through two components: (1) the *Assembly*, and (2) the *Office of the Chairman*.

The Assembly

As defined in the Administrative Conference Act, 101 members meeting in plenary session make up the Assembly (5 U.S.C. § 593). Its membership includes the Chairman, appointed for a five-year term by the President, by and with the advice and consent of the Senate; 10 Council Members appointed for three-year terms by the President; 50 Government Members; and 40 Public Members. Government Members are agency heads or their designees drawn from a wide array of federal agencies. Public Members are academics, practicing lawyers, and other experts in administrative procedure drawn from the private sector.

The Assembly meets semi-annually in plenary session to debate, amend, and formally adopt recommendations appropriate for improving administrative procedure. Sitting with the “Voting Members” of the Assembly in plenary session are three classes of “Non-Voting

Members”: (1) *Senior Fellows*, who are mostly former Voting Members; (2) *Special Counsels*, who are lawyers who advise the membership in their areas of expertise; and (3) *Liaison Representatives*, who represent entities with which ACUS has entered into a liaison arrangement to enhance its deliberations, such as federal courts, agencies unrepresented in the Assembly, and professional associations. Non-Voting Members have the privilege of debate but may not vote at plenary sessions.

In addition, all of the Voting Members and most of the Non-Voting Members of the Conference serve on one of five committees that develop the recommendations. The committees hold two to three meetings in both the spring and the fall to debate and approve recommendations. Once approved by the committee, the Council then decides whether to place the recommendation on the agenda for a plenary session, at which the full Assembly votes on it.

A full list of all Voting and Non-Voting Members is available at www.acus.gov/members.

Office of the Chairman

The Office of the Chairman consists of the Chairman and a small professional staff. A roster of the ACUS staff is available at www.acus.gov/directory/staff.

In addition to supporting all activities of the Assembly and its committees, the Office of the Chairman collects information and statistics from agencies for analysis and dissemination; publishes reports, sourcebooks, and other materials useful for evaluating and improving administrative processes; prepares reports for Congress; provides technical advice to members of Congress, their staffs, and federal agencies, whether informally or through formal reports; facilitates interchange of information among departments and agencies on matters of administrative procedure; conducts training sessions for federal agencies; and holds public forums, sometimes with other entities, to address matters of public interest. These resources are of enormous value to both government officials and the public and often lead to the implementation of best practices at federal agencies.

III. RECENT ACCOMPLISHMENTS

A. HIGHLIGHTS

ACUS has taken and continues to take substantial steps to improve the efficiency, adequacy, and fairness of the procedures that agencies use to carry out federal administrative programs.

Improving Access to Justice and Public Participation in Agency Decision Making

As President Biden recognized in Executive Order 13985, “advancing equity requires a systematic approach to embedding fairness in decision-making processes.” Federal agencies

“must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.” Identifying barriers to access and improving fairness in administrative processes have been at the core of ACUS’s statutory mission since its inception.

ACUS is honored to be one of 29 agency members named to the White House Legal Aid Interagency Roundtable (LAIR), which President Biden reconvened on May 18, 2021. LAIR’s mission includes increasing the availability of meaningful access to justice for individuals and families, regardless of wealth or status; developing policy recommendations that improve access to justice; and improving coordination among federal programs so that programs are more efficient and produce better outcomes by including, where appropriate, legal services among the range of supportive services provided.

President Obama originally appointed ACUS to LAIR in 2015. Along with the Department of Justice’s Access to Justice Initiative, ACUS co-chaired LAIR’s Working Group on Self-Represented Parties in Administrative Hearings. The Working Group’s efforts led to Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*, in which the ACUS Assembly set forth tools and processes agencies should consider adopting to better serve parties who participate in agency proceedings without professional representation.

Since LAIR was reconvened, ACUS has worked with LAIR’s Co-Chairs, the Attorney General and the Counsel to the President, and other Roundtable members to accomplish its mission. ACUS contributed to LAIR’s September 2021 report, *Access to Justice in the Age of COVID-19*, which highlighted ACUS Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*. Drawing on agencies’ experiences during the COVID-19 pandemic, the Recommendation encourages agencies to be mindful of the ways in which virtual hearings can expand access to justice for members of some historically underserved communities while potentially creating barriers to access for others. It sets forth best practices to ensure that agencies manage virtual hearing programs with due regard for fairness and participant satisfaction.

The ACUS Assembly adopted other recommendations in 2021 that will help agencies identify inequities and promote fairness in their decision-making processes:

- Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, encourages agencies to “stay abreast of new technologies for facilitating informative public participation in rulemakings.” As the Recommendation recognizes, “new technologies may offer new opportunities to engage the public,” which can “help ensure that agencies receive input from communities that may not otherwise have an opportunity to participate” in agency rulemakings.
- Recommendation 2021-3, *Early Input on Regulatory Alternatives*, identifies specific, targeted measures by which agencies can meaningfully and equitably obtain public input on regulatory alternatives from communities affected by agency regulations, including from groups that are underrepresented in the administrative process and may suffer disproportionate harms from proposed rules.

- Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*, identifies and urges Congress to remedy certain recurring technical problems in statutory provisions governing judicial review of agency action that may cause unfairness, inefficiency, or unnecessary litigation.
- Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, identifies best practices for promoting fairness, accuracy, timeliness, and consistency in agency adjudications through the use of quality assurance systems. As the Recommendation recognizes, “[t]hrough well-designed and well-implemented quality assurance systems, agencies can proactively identify both problems in individual cases and systemic problems, including . . . systemic barriers to participation in adjudicatory proceedings.”

ACUS continues to lead the conversation on ways agencies can improve fairness in administrative processes, boost meaningful public participation, and eliminate barriers to access:

- ACUS held a virtual, public forum, *Underserved Communities and the Regulatory Process*, that addressed participation by underserved communities and their members in the administrative processes by which agencies make regulatory policies (including rulemaking and adjudication). It addressed Executive Order 13985, which requires that federal agencies “pursue a comprehensive approach to advancing equity for all,” including communities “that have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.” More than 40 senior government officials, community advocates, academics, and other experts participated as panelists and moderators.
- Building on Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, ACUS held a virtual, public forum, *Enhancing Public Input in Agency Rulemaking*, that explored the role of public input in federal agency rulemaking. The forum examined both best practices under the current notice-and-comment process and possible reforms that would enhance public participation in the rulemaking process. Panelists and moderators included current and former government officials, community advocates, and prominent academics.
- ACUS invited experts from the Legal Services Corporation to share their perspectives on access to justice and representation in federal agency adjudication with ACUS’s Council on Federal Agency Adjudication. The Council provides a valuable forum for agency leaders to discuss these important issues.

Supporting Agency Adjudication During the COVID-19 Pandemic

Agency adjudication offices have faced new operational challenges throughout the COVID-19 pandemic, including a switch to primarily remote operations and the need for secure, electronic tools to communicate with parties, process cases, and conduct hearings.

To help agencies continue serving the American public throughout the pandemic, ACUS has maintained an online clearinghouse of agency policies and other statements since April 2020 that describes relevant developments in agency adjudicative processes. ACUS also convened an Interagency Roundtable that month—at which more than 100 officials from across the federal government exchanged best practices on operating remotely, developing electronic processes, and conducting video and telephone hearings—and released a report to help agencies understand legal issues surrounding the use of remote hearings in agency adjudications. ACUS also organized a panel at the American Bar Association’s Administrative Law Conference in November 2020 on responding to challenges in adjudication during the pandemic.

Building on agencies’ experiences during the pandemic, ACUS launched a project in FY 2021 to study how agencies are using virtual hearings in adjudicative proceedings. That project resulted in Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, which identifies best practices for improving existing virtual-hearing programs and establishing new ones in accord with principles of fairness and efficiency and with due regard for participant satisfaction. In conjunction with the project, ACUS released reports on agencies’ use of virtual hearings and legal considerations for remote hearings in agency adjudications. A follow-up project resulted in Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, which, among other things, identifies best practices for facilitating public access to proceedings that are conducted virtually.

ACUS also launched the Council on Federal Agency Adjudication since the start of the COVID-19 pandemic. The Council provides a forum for the heads of agency adjudication programs to exchange information about procedural innovations, best management practices, and other subjects of mutual interest. The Council has provided an effective space for agency leaders to discuss operational challenges during the pandemic, such as virtual hearings and electronic case management, as well as the pandemic’s effects on access to justice.

Exploring Fair and Effective Uses of Technology in Administrative Processes

In addition to its work on virtual hearings, ACUS is dedicated to studying how federal agencies are using and could use machine learning to make rules, adjudicate cases, and perform other regulatory activities. As the ACUS Assembly recently observed, “artificial intelligence (AI) techniques are changing how government agencies do their work. Advances in AI hold out the promise of lowering the cost of completing government tasks and improving the quality, consistency, and predictability of agencies’ decisions. But agencies’ uses of AI also raise concerns about the full or partial displacement of human decision making and discretion.”

To help agencies navigate these issues, the ACUS Assembly approved a statement, *Agency Use of Artificial Intelligence*, in FY 2021 that identifies issues agencies should consider when adopting, revamping, establishing policies and practices governing, and regularly monitoring AI systems. Among the topics it addresses are transparency, harmful biases, technical capacity, procurement, privacy, security, decisional authority, and oversight.

This statement follows two reports, authored by leading scholars, that analyze how agencies are using AI to enforce federal law, adjudicate cases, make rules, and perform regulatory tasks. The reports also address the legal and policy hurdles to deploying AI in the regulatory process. ACUS also invited officials from the General Services Administration, Government Accountability Office, Health and Human Services Department, Securities and Exchange Commission, and Social Security Administration to share their perspectives on the use of AI in federal administrative programs at the American Bar Association’s Administrative Law Conference in November 2019 and at a virtual symposium in summer 2020.

ACUS has continued to study how agencies are using and might better use AI to administer government programs. Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, recognized that agencies, particularly those with large caseloads, can use AI techniques to “rapidly and efficiently identify anomalies and systemic trends.” An ongoing study, *Artificial Intelligence in Retrospective Review of Agency Rules*, examines how agencies might use AI tools to identify rules that are outdated, inaccurate, or redundant or contain typographical errors. Another ongoing study, *Automated Legal Guidance at Federal Agencies*, addresses agencies’ use of automated tools—like interactive chatbots and virtual assistants—to provide legal guidance to members of the public.

Recognizing the continuing need for guidance and coordination, ACUS launched the Roundtable on Artificial Intelligence in Federal Agencies. The Roundtable provides a forum for officials from agencies across the government to exchange information and best practices related to uses of AI in rulemaking, adjudication, enforcement, and other administrative processes. Its members are supported by a consultative group of leading scholars and other experts.

Providing Vital Information to Congress About Agency Programs

Congress often calls upon ACUS to conduct research on issues of enormous importance, to ensure that federal programs continue to work effectively for those they are meant to help. In response to congressional mandates, ACUS submitted the second annual report of awards of attorney’s fees to individuals and small businesses who prevail against the federal government under the Equal Access to Justice Act and updated the accompanying searchable database to include FY 2020 awards. The third annual report, covering FY 2021, and data on FY 2021 awards will be released in March 2022.

In recent years, Congress has also relied on ACUS to study how the Social Security Administration can better prevent the fraudulent or inappropriate use of the approximately \$70 billion annually in benefit payments made to the more than 7.7 million beneficiaries who are assigned a representative payee.

Recognizing the value of ACUS’s work, a bipartisan group of six senators on the Senate Judiciary Committee recently requested that the U.S. Patent and Trademark Office engage and

fund ACUS to study whether and how to establish a small claims tribunal for patent cases. Working with USPTO, ACUS will begin work on the study in FY 2022.

ACUS staff also continue to provide technical advice in response to requests from House and Senate staff, including through ACUS's Statutory Review Program, under which ACUS transmits to Congress federal judicial and agency adjudicative decisions that identify technical problems in statutes governing administrative procedure.

B. PROGRAMMATIC IMPACT

ACUS's work has consistently informed the actions of federal agencies, the President, Congress, and federal courts.

Encouraged the Public Availability of Significant Agency Materials

ACUS has encouraged agencies to make guidance documents, adjudication materials, and important descriptions of agency policies accessible to members of the public. As a result:

- The PLUM Act (H.R. 2043) was reported favorably by the House Committee on Oversight and Reform on June 29, 2021. As Chairwoman Carolyn Maloney noted in her opening remarks, the PLUM Act would implement Recommendation 2019-8, *Public Identification of Agency Officials*.
- Agencies across the federal government have made many important guidance documents available on their websites, consistent with Recommendation 2019-3, *Public Availability of Agency Guidance Documents*.
- The Office of the Federal Register and the Government Accountability Office (GAO) have taken steps, relying on Recommendation 2011-5, *Incorporation by Reference*, to ensure that regulated parties and the public can access copyrighted private standards incorporated into federal regulations.
- The Unified Agenda of Regulatory and Deregulatory Actions now includes regulations that have been dormant for long periods, consistent with Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*.
- The Social Security Administration (SSA) pledged to consult Recommendation 2017-1, *Adjudication Materials on Agency Websites*, when it determines how it will make precedential decisions regarding the conduct of representatives available to the public.

Promoted Public Participation in the Rulemaking Process

An integral part of ACUS's statutory mission is to promote more effective public participation in the rulemaking process. ACUS has issued several recommendations urging

agencies to adopt best practices that encourage the public's involvement in agency rulemakings. Many agencies have consulted or relied on those recommendations to promote public participation in the rulemaking process. For example:

- GAO relied on Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, to urge agencies to publicly disclose their policies regarding the treatment of materials submitted for consideration in the rulemaking process.
- The Commodity Futures Trading Commission implemented Recommendation 2014-6, *Petitions for Rulemaking*, by permitting members of the public to file petitions for rulemakings on the agency's website.

Improved the Fairness and Accuracy of Agency Adjudication

ACUS has consistently encouraged agencies to adopt procedures that promote fair, accurate, and efficient adjudication by federal agencies. Many agencies have consulted or relied on ACUS resources to make their adjudicative procedures fairer, more accurate, and more efficient. For example:

- Several agencies, including the Occupational Safety and Health Review Commission, have relied on ACUS's *Model Adjudication Rules*, updated in 2018, and ACUS's *Model Rules for Implementation of the Equal Access to Justice Act*, updated in 2019, to comprehensively revise their procedural rules.
- The Standing Committee of the Judicial Conference of the United States recently relied on Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*, in approving rules that would improve federal-court review of the nearly 18,000 decisions appealed from the Social Security Administration (SSA) each year.
- SSA implemented Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudication*, to improve the accuracy of decisions that evaluate medical evidence in SSA's multi-billion dollar per year disability benefits program. SSA also used an Office of the Chairman report, *SSA Disability Benefits Program: The Duty of Candor and Submission of All Evidence*, as a blueprint for a 2015 regulation requiring claimants to disclose all relevant evidence—not just, as under the previous rule, favorable evidence.
- The Federal Aviation Administration amended its rules of practice to provide procedures for adjudicator recusal in accord with Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*.
- The National Labor Relations Board relied on ACUS resources including Recommendation 2021-4, *Best Practices for Using Video Teleconferencing for Hearings*, and Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*,

to seek public input on the use of videoconference technology to conduct proceedings in unfair labor practice and representation cases.

Ensured the Integrity and Effectiveness of Federal Programs

Consistent with its statutory mission to help ensure that private rights are fully protected and federal regulatory activities are carried out expeditiously in the public interest, ACUS has repeatedly recommended improvements to ensure that agency processes promote the effective administration of federal programs. In response, Congress and agencies have done the following:

- The Bipartisan Budget Act of 2015 implemented Recommendation 2012-8, *Inflation Adjustment Act*, by adjusting civil penalties for regulatory violations. Revenues to the federal government will increase tens of millions of dollars annually as a result. The Government Accountability Office recently found that nearly all agencies have now complied with the Act's requirements.
- The Social Security Advisory Board relied on an Office of the Chairman report, *The SSA Representative Payee Program*, in its January 2018 recommendations to eliminate abuse and fraud by representatives of elderly and disabled recipients of federal benefits. In April 2018, Congress passed the Strengthening Protections for Social Security Beneficiaries Act into law, which required ACUS to study the issue further. ACUS submitted its recommendations to the Social Security Administration in March 2020.
- The U.S. Senate Homeland Security and Governmental Affairs Committee relied on Recommendation 2014-5, *Retrospective Review of Agency Rules*, when it favorably reported legislation (S. 1420, 116th Cong.) that would require agencies to retrospectively review major regulations.

C. RECOMMENDATIONS

ACUS's principal mission is to recommend improvements in agency rulemaking, adjudication, and other regulatory processes to the president, federal agencies, Congress, and the federal judiciary. The Assembly adopted ten recommendations during 2021 to improve the fairness and efficiency of agency rulemaking, adjudication, and other regulatory processes:

- ***Recommendation 2021-1: Managing Mass, Computer-Generated, and Falsely Attributed Comments.*** This recommendation offers best practices for managing mass, computer-generated, and falsely attributed comments in agency rulemakings. Among other things, it offers best practices for agencies to consider with respect to using technology to process such comments, managing their public rulemaking dockets in response to such comments, and ensuring transparency with respect to any such actions they undertake.
- ***Recommendation 2021-2: Periodic Retrospective Review.*** This recommendation identifies best practices for agencies as they conduct retrospective review of their regulations on a

periodic basis. It provides guidance for agencies on identifying the types of regulations that are strong candidates for review, determining the optimal frequency of review, soliciting public feedback to enhance their review efforts, identifying staff to participate in review, and coordinating review efforts with other agencies.

- **Recommendation 2021-3: Early Input on Regulatory Alternatives.** This recommendation addresses when and how agencies should solicit input on alternatives to rules under consideration before issuing notices of proposed rulemaking. Among other things, it provides targeted measures for agencies to obtain input from knowledgeable persons in ways that are cost-effective and equitable and that maximize the likelihood of obtaining diverse, useful responses.
- **Recommendation 2021-4: Virtual Hearings in Agency Adjudication.** This recommendation addresses the use of virtual hearings, in which one or more participants attend remotely using a personal computer or mobile device, in agency adjudications. Virtual hearings have become increasingly common in agency adjudications, especially during the COVID-19 pandemic, but they can pose unique logistical challenges and raise questions of accessibility, transparency, privacy, and data security. The recommendation identifies best practices for improving existing virtual-hearing programs and establishing new ones when appropriate.
- **Recommendation 2021-5, Clarifying Statutory Access to Judicial Review of Agency Action** urges Congress to enact a cross-cutting statute that addresses certain recurring technical problems in statutory provisions governing judicial review of agency action that may cause unfairness, inefficiency, or unnecessary litigation. It also offers drafting principles for Congress when it writes new or amends existing judicial review statutes.
- **Recommendation 2021-6: Public Access to Agency Adjudicative Proceedings.** This recommendation identifies best practices regarding when and how federal agencies provide public access to adjudicative proceedings. Within the legal framework established by federal law, it identifies factors agencies should consider when determining whether to open or close particular proceedings. It also offers best practices to promote public access to proceedings that agencies open to the public and recommends that agencies make the policies governing public access readily available.
- **Recommendation 2021-7: Public Availability of Inoperative Agency Guidance Documents.** This recommendation identifies for agencies best practices for maintaining public access to agency guidance documents that are no longer in effect—that is, inoperative guidance documents. It addresses factors agencies should consider in deciding whether to include certain types of inoperative guidance documents on their websites; steps agencies can take to make it easier for members of the public to find the inoperative guidance documents in which they are interested; and what labels and explanations agencies should use to ensure that the public can readily understand the context and significance of particular inoperative guidance documents.

- **Recommendation 2021-8: Technical Reform of the Congressional Review Act.** This recommendation offers technical reforms of the Congressional Review Act (CRA) that clarify certain procedural aspects of the CRA while reducing administrative burdens on executive-branch agencies and congressional offices. Specifically, the recommendation suggests phasing out the requirement that agencies submit paper copies of certain rulemaking materials to Congress in favor of an electronic process; making it easier to ascertain key dates and time periods relevant to review of agency rules under the CRA; and formalizing a procedure by which members of Congress can initiate congressional review of rules that agencies conclude are not covered by the CRA.
- **Recommendation 2021-9: Regulation of Representatives in Agency Adjudicative Proceedings.** This recommendation encourages agencies to consider adopting rules governing attorney and non-attorney representatives in adjudicative proceedings in order to promote the accessibility, fairness, integrity, and efficiency of those proceedings. It provides guidance on the topics that rules might cover and recommends that agencies consider whether greater harmonization of different bodies of rules is desirable and ensure that their rules are readily accessible to representatives and the public.
- **Recommendation 2021-10: Quality Assurance Systems in Agency Adjudication.** This recommendation identifies best practices for agencies when devising and implementing systems to assess and improve the quality of decisions in adjudicative programs. It emphasizes cutting-edge techniques (including artificial intelligence) to structure the capture and analysis of data; the selection, role, and institutional placement of personnel; the use of performance metrics; efforts to ensure fairness, impartiality, efficiency, and other important institutional objectives; and the relationship between quality-assurance review and conventional appellate review.

A full listing of adopted ACUS recommendations and statements is included as Appendix E. All ACUS recommendations and statements, along with reports and other supporting materials, are available at www.acus.gov/recommendations.

D. ASSISTANCE TO CONGRESS

Congress calls on ACUS to conduct research, collect information, and publish reports of its findings or recommendations. ACUS has published two such reports in recent years:

- **Open Book on Equal Access to Justice.** Pursuant to Section 4201 of the bipartisan John D. Dingell, Jr. Conservation, Management, and Recreation Act, in March 2020, ACUS submitted to Congress its first annual report on attorneys' fees awards under the Equal Access to Justice Act (EAJA). ACUS released its second annual report in March 2021 and will release its third in March 2022. Under EAJA, federal agencies must reimburse private litigants for their attorneys' fees when they prevail against the federal government in judicial proceedings and certain adversarial adjudications when the government's position is not substantially justified. ACUS will continue to work with agencies to collect

EAJA award information for subsequent years, submit annual reports to Congress, and update its online database of awards as additional information comes available. The report and database are available at www.acus.gov/eaja.

- ***Social Security Administration’s Representative Payee Program: Information Sharing with States.*** Pursuant to the unanimously passed Strengthening Protections for Social Security Beneficiaries Act of 2018, ACUS submitted a report in June 2020 on information sharing between SSA and state courts regarding individuals who receive and manage benefits on behalf of beneficiaries. The representative payee program protects some of the most vulnerable members of society by having SSA appoint representative payees to help manage their benefits. State courts often appoint guardians or conservators to help manage assets for the same group of people. Information sharing between SSA and the state courts about the individuals involved in both programs could improve outcomes for beneficiaries, but there are certain legal and practical barriers to doing so. This project examined the potential opportunities, barriers, and risks of sharing representative payees’ information.

Recognizing the value of ACUS’s work, a bipartisan group of six senators on the Senate Judiciary Committee recently requested that the U.S. Patent and Trademark Office engage and fund ACUS to study whether and how to establish a small claims tribunal for patent cases. Working with USPTO, ACUS will begin work on the study in FY 2022.

ACUS also provides assistance to members of Congress and their staffs in other ways, including:

- ***Proposed Statute to Clarify Statutory Access to Judicial Review of Agency Action.*** As suggested in Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*, ACUS’s Office of the Chairman submitted a proposed statute to key congressional committees. If enacted, it would implement the part of the Recommendation calling for amendments to Title 28 that would clarify the event that starts the time for seeking judicial review and the specific number of days in which review may be sought. The statute would also provide that documents styled as a notice of appeal or complaint should be treated as such. The Office of the Chairman was assisted in the drafting of the proposed statute by a working group of ACUS members.
- ***Congressional Trainings.*** ACUS has offered trainings to congressional staff on topics ranging from best practices recommended by the ACUS Assembly to legislative drafting involving delegation of power to administrative agencies.
- ***Statutory Review Program.*** ACUS staff transmit to Congress (through its legislative counsel offices) federal judicial opinions that identify technical and related problems in statutes dealing with administrative procedure. The primary purpose of this program is to provide legislative drafters with the information they need to ensure future statutes

adequately reflect Congress's intent. Opinions are selected by ACUS staff based on independent research and, most importantly, suggestions from federal agencies.

- **Individualized Advice.** Congressional staff often request technical assistance from ACUS. The Office of the Chairman frequently provides background information, technical legislative drafting assistance, and other non-partisan, technical advice to Hill staff.

More information about ACUS resources for Congress is available online at www.acus.gov/resources-congress.

E. MODEL RULES

ACUS periodically convenes committees or working groups to develop model rules that agencies can use to design new procedures or update their existing procedures. Recent model rule initiatives include:

- **Revised Model Rules for Implementation of the Equal Access to Justice Act.** ACUS published the *Revised Model Rules for Implementation of the Equal Access to Justice Act* on its website and provided notice of their availability in the *Federal Register* (84 Fed. Reg. 38,934 (Aug. 8, 2019)). The updated *Rules* implement ACUS's statutory charge to advise agencies in establishing "uniform procedures for the submission and consideration of applications for an award of fees and other expenses" under the Equal Access to Justice Act (EAJA) in light of amendments to EAJA made since 1986 and evolving adjudicative practices since that time. Acting on research by Office of the Chairman staff, an Ad Hoc Committee of agency and administrative law experts developed the revised *Rules*, which were formally recommended for agencies' consideration as Recommendation 2019-4, *Revised Model Rules for Implementation of the Equal Access to Justice Act*.
- **Model Adjudication Rules.** In 2018, ACUS published the revised *Model Adjudication Rules* on its website and noticed them in the *Federal Register* (83 Fed. Reg. 49,530 (Oct. 2, 2018)). The *Rules* are intended for use by all federal agencies when designing new, and revising existing, procedural rules governing agency adjudications that involve a trial-type hearing that offers an opportunity for fact-finding before an adjudicator. A working group of esteemed experts from inside and outside the government revised an earlier version of the *Model Adjudication Rules*, which were first published in 1993, to reflect significant changes in adjudicative practices and procedures. The working group relied on ACUS's extensive empirical research of adjudicative practices reflected in the *Federal Administrative Adjudication Database* and input from agency officials, academics, practitioners, and other stakeholders.

Many agencies have consulted or relied on these resources to improve their procedural rules, including, in recent years, the Consumer Financial Protection Bureau and Occupational Safety and Health Review Commission.

F. SOURCEBOOKS

ACUS publishes sourcebooks of enormous value to executive-branch officials, members of Congress and their staffs, the federal courts, and the public. The forthcoming *Sourcebook of Federal Judicial Review Statutes* (discussed along with other projects underway below) will provide Congress, in particular, with a useful guide to all provisions in the *U.S. Code* governing judicial review of agency rules and orders. Recent sourcebooks include:

- ***Federal Administrative Adjudication Outside the Administrative Procedure Act.*** This *Sourcebook* examines federal administrative adjudication that is not subject to the adjudicatory provisions of the Administrative Procedure Act (i.e., non-APA adjudication). It provides a comprehensive overview and cross-cutting analysis of non-APA adjudication, and examines, among other things, the structure of the initial adjudication and any appeals; pre-hearing, hearing, and post-hearing procedures; the types of adjudicators used; and the caseloads at individual agencies. It relies in part on case studies to flesh out the overarching findings.
- ***Federal Administrative Procedure Sourcebook.*** In February 2019, ACUS launched a continuously updated, electronic edition of the *Federal Administrative Procedure Sourcebook*. The *Sourcebook*, a joint initiative with the Section of Administrative Law and Regulatory Practice of the American Bar Association, is an annotated compilation of the key legal sources—including the Administrative Procedure Act, the Freedom of Information Act, the Congressional Review Act, and executive orders—governing nearly every aspect of administrative procedure. The electronic edition provides ready access to many of the valuable sources highlighted in the *Sourcebook* and is updated with significant developments, including statutory amendments and executive orders, and additional government documents, articles, and other sources as they become available.
- ***Sourcebook of United States Executive Agencies.*** This *Sourcebook* examines the diverse characteristics of the departments, agencies, and other organizational entities that comprise the federal executive establishment and catalogs a comprehensive set of characteristics for each entity, including structure (e.g., commission or single-head agency, internal organization), personnel (e.g., number and types of appointed positions, limitations on removal), decision-making processes and requirements, political oversight, and sources of funding. Congress, federal agencies, and the federal courts have relied extensively on the *Sourcebook*.

G. REPORTS

Along with its longer sourcebooks, ACUS publishes reports on specific aspects of administrative procedure. Recent reports cover a range of topics, from agencies' use of artificial intelligence (AI) in the administrative process to administrative recusal rules to remote hearings, which agencies have increasingly used during the COVID-19 pandemic. Recent reports include:

- ***Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions.*** This study examines the legal questions and practical benefits and risks associated with agency heads' involvement in decisions to investigate and charge enforcement targets at five independent regulatory agencies at which agency heads also serve as final adjudicatory decision makers.
- ***Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies.*** Released in early 2020, this first-of-its-kind report, commissioned by ACUS and authored by leading AI researchers and administrative law scholars at Stanford University and New York University, examines the growing role that machine learning and other AI technologies are playing in federal agency adjudication, enforcement, and other regulatory activities. Based on a wide-ranging survey of federal agency activities and interviews with federal officials, the report maps current uses of AI technologies in federal agencies, highlights promising uses, and addresses challenges in assuring accountability, transparency, and non-discrimination in agency programs.
- ***A Framework for Governmental Use of Machine Learning.*** This report, authored by a leading administrative law scholar at the University of Pennsylvania, explores the contexts in which agencies might use machine learning and other forms of AI to carry out regulatory functions. It examines the comparative strengths and weakness of human decision-making and AI, seeking to identify areas in which agencies should explore using AI, and considers legal and practical hurdles to deploying AI in the regulatory process.
- ***Legal Considerations for Remote Hearings in Agency Adjudications.*** Many adjudication offices have relied on remote hearings to continue to serve the public during the COVID-19 pandemic, with federal agencies experimenting with a variety of remote hearing types, including video and virtual hearings, telephone hearings, and written-only hearings. This June 2020 report provides an overview of the legal considerations that federal agencies may encounter as they develop and implement processes for remote hearings. It addresses potential due process and other constitutional questions, the requirements of generally applicable statutes including the Administrative Procedure Act and Rehabilitation Act, and concerns arising under agency-specific statutes and regulations.
- ***Federal Court Review of SSA Disability Adjudication.*** SSA engaged ACUS to conduct an independent study of federal court review in Social Security Disability Insurance and Supplemental Security Income cases. Based on an extensive study of federal district court cases reviewing SSA's disability decisions and of SSA's internal quality control procedures,

this report identifies causes for the high rates of remand or reversal by federal courts, offers recommendations to SSA for targeted reforms aimed at reducing the reversal rate, and recommends reforms to the Federal Rules of Civil Procedure to account for the unique nature of SSA disability appeals in the district courts. This report led to *Special Procedural Rules for Social Security Litigation in District Court*, which urged the Judicial Conference to consider such reforms. The Standing Committee of the Judicial Conference relied on ACUS's proposal when it recently approved rules to implement such reforms. The Office of the Chairman also prepared a report for federal judges that explains recent SSA reform initiatives.

- ***Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators.*** This report follows, and helps agencies implement, Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*. The report collects and analyzes a wide-ranging set of recusal standards and practices employed by more than 60 agencies across the federal government, highlighting their strengths and weaknesses and identifying features of adjudication programs that may affect agencies' approaches to recusal. Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of adjudication, and the report finds that a large majority of the agencies surveyed do not have rules that instruct adjudicators to explain their recusal decisions on the record even though there may be numerous benefits to be gained from such a requirement.
- ***Alternative Dispute Resolution in Agency Administrative Programs.*** This report examines the use of alternative dispute resolution (ADR) in public-facing administrative programs such as those involving regulatory enforcement and claims adjudication. It addresses different ADR modalities, the selection and training of ADR personnel, ethics and confidentiality requirements, case management, and interagency cooperation.

The Office of the Chairman also publishes research reports for most recommendation projects that ACUS's committees and Assembly undertake. All reports are available on ACUS's website.

H. OTHER RESOURCES

In addition to research-focused sourcebooks and reports, ACUS has made available a variety of other resources to help agency officials understand applicable legal requirements and implement best practices recommended by the Assembly. Recent materials include:

- ***Information Interchange Bulletins.*** ACUS regularly issues short, one-page Information Interchange Bulletins on discrete topics of administrative procedure. These Bulletins provide useful information for agency officials on legal issues they are likely to encounter as they carry out their work. These Bulletins further ACUS's statutory mission of arranging for the exchange of information among agencies to help improve administrative procedure (5 U.S.C. § 594).

- **Updates in Federal Agency Adjudication.** ACUS issues monthly updates to share adjudication-related developments from the executive branch, Congress, and the courts with agencies, Congress, and the public. These updates further ACUS’s statutory mission of arranging for the exchange of information among agencies to help improve administrative procedure (5 U.S.C. § 594).
- **Handbook on Compiling Administrative Records for Informal Rulemaking.** ACUS convened a Working Group of public- and private-sector representatives to prepare a handbook to help agencies develop guidance for rulemaking personnel that would implement best practices on administrative recordkeeping identified in several ACUS recommendations. The Handbook addresses a wide range of legal, policy, technological, organizational, and personnel matters related to preserving, compiling, and certifying rulemaking records.
- **Guide to Legal Issues Encountered in Public-Private Partnerships.** ACUS convened senior federal officials from 21 agencies who actively work on public-private partnerships (P3s). The *Guide*, drafted collaboratively by the working group, centers on the major legal issues that agencies encounter as they participate in P3s. It also defines P3s; discusses a previous interagency effort on P3s; highlights activities that agencies often undertake as part of P3s; discusses issues that arise with agencies’ vetting of potential private partners; and provides examples of specific P3s. The State Department circulated the *Guide* to its Interagency Working Group on Public Private Partnerships in 2019.
- **Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings.** Building on ACUS’s recommendations on best practices in video hearings, the *Handbook* provides guidance and advice through concrete and practical recommendations detailing how agencies may implement or improve their use of video teleconferencing in adjudicatory hearings.

I. DATABASES AND INFORMATION COLLECTIONS

ACUS compiles information on a variety of important subjects from agency and congressional source and makes them available on its website. Current databases and information collections include:

- **Open Book on Equal Access to Justice.** As noted under “Congressionally Mandated Reports” above, ACUS submitted to Congress its first annual report on attorneys’ fees awards under the Equal Access to Justice Act (EAJA) in March 2020 and its second annual report in March 2021. The third annual report is forthcoming in March 2022. The reports and database are available at www.acus.gov/eaja.
- **Coronavirus (COVID-19) and Adjudication.** ACUS maintains a webpage to help federal agency adjudication offices navigate challenges posed by the ongoing national emergency

surrounding COVID-19. The webpage compiles relevant orders, policies, news releases, and other statements from dozens of adjudication offices across the federal government as well as reference materials prepared by ACUS.

- ***Coronavirus (COVID-19) and Rulemaking.*** ACUS maintains a webpage to track rulemaking adaptations during the COVID-19 pandemic. The page catalogs rulemakings in which agencies, citing the pandemic, invoke exceptions to the Administrative Procedure Act’s rulemaking provisions, extend public comment periods, or modify in-person and paper processes to submit or review documents and hold public meetings.
- ***Federal Administrative Adjudication Database.*** With Stanford Law School, ACUS developed a database that catalogs federal administrative adjudication across the federal government. The database, which surveys 133 federal agencies and identifies 159 major adjudicatory schemes, provides an important resource for members of Congress and their staffs, agency officials, federal judges, and the public.
- ***Summary of Recent Administrative Law Reform Bills.*** Members of Congress have introduced a number of bills designed to amend or overhaul certain aspects of the federal administrative process. Given the significance of these proposals and the large number of bills introduced, the Office of the Chairman felt it would be useful to compile a list of bills introduced in the last several years. The Office of the Chairman updates this document periodically to add new bills and to reflect developments for existing bills.

J. PUBLIC FORUMS

ACUS regularly holds public forums and symposiums, sometimes with other entities, to address matters of public interest. These events are of enormous value to both government officials and the public and often lead to the implementation of best practices at federal agencies. Forums and symposiums in recent years include:

- ***Forum on Enhancing Public Input in Agency Rulemaking (December 2021).*** This forum explored the important role of public input in federal agency rulemaking. Through two panels and remarks, it considered what types of public input are most valuable to agencies and how agencies can structure the rulemaking process to receive that input. Two virtual panels examined best practices under the current notice-and-comment process and possible reforms that would enhance public participation in the rulemaking process.
- ***Forum on Underserved Communities and the Regulatory Process (November 2021).*** This virtual, six-part forum addressed participation by underserved communities and their members in the administrative processes by which agencies make regulatory policies (including rulemaking and adjudication). It addressed Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, which requires that federal agencies “pursue a comprehensive

approach to advancing equity for all,” including communities “that have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”

- ***Making FOIA Work (November 2021)***. ACUS sponsored this panel at the American Bar Association’s annual Administrative Law Conference. The panel explored different potential solutions for improving dispute resolution under the Freedom of Information Act, including alternative conflict management systems, technological solutions, alternative disclosure systems, and affirmative disclosure requirements.
- ***Nationwide Injunctions and Federal Rulemaking (November 2021)***. ACUS sponsored this panel at the American Bar Association’s annual Administrative Law Conference. The panel examined the effects of nationwide injunctions and similar equitable relief on the regulatory activities of federal agencies.
- ***Artificial Intelligence in Agency Rulemaking (November 2021)***. ACUS sponsored this panel at the American Bar Association’s annual Administrative Law Conference. The panel explored how agencies can best navigate the challenges and exploit the opportunities associated with the use of artificial intelligence in rulemaking. It drew upon several recent ACUS recommendations and statements, including those relating to AI, mass comments, and retrospective review.
- ***Agency Adjudication During the COVID Pandemic and Beyond (November 2020)***. ACUS sponsored this panel at the American Bar Association’s annual Administrative Law Conference. The panel examined how adjudicative agencies have responded to operational challenges during the COVID-19 pandemic and how measures adopted in response to the pandemic may impact future practice.
- ***Mass, Bot, and Fake Comments (November 2020)***. ACUS sponsored this panel at the American Bar Association’s annual Administrative Law Conference. The panel examined legal and practical issues related to the receipt of mass, bot, and fake comments during agency rulemaking proceedings.
- ***Symposium on Federal Agency Adjudication (August 2020)***. ACUS cosponsored this forum with George Mason University’s C. Boyden Gray Center for the Study of the Administrative State and the Center for Progressive Reform. Through four virtual panels, leading scholars, practitioners, and agency officials examined issues related to the personnel, management, procedures, and design of federal administrative adjudication.
- ***Symposium on Artificial Intelligence in Federal Agencies (July – August 2020)***. Cosponsored with the Institute for Technology Law and Policy at Georgetown University Law Center, this symposium’s four virtual panels explored current and future agency uses of AI and their interplay with administrative and constitutional law doctrines.

- ***Forum on Nationwide Injunctions and Federal Regulatory Programs (February 2020).*** ACUS cosponsored this forum with the George Washington University Law School and American Bar Association’s Section of Administrative Law and Regulatory Practice. Deputy Attorney General Jeffrey Rosen provided the keynote address, and panelists—including a circuit court judge and assistant attorney general—discussed the arguments for and against nationwide injunctions, special issues that arise in challenges to federal regulations, and possible judicial and statutory reforms.
- ***Artificial Intelligence in Regulatory Enforcement and Artificial Intelligence in Administrative Adjudication (November 2019).*** ACUS sponsored two companion panels at the American Bar Association’s annual Administrative Law Conference that examined a wide array of legal and practical issues associated with agencies’ use of artificial intelligence (AI) in regulatory enforcement and administrative adjudication. The panels largely drew upon an extensive report that a team of researchers at Stanford and New York University Law Schools prepared for ACUS. Panelists included several of the professors who prepared the report as well as agency officials whom they interviewed.
- ***Forum on Mass and Fake Comments in Agency Rulemaking (October 2018).*** ACUS cosponsored this forum with the *Administrative Law Review*. Dominic J. Mancini, Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA), provided the keynote address. The forum also included several panels consisting of leading academics and agency officials discussing how agencies address mass comments and how the rise of “fake” comments affects the rulemaking process.
- ***Forum on Federal Administrative Adjudication (September 2017).*** ACUS cosponsored a forum on federal administrative adjudication. The forum took place on Capitol Hill with many congressional staffers in attendance. Topics included technological innovations in adjudication and balancing fairness and efficiency in high-volume adjudication programs.
- ***Symposium on New Developments in Regulatory Benefit-Cost Analysis (September 2017).*** ACUS cosponsored a symposium on regulatory benefit-cost analysis with the George Washington University Regulatory Studies Center and the Society for Benefit-Cost Analysis. Former OIRA Administrators Susan Dudley and Sally Katzen appeared as featured speakers. The event included discussions of tools for evaluating regulatory and deregulatory impacts and on using regulatory analysis to implement new Presidential directives on regulatory review.
- ***Forum on Regulatory Capture (March 2016).*** ACUS sponsored a forum exploring special interest influence and the administrative state. The event, hosted on the Hill, featured remarks by Senators Mike Lee, Elizabeth Warren, and Sheldon Whitehouse. Topics discussed include whether certain types of regulations are less vulnerable to capture than others and whether deregulation is a solution to capture or is itself evidence of capture.

K. ASSISTANCE TO FEDERAL AGENCIES

ACUS regularly facilitates conversations among agencies, as well as between agency officials and outside experts, on matters of mutual interest. These events are of enormous value to government officials and often lead to the implementation of best practices at federal agencies. Current initiatives include:

- ***Alternative Dispute Resolution Advisory Group.*** The ADR Advisory Group advises ACUS on potential new initiatives to improve—through potential ACUS-recommended administrative and legislative reforms—the design and administration of ADR programs throughout the federal government. The ADR Advisory Group builds on ACUS’s longstanding study and implementation of ADR in federal administrative processes. All members of the ADR Advisory Group are government officials. (The Advisory Group is distinct from the agency or interagency committee designated under 5 U.S.C. § 573(c).)
- ***Council on Federal Agency Adjudication.*** The Office of the Chairman convenes the Council on Federal Agency Adjudication. The Council provides a forum for the heads of agency adjudication programs to exchange information—about procedural innovations, best management practices, and other subjects—that may be “useful in improving administrative procedure.”
- ***Council of Independent Regulatory Agencies.*** The Office of the Chairman convenes the Council of Independent Regulatory Agencies. A council for leaders in independent regulatory agencies, CIRA’s goal is to provide an ongoing forum to discuss issues common to these agencies.
- ***Interagency Roundtable.*** The Office of the Chairman convenes the Interagency Roundtable. Similar to CIRA (above), the purpose of the Roundtable is for all agencies (including independent and non-independent agencies) to discuss legal and policy issues with wide effect.
- ***Roundtable on Artificial Intelligence in Federal Agencies.*** The Roundtable on AI in Federal Agencies helps agencies develop and improve protocols and practices for using AI tools in their administrative processes. It provides a forum for officials representing agencies across the federal government to exchange information and best practices related to uses of AI in rulemaking, adjudication, enforcement, and other administrative processes.
- ***Roundtable on State Administrative Procedural Practices.*** The administrative procedural practices of state and local governments might provide helpful lessons for federal agencies. Through this program, the ACUS Office of the Chairman is interested in learning more about state and local practices related to rulemaking, enforcement, adjudication, and other aspects of administrative procedure. The Office of the Chairman will, on an ongoing basis, identify and share relevant practices with federal agencies. ACUS may also periodically convene meetings on specific topics of interest to federal officials.

The Office of the Chairman also provides background information and other non-partisan, technical advice to agency officials on matters of administrative procedure.

IV. PROJECTS UNDERWAY

ACUS issues about 10–12 recommendations each year and at any one time has around 12 ongoing research projects. A listing and summary of projects actively under study and expected to lead to recommendations, reports, or publications in FY 2022 or FY 2023 follows. A full listing of active projects and related documents is available at www.acus.gov/current-projects.

A. PROJECTS ANTICIPATED TO RESULT IN RECOMMENDATIONS

- ***Accrual of Cause of Action and Availability of Judicial Review in Agency Enforcement Proceedings.*** This project addresses two related issues identified in connection with Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*. First, the project addresses the legal requirement that civil actions against the federal government, including under the Administrative Procedure Act (APA), must be filed within six years after a “right of action first accrues.” The project seeks to identify potential statutory reforms to clarify, for agency rules and orders, when a “right of action first accrues.” Second, the project addresses the APA’s rule that judicial review of agency action is available “[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law.” The project identifies potential statutory reforms to clarify whether and when the availability of pre-enforcement judicial review of an agency rule or order provides a “prior, adequate, and exclusive” opportunity, such that courts lack authority to decide facial challenges later raised as a defense to a government enforcement action.
- ***Agency Enforcement Manuals.*** This project addresses whether and when enforcement manuals provide an effective means for agencies to communicate enforcement-related policies internally and publicly. It examines the extent to which agencies have developed enforcement manuals, identifies legal and practical issues associated with their development and use, compares their contents and form of presentation, and assesses how manuals are disseminated to staff, in order to identify best practices for developing and using enforcement manuals. The project also examines whether agencies should make enforcement manuals publicly available and identifies best practices for doing so.
- ***Artificial Intelligence in Retrospective Review of Agency Rules.*** This project considers how artificial intelligence (AI) tools can be used to identify rules that are outdated, inaccurate, or redundant; that contain typographical errors; or that might benefit from elaboration or clarification. It also considers how agencies can design and use AI tools in a way that accords with requirements of the Administrative Procedure Act and other laws and promotes transparency, public participation, and accountability.

- ***Automated Legal Guidance at Federal Agencies.*** This project identifies best practices for agencies to use when implementing automated tools—like interactive chatbots and virtual assistants—to provide legal guidance to members of the public. Among other topics, it explores the types of automated legal guidance agencies issue and the circumstances in which different types of automated legal guidance are most effective; how agencies oversee the programs providing such guidance to ensure that the information they provide is accurate and useful; and how agencies can ensure that recipients of such guidance understand its limitations and do not rely on it to their detriment.
- ***Contractors in Rulemaking.*** This project seeks to identify best practices for agencies’ use of contractors in the rulemaking process. It examines the key legal and practical issues an agency should address in deciding whether it can or should contract out a particular function, among them the prohibition on contracting out “inherently governmental functions.” It also seeks to identify best practices for managing contractors in those instances in which an agency decides to outsource one or more functions. These include clearly allocating responsibility between contractors and agency staff, providing proper oversight of contractors, and ensuring transparency in connection with the agency’s contractual activities. Relatedly, the project explores alternatives to hiring contractors, such as sharing services among agencies, enhanced use of artificial intelligence tools, or expanded use of interagency personnel agreements.
- ***Disclosure of Legal Materials.*** This project considers whether the main statutes governing disclosure of agencies’ legislative rules, guidance documents, adjudicative decisions, and other important legal materials should be amended to consolidate and harmonize their overlapping requirements, account for technological developments, correct certain statutory ambiguities and drafting errors, and address other potential problems that may be identified. If warranted, the project will recommend statutory reforms to provide clear standards as to what legal materials agencies must publish and where they must publish them (whether in the *Federal Register*, on their websites, or elsewhere). The objective of any such amendments will be to ensure that agencies provide ready public access to important legal materials in the most efficient way possible.
- ***Improving Notice of Regulatory Changes.*** This project examines agency practices for publicizing regulatory developments (i.e., changes in regulatory requirements announced in regulations, guidance documents, and adjudicative decisions and orders) and assess which are most effective at providing notice to those affected by them, especially those with fewer resources to monitor agency actions. It also considers the associated costs. Among other things, possible strategies might include updating agency websites to provide clearer notice of regulatory developments, publicizing regulatory developments through social media and email lists, and providing direct notice of regulatory developments to interested parties.

- ***Precedential Decision Making in Agency Adjudication.*** This project seeks to identify best practices on the use of precedential decisions in agency adjudication. It examines when agencies should issue precedential decisions and according to what criteria, what procedures agencies should follow to designate decisions as precedential and overrule previously designated decisions, how agencies should structure and write precedential decisions, how agencies should enforce precedential decisions, and how agencies should communicate precedential decisions internally and publicly.
- ***Public Availability of Settlement Agreements in Agency Enforcement Proceedings.*** This project addresses the public availability of settlement agreements reached during administrative enforcement proceedings. It seeks to identify best practices for providing public access to such agreements without disclosing legally protected materials, consistent with the transparency objectives and privacy considerations of the Freedom of Information Act, Privacy Act, and other relevant laws and directives.

B. FORTHCOMING STUDIES AND SOURCEBOOKS

- ***Classification of Agency Guidance.*** This project is developing a classification system to catalog the wide array of guidance agencies issue, which can range from the relatively formal (e.g., policy manuals) to the very informal (e.g., phone calls). It identifies considerations and circumstances that lead agencies to use one type of guidance instead of another. The project is producing a guide that sets forth a classification scheme and examines how agencies use the many different forms of guidance available to them. The guide will help agencies, Congress, the courts, and the public better understand the role of agency guidance in the interpretation and administration of statutes and regulations.
- ***Nationwide Injunctions and Federal Regulatory Programs.*** This project studies how nationwide injunctions and similar equitable remedies affect the administration of federal regulatory programs. Among other topics, it addresses the use, frequency, and characteristics of nationwide injunctive and similar relief in challenges to agency rules; how agencies understand the scope of judgments vacating and setting aside agency rules under the Administrative Procedure Act; and how agencies respond to nationwide injunctive and similar relief in carrying out their rulemaking activities. The project draws in part on a 2020 ACUS-sponsored forum of leading experts that examined nationwide injunctions.
- ***Sourcebook of Federal Judicial Review Statutes.*** This project catalogs all provisions in the United States Code that govern federal judicial review of agency action. The resulting guide will provide an overview of common features in federal judicial review statutes, including the availability of review, choice of court, administrative exhaustion, limitations periods, and the scope and standard of review. It will be particularly helpful to Congress in drafting new statutes that provide for judicial review of agency action.

V. BUDGET STATUS & REQUEST

A. PROPOSED APPROPRIATIONS LANGUAGE FOR FY 2023

Administrative Conference of the United States

Salaries and Expenses

For necessary expenses of the Administrative Conference of the United States, authorized by 5 U.S.C. §§ 591 et seq., \$3,465,000 to remain available until September 30, 2024, of which not to exceed \$1,000 is for official reception and representation expenses.

B. BUDGET AUTHORITY AND STAFFING BY ACTIVITY

Salaries and Expenses

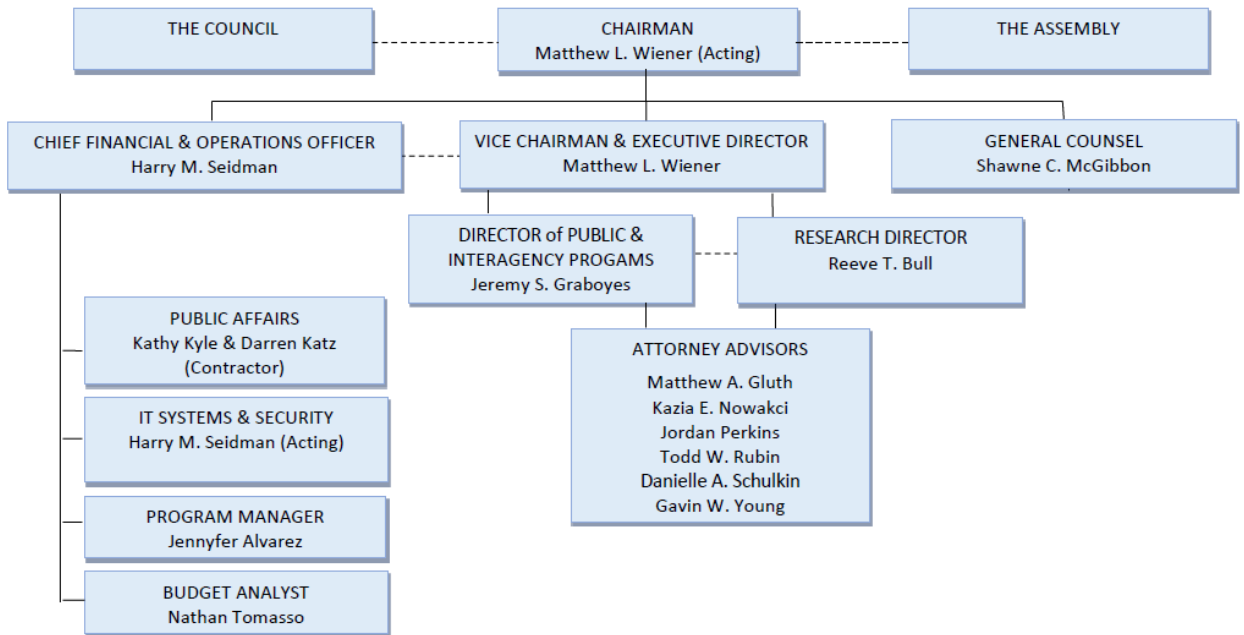
	FY 2019 Enacted	FY 2020 Enacted	FY 2021 Enacted	FY 2022 Enacted	FY 2023 Requested
Appropriation	\$3,100,000*	\$3,250,000	\$3,400,000	\$3,400,000	\$3,465,000
Authorized FTE	18	18	18	18	18
Filled FTE	15	15	15	16	16

*FY 2019 appropriations assumed additional carryover funds for total budgetary resources of \$3.2 million.

C. ACUS ORGANIZATION CHART
 Current as of January 2022



**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
 (ACUS)**



UPDATED January 2022

D. FINANCIAL SUMMARY

	FY 2021 OBLIGATIONS ACTUAL	FY 2022 PROPOSED BUDGET	FY 2023 PROPOSED BUDGET
Appropriation	\$3,400,000	\$3,400,000	\$3,465,000
Carry Forward	\$113,801	\$439,200	\$0
Net Appropriation	\$3,513,801	\$3,839,200	\$3,465,000
<i>Obligations/Expenses</i>			
Salaries, Full Time	\$1,622,496	\$1,900,000	\$1,940,000
<u>Benefits</u>	<u>\$511,670</u>	<u>\$522,500</u>	<u>\$495,000</u>
<i>Subtotal, Salaries and Benefits</i>	\$2,134,166	\$2,422,500	\$2,435,000
Member/ Staff Travel	\$518	\$20,000	\$15,000
Rent & Utilities	\$113,571	\$470,000	\$415,000
Communications/ IT	\$65,099	\$45,000	\$20,000
Printing/Reproduction	\$15,890	\$45,000	\$20,000
Contract Office Personnel	\$136,656	\$146,700	\$85,000
Consultant Contracts (Research & Projects)	\$324,009	\$375,000	\$300,000
Administrative Contracts	\$138,236	\$140,000	\$120,000
Supplies	\$11,884	\$25,000	\$5,000
EAJA Database (Congressional Mandate)	\$134,568	\$150,000	\$50,000
		\$0	
Equipment	\$0	\$0	\$0
<i>Subtotal, Operating expenses</i>	<u>\$940,431</u>	<u>\$1,416,700</u>	<u>\$1,030,000</u>
Total Obligation/Expenses	\$3,074,597	\$3,839,200	\$3,465,000
Unexpended Prior Year Funds	\$4		
Unobligated Balance Brought Forward	\$439,200	\$0	\$0

E. RECENT APPROPRIATIONS HISTORY

<u>Salaries and Expense Account</u> (Amounts in thousands of dollars)	
<u>Fiscal Year</u>	<u>Budget Authority</u>
2018	3,100*
2019	3,100*
2020	3,250
2021	3,400
2022	3,400

*FY 2018-19 appropriations assumed carryover funds for total budgetary resources of \$3.2 million.

ACUS requests \$3.465 million, including two-year spending authority, to support a full year of agency operations during FY 2023. The FY 2023 request assumes flat staffing and programming levels. Tight control of agency expenditures and effective use of two-year spending authority permitted ACUS to operate on the same baseline budget from FY 2010 through FY 2020. However, organic growth in overhead expenses necessitated a small increase in appropriation. These include administrative support contracts, annual cost-of-living (COLA) increases for federal employees, added costs for IT and communications systems to comply with the Federal Information Security Management Act (FISMA), and additional agency mandates assigned by Congress, such as the recently enacted Equal Access to Justice Act (EAJA). The request of \$3.465 million in FY 2023 would permit ACUS to carry out its statutorily mandated work and to fulfill the agency’s mission.

Two-year spending authority remains crucial for efficiently sustaining agency operations, and Congress has consistently given ACUS two-year funding authority. Tight control of agency expenditures has allowed ACUS to utilize its two-year funding authority to carryover small balances from one fiscal year to the next. This authority is necessary to maintain optimal spending efficiency given the nature of ACUS’s work and the agency’s small size.

ACUS’s recent budgetary history is as follows:

For FY 2018, the President’s budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2018 (Public Law 115-141) funded ACUS at \$3.1 million and provided two-year spending authority.

For FY 2019, the President’s budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2019 (Public Law 116-6) funded ACUS at \$3.1 million and provided two-year spending authority.

For FY 2020, the President’s budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2020 (Public Law 116-93) funded ACUS at \$3.25 million and provided two-year spending authority.

For FY 2021, The President’s budget requested \$3.5 million to support a full year of agency operations. The Consolidated Appropriations Act of 2021 (Public Law 116-260) funded ACUS at \$3.4 million and provided two-year spending authority.

For FY 2022, the President’s budget requested \$3.4 million to support a full year of agency operations and to remain available through September 30, 2023. The Consolidated Appropriations Act of 2022 (Public Law 117-103) funded ACUS at \$3.4 million and provided two-year spending authority.

ACUS ended FY 2021, the most recently closed fiscal year, with a carryover balance of \$439,200. The FY 2021 carryover amount is unusually large and is entirely the result of two factors: 1) the agency Chairmanship remaining vacant throughout FY 2021 while the administration’s nominee awaits Senate confirmation and 2) unforeseen savings on rent due to a successful renegotiation of the agency’s leased office space. The reduced rent was a one-time concession from the lessor. ACUS is paying full rent in FY 2022 and through the remainder of its 15-year lease, as detailed in the agency’s budget request and justifications. Had the agency been responsible for full rent and a Chairman’s salary in FY 2021, there would be no carryover. An appropriation of \$3.465 million would fund ACUS at the level required to cover operating and personnel costs at the current reduced staffing level and support an agency Chairman.

F. FY 2023 REQUEST

A \$3.465 million FY 2023 appropriation will fund ACUS at the level required to cover operating and personnel costs.

<u>Program</u>	<u>OC</u>	<u>Amt</u>
Personnel Salaries	11	\$1,940,000
Personnel Benefits	12	\$495,000
Travel	21	\$15,000
Rent, Comm. & Utilities	23	\$435,000
Printing	24	\$20,000
Contractual Services	25	\$505,000
EAJA (Congressional Mandate)	25	\$50,000
Supplies	26	<u>\$5,000</u>
		\$3,465,000

AGENCY PERSONNEL (Object Classes 11 and 12)

Personnel costs are by far the largest agency expenditure. While this is the case for many federal agencies, ACUS personnel costs also reflect the agency's need to employ highly credentialed, specialized, and experienced lawyers to fulfill its mission and mandate. It should be noted that all but two of the agency's filled FTE positions are lawyers (classified as *Attorney Advisors* by OPM). Therefore, ACUS personnel tend to have higher GS grades—and related salary and benefits costs—relative to other federal agencies where the aggregate distribution of personnel is more evenly distributed on the pay scale.

For FY 2023, ACUS anticipates a staff of 15 filled FTEs, one filled contract FTE, and two vacant but authorized FTEs. This includes the Chairman and 14 permanent employees included under Object Class 11. In some past years, ACUS has filled 1-2 of its allotted FTE positions under the Intergovernmental Personnel Act or other reimbursable arrangements. ACUS may opt to use these hiring mechanisms for personnel in FY23, contingent upon agency needs and the availability of funding.

The ACUS staff supports the 101 voting ACUS members as well as the approximately 150 other ACUS members who serve in a non-voting capacity.

Agency Management

The ACUS Chairman is appointed for a five-year term by the President with the advice and consent of the Senate. Among his or her duties, the Chairman appoints Public Members (with the consent of the Council), initiates and oversees research studies designed to result in ACUS recommendations, and presides at meetings of the Council and plenary sessions. The Chairman also oversees the staff of ACUS and, together with the staff, constitutes the Office of the Chairman. During a vacancy in the office, the Vice Chairman exercises the Chairman's powers. Currently, Matthew L. Wiener serves as ACUS Vice Chairman and acting agency head. On August 4, 2021, the President announced Mr. Andrew Fois as the nominee for ACUS Chairman. Mr. Fois' nomination is currently awaiting Senate confirmation.

The Executive Director provides leadership, planning, direction, and coordination for all ACUS operations, including recruiting and managing the ACUS legal staff. The Executive Director provides managerial expertise and staff support to the ACUS Chairman and Council in developing the agency's strategic planning and direction and implementing activities essential to ensuring that ACUS continues to meet its statutory mission. The Executive Director assesses the overall effectiveness, efficiency, and productivity of ACUS operations.

The Chief Financial and Operations Officer (CFOO) is responsible for oversight of the agency's budget as well as management of daily operations and management of the agency's administrative and support staff. The CFOO oversees the annual financial audit and is responsible

for ensuring compliance with all financial management and reporting requirements. The CFOO also oversees contracts for external administrative and operational support services such as payroll, human resources, and accounts payable. The CFOO develops performance standards and financial and organizational staffing plans and is responsible for the preparation of annual budgetary and administrative reports to Congress and OMB in accordance with applicable legislation and regulations. Finally, the CFOO, among other things, reviews and comments on proposed legislation, sometimes responds to congressional inquiries and requests to ACUS, and oversees the agency's public relations (including press) activities.

The General Counsel serves as the chief legal, ethics, and EEO officer for ACUS and provides legal advice and counsel to the agency and its staff on a wide variety of legal matters. The General Counsel is responsible for ensuring that ACUS meets all federal legal and regulatory requirements, including compliance with the Administrative Conference Act as well as all other federal statutes governing the operation of executive branch agencies. The General Counsel also oversees the agency's records management program.

The Research Director is a Senior Attorney responsible for directing the activities of attorney advisors in developing new research projects and managing existing projects. This includes working in conjunction with agency leadership in developing the agency's policy recommendations, keeping abreast of issues and developments in administrative law and practice, and identifying and prioritizing issues to be studied.

The Director of Public and Interagency Programs is a Senior Attorney responsible for directing agency activities to promote implementation of policy recommendations and arrange for the interagency and public interchange of information useful in improving administrative procedure. This includes working in conjunction with agency leadership in developing strategies for interagency and public outreach, identifying and prioritizing issues for interagency and public programming, and keeping abreast of issues and developments in administrative law and practice.

Legal Staff

Attorney Advisors comprise the bulk of the agency's professional staff. Among other things, they are responsible for managing the work of committees in their development of recommendations for consideration by the full membership of ACUS. This includes reviewing research studies for projects assigned to the committees, assisting the committees in drafting proposed recommendations, responding to requests for information about committee activities, reviewing and summarizing public comments, and generally providing procedural and legal oversight for the work of the committees. Staff attorneys also serve as in-house researchers on select projects in lieu of outside consultants, research and draft reports of the Office of the Chairman, and participate in the implementation of ACUS recommendations.

Confidential Assistant / Counsel (Schedule C)

The ACUS Chairman may elect to fill up to one FTE position with a Schedule C confidential assistant or counsel. This Schedule C position is allotted by OMB and is directly tied to the Presidentially-appointment Chairman position. This position would likely be taken from the agency's allotment of attorney advisors to avoid a net increase in the number of agency personnel.

Administrative and Support Staff

The ACUS staff includes an Information Technology Specialist to support both internal and external communications, including technical support, website development and maintenance, network management, and cybersecurity. This position is also responsible for preparation and submission of IT-related reporting requirements, such as FISMA compliance. This FTE has remained vacant for the past several fiscal years due to lack of funding. IT services are instead delivered by outside contractor, Dataprise, via a mix of 24/7 remote support and scheduled on-site visits for network maintenance and security patching. In response to both operating needs and a marked rise in cybersecurity threats directed at federal agencies, ACUS intends to fill this position in FY 2023, contingent on identifying funding.

The Communications Director is responsible for developing and managing the agency's strategic communications program, which includes media relations, digital outreach, marketing, and special events. In recent years, ACUS has experimented with this functional area to determine if communications-related objectives can be delivered at lower cost to the agency. Results were encouraging, and, at present, the agency has opted to leave this FTE vacant. The duties of this position are now vested with the Chief Financial and Operations Officer with discrete portions, such as social media management, contracted out to a third-party vendor.

Finally, a Program Manager and a Budget Analyst provide administrative support for the ACUS staff and membership.

ACUS's FY 2023 budget request leaves vacant two allotted FTEs for additional legal and administrative support. As in previous budget requests, these vacancies reduce the agency's total FTE count below the allotted 18. During FY 2023, ACUS anticipates 16 total FTEs. A portion of one Attorney Advisor position will be utilized to discharge the agency's Congressional mandate under the Equal Access to Justice Act (EAJA), as discussed in more detail later in this justification.

For FY 2023, ACUS requests a budget of **\$1,940,000** for salary expenses associated with full-time employees (Object Class 11). This amount represents the projected cost for a total of 16 full-time positions, including annual civil service cost-of-living salary increases and grade/step increases.

A total of **\$495,000** is budgeted for personnel benefits during FY 2023 (Object Class 12/13). Personnel benefits are a direct function of the amount of budgeted salary/wages and inclusive of transit subsidy.

RESEARCH, CONSULTING, AND PROFESSIONAL SERVICES (Object Class 25)

As discussed in the introductory section above, the research and policy work of ACUS is most frequently pursued through contracts with academics in law, public administration, or other related fields. ACUS's research activities are at the core of the agency's ability to analyze issues and develop proposed recommendations through the ACUS committee consensus process. ACUS uses acquisition procedures that provide high value and low risk to the government. ACUS research contracts are generally competitive, fixed-price contracts with recognized experts in their respective fields.

The typical research contract awarded by ACUS, including expenses for research assistance and consultant travel, is approximately \$25,000. These modest contracts allow the federal government to enlist the expertise of scholars in academia and the private bar, many of whom would receive research grants or bill private clients at several multiples of the effective hourly rates the government is paying.

In FY 2023, ACUS is requesting **\$300,000** in funding for research contracts (Object Class 25). This funding will allow ACUS to maintain a research program of new projects directed toward ACUS's statutory mission to study and cooperatively seek solutions to issues and problems arising in the administration of federal agency programs. The number of projects is dependent on the funding level, which enables ACUS to pursue the projects described in the performance section above, including projects undertaken at the request of Congress.

To minimize contracting costs, ACUS staff attorneys sometimes conduct in-house research in addition to serving as legal counsel for ACUS committee projects and staffing the numerous projects undertaken by the Office of the Chairman described in this justification. In-house research initiatives have resulted in several ACUS recommendations and significant Office of the Chairman projects for agencies such as SSA, EEOC, CMS, and DHHS. In-house staff research projects and other outreach initiatives, including inter-agency workshops, are included within ACUS's salary and administrative overhead expenses.

In addition to funding for research contracts, ACUS requests **\$120,000** for administrative support contracts and the mandated annual financial audit. As a small agency, ACUS is required by law and policy to contract with multiple agencies or private vendors for many of the administrative functions typically performed in-house at larger agencies. These contracts cover items such as human resources (GSA), payroll (GSA), accounting (USDA), website hosting (GSA), security credentialing (GSA/ DHS), and mandated financial auditing. ACUS is also required to pay the Federal Protective Service (FPS) a monthly fee for security services due to its leased office space in a non-government owned building.

As discussed above in the section on personnel, ACUS has utilized contract positions in past years instead of full-time permanent employees to give the agency flexibility to match expertise with current projects and to rotate experts from academia, nonprofits, or other federal agencies to provide fresh and innovative thinking to ACUS. In FY 2023, ACUS anticipates filling one FTE position with contract personnel. Any contract positions would utilize resources that would otherwise be expended from other sections of the agency budget, principally object classes 11 and 12. ACUS estimates contract personnel costs of **\$85,000** in FY 2023.

SUPPORT AND INFRASTRUCTURE (Object Classes 21, 23, 24 and 26)

Travel by ACUS members and staff is budgeted at **\$15,000** for FY 2023 (Object Class 21). This is a reduction from previous budget requests and reflects the agency's tight control of travel-related costs as well as uncertainty about future agency travel during the Covid-19 public health crisis. Through FY 2020 (pre-Covid), over 85% of agency travel expenses involved the travel of out-of-town ACUS members to Council, committee, and plenary session meetings. ACUS members, other than the Chairman, serve without pay and are only reimbursed for travel and per diem, pursuant to 5 U.S.C § 593(c) and 5 U.S.C § 5703. To the extent practicable, ACUS uses videoconferencing and other virtual hosting technologies to minimize travel expenses at the committee meetings. During the Covid-19 era, ACUS has transitioned to an entirely virtual meeting process to ensure the agency can continue to fulfill its mission. However, in-person biennial plenary sessions are desirable for ensuring robust debate and effective exchange of ideas. Therefore, ACUS hopes to return to some in-person events by FY 2023. In addition, some staff members will travel to conduct research or as required, participate in various professional meetings and conferences.

ACUS has negotiated a lease to occupy office space at 1120 20th Street, NW, Suite 706 South, Washington, D.C. 20036. Leasing arrangements are coordinated for ACUS through the Public Building Services Division of the General Services Administration (GSA). During FY 2023 ACUS will be responsible for **\$415,000** in rental payments and related fees to GSA, as estimated in the Occupancy Agreement with GSA (Object Class 23). ACUS successfully re-negotiated a new 15-year lease of its existing office space, effective August 2020. The requested amount for rent expense is, therefore, lower than some fiscal years prior to 2020.

ACUS's budget includes an estimated **\$20,000** for electronic communications expenses, including telephone service and website hosting during FY 2023 (Object Class 23). This estimate is based on ACUS's historical usage as well as compliance costs related to mandated security and accessibility requirements for federal government-owned websites, such as Section 508 compliance, and other government-wide IT security mandates such as FISMA compliance. This estimate also accounts for the natural growth in ACUS's electronic records and online presence that will require incremental scaling-up of data storage and processing capacity.

The requested \$20,000 for electronic communications expenses assumes a return to some in-person meetings during FY 2023, resulting in a decrease in anticipated expenses in this

category. As of this submission, it remains unclear to what extent ACUS will be able to host in-person events in FY 2023. If necessary, additional funding may be repurposed from travel.

ACUS has budgeted **\$20,000** in FY 2023 for printing costs (Object Class 24). The majority of this expense is the cost of printing notices in the *Federal Register* as mandated by the Federal Advisory Committee Act (FACA). The remaining balance funds annual and interim reports to Congress and the President, inter-agency reporting requirements, outreach to ACUS members and key stakeholders, and other mandated reports and publications.

ACUS's budget includes **\$5,000** for the purchase of supplies, materials, and legal publications during FY 2023 (Object Class 26). The amount includes supplies for mailing, copying, and ordinary office supplies such as paper, pens, and printer cartridges. Also budgeted are funds for the purchase of computer software, mandated anti-virus protection for the agency's IT network, library materials, and for subscriptions to relevant technical, and policy-oriented publications and online services such as Westlaw.

NEW STATUTORY MANDATE (Object Classes 11, 12, 25)

S. 47, the Natural Resources Management Act, was signed into law on March 12, 2019. The act assigned to ACUS a new statutory responsibility to report and maintain a database on attorneys' fees awards paid out government-wide under the Equal Access to Justice Act (EAJA). The Congressional Budget Office (CBO) scored the cost of new personnel and IT infrastructure necessary to comply with the new mandate at \$500,000 to \$1 million in the initial start-up fiscal year and \$500,000 or less annually thereafter. However, ACUS intends to fully comply with the new mandate at a much lower cost of approximately \$150,000 per annum now that initial database design and setup is complete. ACUS will apportion \$100,000 in salary and benefits (from OC 11 and 12) to support a portion of a GS-13 grade Attorney Advisor necessary to carry out this mandate.

ACUS further requests **\$50,000** (OC 25) to operate and maintain the database and public-facing website for disseminating EAJA award data, as mandated by S. 47. Again, CBO's estimate for building out and maintaining the required IT infrastructure is significantly higher than this request as ACUS estimates that annual costs of \$150,000 are achievable in FY 2023.

VI. CONCLUSION

For FY 2023, ACUS submits a budget request of \$3.465 million. This level of funding will allow ACUS to pursue a full program of research projects and other programs aimed at discharging the agency's mission and statutory responsibilities. This level of funding will also allow ACUS to pursue a robust research program that will help improve and reform government procedures. Such reforms will be designed to enhance fairness, efficiency, expedition, and public participation in the work of federal executive branch agencies, given their substantial impact on all sectors of the national economy and on the lives of all citizens.

Appendix A: Council Members

Current as of January 2022

Matthew L. Wiener (Vice Chairman)

Matthew Lee Wiener is the Vice Chairman and Executive Director of the Administrative Conference of the United States. Before affiliating with the Conference, he was general counsel to U.S. Senator Arlen Specter, counsel to the U.S. House of Representatives Committee on the Judiciary, a partner at Dechert LLP, and special counsel to Cuneo Gilbert & LaDuca. Mr. Wiener is an elected member of the American Law Institute, a fellow of the American Bar Foundation, a lecturer in law at the University of Pennsylvania Law School, and the co-chair of the Adjudication Committee of the American Bar Association's Section of Administrative Law and Regulatory Practice.

Funmi Olorunnipa Badejo

Funmi Olorunnipa Badejo currently serves as Special Assistant to the President and Associate Counsel in the White House Counsel's Office. Her prior government service includes as General Counsel of the U.S. House of Representatives Select Subcommittee on the Coronavirus Crisis, Counsel for Policy to the Assistant Attorney General in the Civil Division at the U.S. Department of Justice, Ethics Counsel at the White House Counsel's Office and Attorney Advisor at the Administrative Conference of the United States. Olorunnipa Badejo began her legal career as an associate with the law firm of Manatt, Phelps & Phillips, LLP and previously served as Legal Counsel at Palantir Technologies Inc.

Ronald A. Cass

Ronald A. Cass has been the President of Cass & Associates since 2004. He is also Dean Emeritus of Boston University School of Law where he served as Dean from 1990-2004. Cass was a law professor at the University of Virginia School of Law from 1976-1981 and at Boston University from 1981-2004. Outside of his professional activities, he has also served as Vice Chairman of the U.S. International Trade Commission (1988-1990), U.S. Representative to the World Bank Panel of Conciliators (2009-Present), advisor to the American Law Institute, Chairman of the Federalist Society Practice Group on Administrative Law, Past Chair of the American Bar Association Administrative Law Section, and President of the American Law Deans Association.

Jeffrey M. Harris

Mr. Harris is an experienced litigator who focuses on constitutional, appellate, and regulatory matters. In 2015, he was named to the Legal Times list of “D.C.’s Rising Stars,” which identified “some of the most accomplished young attorneys in the D.C. area.” Mr. Harris previously served as Associate Administrator of the Office of Information and Regulatory Affairs (OIRA). In that role, he was second in charge of the 50-person office within the Executive Office of the President that reviews all significant federal regulatory actions and coordinates regulatory policy across the federal government.

Leslie B. Kiernan

Leslie B. Kiernan was sworn in on June 15, 2021, as the General Counsel at the Department of Commerce. She serves as the Chief Legal Officer of the Department and as legal advisor to the Secretary, Secretarial Officers and the Department’s operating units. During the Obama-Biden Administration, Ms. Kiernan served in the White House as Deputy Counsel to the President from 2011-14, where she advised on a wide range of compliance, risk-management, policy, and oversight issues. She also worked with the White House Council on Women and Girls, and later served as a senior advisor to the U.S. Mission to the United Nations.

Donald F. McGahn II

Donald F. McGahn II is the U.S. Practice Leader of global law firm Jones Day’s Government Regulation Practice in Washington D.C. focused on representing clients before government agencies in enforcement matters and in court disputes arising from government regulation or action. Immediately prior to joining Jones Day, Mr. McGahn served as White House Counsel, advising the President of the United States on all policy, legislative, and regulatory matters.

Michael H. McGinley

Michael H. McGinley focuses his practice on litigation, specifically appellate and complex commercial matters. Mr. McGinley has experience representing clients at every level of the federal judiciary, as well as in numerous federal agencies and state courts. He has litigated a wide range of issues, including federal jurisdiction, foreign sovereign immunity, Chevron deference, federalism, preemption, arbitration, labor law, tort law, securities and corporate law, contract rights, voting rights, free speech, religious freedom and many other constitutional issues. Mr. McGinley also regularly advises individual, corporate and government clients on strategic and regulatory matters.

Matthew E. Morgan

Matthew E. Morgan is a Partner at Elections, LLC where he counsels clients on all aspects of law related to the political process and elections. He advises candidates, political committees, corporations, and nonprofits on regulatory and political law issues, including federal and state campaign finance and election administration laws, ethics and gift rules, pay-to-play laws, and lobbying laws. Previously, Mr. Morgan served as the Deputy Chief of Staff and Chief Counsel to the Vice President of the United States where he provided advice to the Vice President and his staff on constitutional, regulatory, national security and related policy issues, led the Office's response to congressional oversight and litigation, and represented the Office in the inter-agency process with respect to federal regulations.

Nitin Shah

Nitin Shah currently serves as General Counsel of the U.S. General Services Administration. He oversees all legal matters arising before the agency, is GSA's Designated Agency Ethics Official and Chief FOIA Officer, and manages a nationwide office of approximately 170 attorneys and staff. During his career, Mr. Shah has focused on administrative law issues from various perspectives. He previously served in the Department of Justice in several capacities, including as Chief of Staff of the Civil Division and as an attorney in the Office of Legal Counsel. He also served as senior counsel at a nonprofit organization focused on administrative litigation and was a legal director for the Biden-Harris Transition Team.

Adrian Vermeule

Adrian Vermeule is the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard Law School. He is the author or co-author of ten books, most recently Law and Leviathan: Redeeming the Administrative State (2020) (with Cass R. Sunstein), and Law's Abnegation: From Law's Empire to the Administrative State (2017). He was elected to the American Academy of Arts and Sciences in 2012. His research focuses on administrative law, the administrative state, the design of institutions, and constitutional theory.

Appendix B: Government Members

The following were government members as of January 13, 2022:

James L. Anderson	Federal Deposit Insurance Corporation
David J. Apol	U.S. Office of Government Ethics
Gregory R. Baker	Federal Election Commission
Eric S. Benderson	U.S. Small Business Administration
Krystal J. Brumfield	U.S. General Services Administration
Daniel Cohen	U.S. Department of Transportation
Michael J. Cole	Federal Mine Safety and Health Review Commission

Peter J. Constantine	U.S. Department of Labor
Anika S. Cooper	Surface Transportation Board
Hampton Y. Dellinger	U.S. Department of Justice
Elizabeth H. Dickinson	U.S. Food & Drug Administration
Robert J. Girouard	U.S. Office of Personnel Management
Ami M. Grace-Tardy	U.S. Department of Energy
Gina K. Grippando	U.S. International Trade Commission
Richard J. Hipolit	U.S. Department of Veterans Affairs
Janice L. Hoffman	Centers for Medicare & Medicaid Services
Erica Hough	Federal Energy Regulatory Commission
Paul S. Koffsky	U.S. Department of Defense
Alice M. Kottmyer	U.S. Department of State
Katia Kroutil	Federal Maritime Commission
Tristan L. Leavitt	U.S. Merit Systems Protection Board
Jeremy Licht	U.S. Department of Commerce
Hilary Malawer	U.S. Department of Education
Nadine N. Mancini	Occupational Safety and Health Review Commission
Christina E. McDonald	U.S. Department of Homeland Security
Patrick R. Nagle	Social Security Administration
Mitchell E. Plave	Office of the Comptroller of the Currency
Connor N. Raso	U.S. Securities and Exchange Commission
Roxanne L. Rothschild	National Labor Relations Board
Jay R. Schwarz	Board of Governors of the Federal Reserve System
Helen Serassio	U.S. Environmental Protection Agency
Robert F. Stone	Occupational Safety and Health Administration
Stephanie J. Tatham	Office of Management and Budget
Drita Tonuzi	Internal Revenue Service
David A. Trissell	U.S. Postal Regulatory Commission
Miriam E. Vincent	National Archives and Records Administration
Kenny A. Wright	Federal Trade Commission
Chin Yoo	Federal Communications Commission
Marian L. Zabler	U.S. Nuclear Regulatory Commission
Vacant	U.S. Consumer Product Safety Commission
Vacant	U.S. Commodity Futures Trading Commission
Vacant	U.S. Department of Health & Human Services
Vacant	U.S. Department of Housing and Urban Development
Vacant	U.S. Department of the Interior
Vacant	U.S. Department of the Treasury

Vacant	Federal Housing Finance Agency
Vacant	Office of Science and Technology Policy

Appendix C: Public Members

The following were public members as of January 13, 2022:

Katherine Twomey Allen	[Formerly] Office of the Associate General, U.S. Department of Justice
Kent H. Barnett	University of Georgia School of Law
Jack M. Beermann	Boston University School of Law
Susan G. Braden	The Office of Judge Susan G. Braden (Ret.) LLC
Emily S. Bremer	University of Notre Dame Law School
Cary Coglianese	University of Pennsylvania Carey Law School
Ilona R. Cohen	Aledade, Inc.
Kirti Datla	Earthjustice
John F. Duffy	University of Virginia School of Law
David Freeman Engstrom	Stanford Law School
Claire J. Evans	Wiley Rein LLP
Chai R. Feldblum	[Formerly] Morgan Lewis & Bockius LLP
Deepak Gupta	Gupta Wessler PLLC
Kristin E. Hickman	University of Minnesota Law School
Allyson N. Ho	Gibson Dunn & Crutcher LLP
Daniel E. Ho	Stanford Law School
Renée M. Landers	Suffolk University Law School
Erika Lietzan	University of Missouri School of Law
Elbert Lin	Hunton Andrews Kurth LLP
Michael A. Livermore	University of Virginia School of Law
Jennifer L. Mascott	George Mason University Antonin Scalia Law School
Aaron L. Nielson	Brigham Young University J. Reuben Clark Law School
Jennifer Nou	The University of Chicago Law School
Victoria F. Nourse	Georgetown University Law Center
Jesse Panuccio	Boies Schiller Flexner LLP
Elizabeth P. Papez	Gibson Dunn & Crutcher LLP
Nicholas R. Parrillo	Yale Law School
Eloise Pasachoff	Georgetown University Law Center
Jeffrey A. Rosen	American Enterprise Institute
Bertrall L. Ross	University of Virginia School of Law
Sidney A. Shapiro	Wake Forest University School of Law
Anna Williams Shavers	University of Nebraska-Lincoln College of Law

Kate A. Shaw	Yeshiva University Benjamin N. Cardozo School of Law
Ganesh Sitaraman	Vanderbilt University Law School
Kevin M. Stack	Vanderbilt University Law School
Christopher J. Walker	The Ohio State University Michael E. Moritz College of Law
Melissa Feeney Wasserman	The University of Texas School of Law
Russell R. Wheeler	The Brookings Institution
Adam J. White	American Enterprise Institute
Jonathan B. Wiener	Duke University School of Law

Appendix D: Liaison Representatives, Senior Fellows, and Special Counsels

The following were liaison representatives as of January 13, 2022:

Thomas H. Armstrong	Government Accountability Office
Casey Q. Blaine	National Transportation Safety Board
Emily Burns	U.S. House of Representative Committee on Oversight and Reform
Lena C. Chang	U.S. Senate Committee on Homeland Security & Governmental Affairs
Tobias A. Dorsey	Executive Office of the President, Office of Administration
Daniel M. Flores	U.S. House of Representatives Committee on Oversight and Reform
William Funk	ABA Section of Administrative Law & Regulatory Practice
Sonia K. Gill	U.S. Senate Committee on the Judiciary
Claire Green	Social Security Advisory Board
Will A. Gunn	Legal Services Corporation
Kristen L. Gustafson	National Oceanic & Atmospheric Administration
Eileen Barkas Hoffman	Federal Mediation & Conciliation Service
Nathan Kaczmarek	The Federalist Society
Allison Lerner	Council of the Inspectors General on Integrity and Efficiency
Daniel S. Liebman	Pension Benefit Guaranty Corporation
Eric R. LoPresti	Office of the National Taxpayer Advocate Service
H. Alexander Manuel	ABA National Conference of the Administrative Law Judiciary
Charles A. Maresca	U.S. Small Business Administration
Thomas P. McCarthy	Federal Administrative Law Judges Conference
Mary C. McQueen	National Center for State Courts

Stephanie A. Middleton	The American Law Institute
Jeffrey P. Minear	Judicial Conference of the U.S.
Randolph D. Moss	U.S. District Court for the District of Columbia
Amanda Neely	U.S. Senate Committee on Homeland Security & Governmental Affairs
Rebecca D. Orban	U.S. Coast Guard
Debra Perlin	American Constitution Society
Cornelia T.L. Pillard	U.S. Court of Appeals for the District of Columbia Circuit
Lauren Alder Reid	Executive Office for Immigration Review
Katy Rother	U.S. House of Representative Committee on the Judiciary
Eleni M. Roumel	U.S. Court of Federal Claims
Max Stier	Partnership for Public Service
Elliot Tomlinson	U.S. Senate Committee on the Judiciary
Susan K. Ullman	U.S. Office of Special Counsel
Sheryl L. Walter	Administrative Office of the U.S. Courts
David L. Welch	U.S. Federal Labor Relations Authority
Vacant	Council on Environmental Quality
Vacant	Federal Aviation Administration
Vacant	National Aeronautics and Space Administration
Vacant	National Highway Traffic Safety Administration
Vacant	Office of the Director of National Intelligence
Vacant	Office of the Federal Register
Vacant	Office of the U.S. Trade Representative
Vacant	U.S. Citizenship and Immigration Services
Vacant	U.S. Department of Justice Executive Office for Immigration Review
Vacant	U.S. House of Representative Committee on the Judiciary

The following were senior fellows as of January 13, 2022:

Gary D. Bass	The Bauman Foundation
Warren Belmar	Capitol Counsel Group LLC
Jodie Z. Bernstein	[Formerly] Kelley Drye & Warren
Boris Bershteyn	Skadden Arps Slate Meagher & Flom LLP
Marshall J. Breger	The Catholic University Columbus School of Law
Stephen G. Breyer	Supreme Court of the U.S.
Amy P. Bunk	U.S. Department of Homeland Security
James Ming Chen	Michigan State University College of Law

Betty Jo Christian	[Formerly] Steptoe & Johnson LLP
H. Clayton Cook	Cook Maritime Finance
John F. Cooney	[Formerly] Venable LLP
Steven P. Croley	Ford Motor Company
Bridget C.E. Dooling	The George Washington University Regulatory Studies Center
Susan E. Dudley	The George Washington University Regulatory Studies Center; The George Washington University Tractenberg School of Public Policy & Public Administration
Neil R. Eisner	[Formerly] U.S. Department of Transportation
E. Donald Elliott	George Mason University Antonin Scalia Law School
Cynthia R. Farina	Cornell Law School
Fred F. Fielding	Morgan Lewis & Bockius LLP
Michael A. Fitzpatrick	Google
David C. Frederick	Kellogg Hansen Todd Figel & Frederick PLLC
H. Russell Frisby	Stinson LLP
Brian C. Griffin	Clean Energy Systems, Inc.
Susan Tsui Grundmann	U.S. Congress Office of Compliance
Michael E. Herz	Yeshiva University Benjamin N. Cardozo School of Law
Elena Kagan	Supreme Court of the U.S.
Paul D. Kamenar	[Formerly] Washington Legal Foundation
John M. Kamensky	Emeritus Fellow, IBM Center for the Business of Government
Sally Katzen	New York University School of Law
Richard J. Leighton	[Formerly] Keller and Heckman LLP
Robert J. Lesnick	[Formerly] Federal Mine Safety and Health Review Commission
Ronald M. Levin	Washington University in St. Louis School of Law
Daniel R. Levinson	[Formerly] U.S. Department of Health & Human Services
Jerry L. Mashaw	Yale Law School
Randolph J. May	The Free State Foundation
Nina A. Mendelson	The University of Michigan Law School
David M. Michaels	The George Washington University Milkin Institute School of Public Health
James C. Miller	King & Spalding LLP
Alan B. Morrison	The George Washington University Law School
Anne Joseph O'Connell	Stanford Law School
David W. Ogden	Wilmer Cutler Pickering Hale & Dorr LLP
Nina E. Olson	Center for Taxpayer Rights

Theodore B. Olson	Gibson Dunn Crutcher LLP
Lee Liberman Otis	The Federalist Society
Sallyanne Payton	The University of Michigan Law School
Richard J. Pierce	The George Washington University Law School
S. Jay Plager	U.S. Court of Appeals for the Federal Circuit
Edith Ramirez	Hogan Lovells LLP
Neomi Rao	U.S. Court of Appeals for the District of Columbia Circuit
Richard L. Revesz	New York University School of Law
Jonathan Rose	Arizona State University Sandra Day O'Connor College of Law
Teresa Wynn Roseborough	The Home Depot
Eugene Scalia	Gibson Dunn & Crutcher LLP
Robert F. Schiff	[Formerly] National Labor Relations Board
Catherine M. Sharkey	New York University School of Law
Jane C. Sherburne	Sherburne PLLC
David C. Shonka	Redgrave LLP
Carol Ann Siciliano	U.S. Environmental Protection Agency
Jonathan R. Siegel	The George Washington University Law School
Lon B. Smith	[Formerly] Office of the Chief Counsel, Internal Revenue Service
Loren A. Smith	U.S. Court of Federal Claims
Kenneth W. Starr	The Lanier Law Firm
Peter L. Strauss	Columbia Law School
Thomas M. Susman	ABA Section of Administrative Law & Regulatory Practice
James J. Tozzi	The Center for Regulatory Effectiveness
Paul R. Verkuil	National Academy of Public Administration
John M. Vittone	[Formerly] U.S. Department of Labor
David C. Vladeck	Georgetown University Law Center
John M. Walker	U.S. Court of Appeals for the Second Circuit
Geovette E. Washington	University of Pittsburgh
William H. Webster	Milbank LLP
Edward L. Weidenfeld	The Weidenfeld Law Firm, PC
Richard E. Wiley	Wiley Rein LLP
Allison M. Zieve	Public Citizen Litigation Group

The following were special counsel as of January 13, 2022:

Blake Emerson	UCLA School of Law
Andrew Emery	The Regulatory Group
Jeffrey S. Lubbers	American University Washington College of Law
David M. Pritzker	[Formerly] Administrative Conference of the U.S.

Appendix E: Recommendations and Statements Adopted 2010 – 2021

- **Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*** offers agencies best practices for managing mass, computer-generated, and falsely attributed comments in agency rulemakings. It provides guidance for agencies on using technology to process such comments in the most efficient way possible while ensuring that the rulemaking process is transparent to prospective commenters and the public more broadly.
- **Recommendation 2021-2, *Periodic Retrospective Review*** offers practical suggestions to agencies about how to establish periodic retrospective review plans. It provides guidance for agencies on identifying regulations for review, determining the optimal frequency of review, soliciting public feedback to enhance their review efforts, identifying staff to participate in review, and coordinating review with other agencies.
- **Recommendation 2021-3, *Early Input on Regulatory Alternatives*** offers guidance about whether, when, and how agencies should solicit input on alternatives to rules under consideration before issuing notices of proposed rulemaking. It identifies specific, targeted measures for obtaining public input on regulatory alternatives from knowledgeable persons in ways that are cost-effective and equitable and that maximize the likelihood of obtaining diverse, useful responses.
- **Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*** addresses the use of virtual hearings—that is, proceedings in which participants attend remotely using a personal computer or mobile device—in agency adjudications. Drawing heavily on agencies’ experiences during the COVID-19 pandemic, the recommendation identifies best practices for improving existing virtual-hearing programs and establishing new ones in accord with principles of fairness and efficiency and with due regard for participant satisfaction.
- **Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*** urges Congress to enact a cross-cutting statute that addresses certain recurring technical problems in statutory provisions governing judicial review of agency action that may cause unfairness, inefficiency, or unnecessary litigation. It also offers drafting principles for Congress when it writes new or amends existing judicial review statutes.
- **Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*** identifies best practices regarding when and how federal agencies provide public access to adjudicative proceedings. Within the legal framework established by federal law, it identifies factors agencies should consider when determining whether to open or close particular proceedings. It also offers best practices to promote public access to proceedings that agencies open to the public and recommends that agencies make the policies governing public access readily available.

- **Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*** provides best practices for maintaining public access to agency guidance documents that are no longer in effect—that is, inoperative. It identifies factors agencies should consider in deciding whether to include certain types of inoperative guidance documents on their websites, outlines steps agencies can take to make it easier for the public to find inoperative guidance documents, and identifies ways that agencies can label and explain the significance of inoperative guidance documents.
- **Recommendation 2021-8, *Technical Reform of the Congressional Review Act*** offers technical reforms of the Congressional Review Act (CRA) to clarify certain of its procedural aspects and reduce administrative burdens on executive-branch agencies and congressional offices. Specifically, it recommends (1) requiring electronic rather than paper submission of the materials agencies must transmit to Congress, (2) making it easier to ascertain key dates and time periods relevant to review of agency rules under the CRA, and (3) formalizing the procedure by which members of Congress initiate congressional review of rules that agencies conclude are not covered by the CRA.
- **Recommendation 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*** recommends that agencies consider adopting rules governing attorney and non-attorney representatives in order to promote accessibility, fairness, integrity, and efficiency in agency adjudicative proceedings. It provides guidance on the topics that rules might cover and recommends that agencies consider whether greater harmonization of different bodies of rules is desirable and ensure that their rules are readily accessible on their websites.
- **Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*** identifies best practices for promoting fairness, accuracy, timeliness, and consistency in agency adjudications through the use of quality assurance systems. It provides guidance to agencies on the selection, role, and institutional placement of quality-assurance personnel. It also identifies specific considerations for the timing of and process for quality-assurance review; outlines different methodologies for identifying and correcting quality issues; and addresses how agencies might use electronic case management, data analytics, and artificial intelligence for quality-assurance purposes.
- **Recommendation 2020-1, *Rules on Rulemakings*** encourages agencies to consider issuing rules governing their rulemaking procedures. It identifies subjects that agencies should consider addressing in their rules on rulemakings—without prescribing any particular procedures—and it urges agencies to solicit public input on these rules and make them publicly available.
- **Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*** offers agencies best practices for protecting sensitive personal and confidential commercial information in public rulemaking dockets. It identifies, in particular, best practices for agencies to use when redacting, summarizing, and aggregating comments that contain such information. It also encourages agencies to provide public notices that discourage commenters from submitting such information in the first place.

- **Recommendation 2020-3, *Agency Appellate Systems*** offers agencies best practices to improve administrative review of hearing-level adjudicative decisions with respect to case selection, decision-making process and procedures, management oversight, and public disclosure and transparency. In doing so, it encourages agencies to identify the objectives of such review and structure their appellate systems to serve those objectives.
- **Recommendation 2020-4, *Government Contract Bid Protests*** Before Agencies suggests improvements to the procedures governing agency-level procurement contract disputes—commonly called bid protests—under the Federal Acquisition Regulation and agency-specific regulations to make those procedures more simple, transparent, and predictable. It urges agencies to clarify what types of decisions can be the subjects of agency-level bid protests, what processes and deadlines will govern such protests, and who in the agency will decide such protests; make it easier for protesters to get information about the decisions they protest; and publish more data on agency-level protests.
- **Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*** encourages agencies to disclose policies governing the appointment and oversight of adjudicators that bear on their impartiality and constitutional status. It offers best practices on how to provide descriptions of, and access to, such policies on agency websites.
- **Recommendation 2020-6, *Agency Litigation Webpages*** offers agencies best practices for making their federal court filings and relevant court opinions available to the public on their websites, with particular emphasis on materials from litigation dealing with agency regulatory programs. It provides guidance on the types of litigation materials that will be of greatest interest to the public and on how agencies can disseminate the materials in a way that makes them easy to find.
- **Statement # 20, *Agency Use of Artificial Intelligence*** identifies issues agencies should consider when adopting, revamping, establishing policies and practices governing, and regularly monitoring artificial intelligence systems. Among the topics it addresses are transparency, harmful biases, technical capacity, procurement, privacy, security, decisional authority, and oversight.
- **Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*** identifies ways agencies can offer the public the opportunity to propose alternative approaches to those presented in an interpretive rule and to encourage, when appropriate, public participation in the adoption or modification of interpretive rules. It largely extends the best practices for statements of policy adopted in Recommendation 2017-5, *Agency Guidance Through Policy Statements*, to interpretive rules, with appropriate modifications to account for differences between interpretive rules and policy statements.
- **Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*** addresses the processes and procedures agencies should establish for exercising their authority under Executive Order 13,843 (2018) to hire administrative law judges (ALJs). It encourages agencies to advertise ALJ positions in order to reach a wide pool of

applicants, to publish minimum qualifications and selection criteria for ALJ hiring, and to develop policies for the review of ALJ applications.

- **Recommendation 2019-3, *Public Availability of Agency Guidance Documents*** offers best practices for promoting widespread availability of guidance documents on agency websites. It urges agencies to develop and disseminate internal policies for publishing, tracking, and obtaining input on guidance documents; post guidance documents online in a manner that facilitates public access; and undertake affirmative outreach to notify members of the public of new or updated guidance documents.
- **Recommendation 2019-4, *Revised Model Rules for Implementation of the Equal Access to Justice Act*** revises the Conference’s 1986 model agency procedural rules for addressing claims under the Act, which provides for the award of attorney fees to individuals and small businesses that prevail against the government in certain agency adjudications. The revisions reflect, among other things, changes in law and agency practice since 1986.
- **Recommendation 2019-5, *Agency Economists*** addresses the placement of economists within rule-writing agencies (e.g., centralized versus dispersed throughout the agency) and describes methods for promoting high-quality economic analysis within each of the potential organizational structures. Each potential structure has strengths and weaknesses that can affect the flow of information between economists and decision makers. The recommendation does not endorse any one organizational structure over another, but identifies steps agencies can take to remove structural barriers that can impede the communication of objective, consistent, and high-quality economic analysis to decision-makers during the rulemaking process.
- **Recommendation 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*** addresses agency adjudicators’ increasing reliance on their own factual research—especially internet research—when conducting hearings and deciding cases. Though such independent research can be an efficient means to acquire facts, it can also raise concerns regarding the accuracy of information uncovered and fairness to the litigants. The recommendation encourages agencies to develop publicly available policies on independent research that identify sources of information that are reliable in all cases, set forth standards for adjudicators to apply when assessing the reliability of other sources, and ensure that litigants have ready access to all sources.
- **Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*** offers agencies best practices for promoting greater transparency and compliance with the Federal Vacancies Reform Act of 1998 when a Senate-confirmed position sits vacant. It also addresses the use of delegations of authority in response to staffing vacancies. It urges agencies to determine whether they are subject to the Vacancies Act and, if so, establish compliance processes; improve transparency by disclosing on their websites information about acting officials and delegations of authority; and provide additional support and training to agency officials responsible for Vacancies Act compliance.

- **Recommendation 2019-8, *Public Identification of Agency Officials*** promotes the public availability of real-time information about high-level officials leading federal agencies. It encourages agencies to publish on their websites basic information about high-level agency leaders and identify vacant leadership positions and acting officials. It also recommends that the Office of Personnel Management regularly publish on its website a list of high-level agency leaders, as well as an archival list of former Senate-confirmed presidential appointees.
- **Recommendation 2019-9, *Recruiting and Hiring Agency Attorneys*** urges agencies to avail themselves of the flexibilities available to them when hiring attorneys and offers best practices for structuring their hiring processes. First, it suggests that the Office of Personnel Management offer training for agencies on the alternative processes and flexibilities available to them when they hire attorneys. Then, among other suggestions, it advises agencies to post and disseminate vacancy announcements widely when seeking broad applicant pools, draft announcements clearly and concisely, communicate to applicants any limitations on the number of applicants they will consider, and establish policies for reviewing applications and interviewing candidates.
- **Recommendation 2018-1, *Paperwork Reduction Act Efficiencies*** encourages collaboration between the Office of Information and Regulatory Affairs and federal agencies to maximize opportunities for making the information collection clearance process under the Paperwork Reduction Act more efficient, while still maintaining its integrity. The recommendation encourages using generic clearances and common forms more frequently, providing more training to agencies, and improving several other aspects of the information collection clearance process.
- **Recommendation 2018-2: *Severability in Agency Rulemaking*** encourages federal agencies that anticipate litigation over their rules to consider early in the rulemaking process whether a rule is severable—that is, divisible into portions that can and should function independently. It also identifies steps agencies should take if they intend that portions of a rule should continue in effect even though other portions have been held unlawful on judicial review. In addition, it encourages courts reviewing an agency rule to solicit the parties’ views on the issue of severability in appropriate circumstances.
- **Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*** offers guidance for agencies considering whether and how to implement an electronic case management system. It provides factors for agencies to consider in weighing the costs and benefits of an electronic case management system; sets forth measures an agency should take to ensure privacy, transparency, and security; and describes ways an electronic case management system may improve adjudicatory processes.
- **Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*** urges agencies to issue procedural regulations governing the recusal of adjudicators to ensure both impartiality and the appearance of impartiality in agency adjudications. It encourages

agencies to adopt procedures by which parties can seek the recusal of adjudicators assigned to their cases and to provide written explanations for recusal decisions.

- **Recommendation 2018-5, *Public Availability of Adjudication Rules*** offers best practices to optimize agencies' online presentations of procedural rules governing adjudications. It encourages agencies to make procedural rules for adjudications and related guidance documents available on their websites and to organize those materials in a way that allows both parties appearing before the agencies and members of the public to easily access the documents and understand their legal significance.
- **Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Docket*** offers suggested improvements to Regulations.gov, the website that allows the public to comment on many federal agencies' rulemaking proposals. It provides recommendations to the governing body of Regulations.gov, called the eRulemaking Program, and to agencies that participate in Regulations.gov for ensuring that rulemaking materials on Regulations.gov are easily searchable and categorized consistently and clearly. These recommendations include using one electronic docket per rulemaking, promoting interoperability among key websites (e.g., Federalregister.gov and Reginfo.gov), and making rulemaking materials available to search engines.
- **Recommendation 2018-7, *Public Engagement in Rulemaking*** offers strategies for agencies to enhance public engagement prior to and during informal rulemaking. It encourages agencies to invest resources in a way that maximizes the probability that rulewriters obtain high quality public information as early in the process as possible. It recommends expanding the use of requests for information and advance notices of proposed rulemaking, targeting outreach to individuals who might otherwise be unlikely to participate, and taking advantage of in-person engagement opportunities to solicit stakeholder input and support future informed participation.
- **Recommendation 2018-8, *Public-Private Partnerships*** offers agencies guidance on legal and other considerations for participating in public-private partnerships. It commends to agencies a *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level*, which provides guidance on the key legal questions agencies encounter in the operation of public-private partnerships, and proposes mechanisms that would allow agencies to share resources and best practices with one another when creating and administering such partnerships.
- **Recommendation 2017-1, *Adjudication Materials on Agency Websites*** provides guidance regarding the online dissemination of administrative adjudication materials. It offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with the transparency objectives and privacy considerations of the Freedom of Information Act and other relevant laws and directives.

- **Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*** offers best practices to agencies for choosing among several possible methods—among them negotiated rulemaking—for engaging the public in agency rulemakings. It also offers best practices to agencies that choose negotiated rulemaking on how to structure their processes to enhance the probability of success.
- **Recommendation 2017-3, *Plain Language in Regulatory Drafting*** identifies tools and techniques agencies have used successfully to write regulatory documents (including rulemaking preambles and guidance documents) using plain language, proposes best practices for agencies in structuring their internal drafting processes, and suggests ways agencies can best use trainings and other informational resources.
- **Recommendation 2017-4, *Marketable Permits*** provides best practices for structuring, administering, and overseeing marketable permitting programs for any agency that has decided to implement such a program.
- **Recommendation 2017-5, *Agency Guidance Through Policy Statements*** provides best practices to agencies on the formulation and use of policy statements. It lists steps that agencies can take to remain flexible in their use of policy statements and to encourage, when appropriate, public participation in the adoption or modification of policy statements.
- **Recommendation 2017-6, *Learning from Regulatory Experience*** offers advice to agencies on learning from different regulatory approaches. It encourages agencies to collect data, conduct analysis at all stages of the rulemaking lifecycle (from pre-rule analysis to retrospective review), and solicit public input at appropriate points in the process.
- **Recommendation 2017-7, *Regulatory Waivers and Exemptions*** provides best practices to agencies in structuring their waiver and exemption procedures for regulatory requirements. It encourages transparency and public input by asking agencies to consider establishing standards and procedures for approval of waivers and exemptions and to seek public comments in developing standards and procedures and in approving individual waivers and exemptions.
- **Recommendation 2016-1, *Consumer Complaint Databases*** encourages agencies that make consumer complaints publicly available through online databases or downloadable data sets to adopt and publish written policies governing the dissemination of such information to the public. These policies should inform the public of the source and limitations of the information and permit entities publicly identified to respond or request corrections or retractions
- **Recommendation 2016-2, *Aggregate Agency Adjudication*** provides guidance to agencies on the use of aggregation techniques to resolve similar claims in adjudications. It sets forth procedures for determining whether aggregation is appropriate. It also considers

what kinds of aggregation techniques should be used in certain cases and offers guidance on how to structure the aggregation proceedings to promote both efficiency and fairness.

- **Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*** encourages the Judicial Conference of the United States to develop a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).
- **Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*** offers best practices to agencies for structuring evidentiary hearings that are not required by the Administrative Procedure Act. It suggests ways to ensure the integrity of the decision-making process; sets forth recommended pre-hearing, hearing, and post-hearing practices; and urges agencies to describe their practices in a publicly accessible document and seek periodic feedback on those practices.
- **Recommendation 2016-5, *the Use of Ombuds in Federal Agencies*** takes account of the broad array of federal agency ombuds offices that have been established since the time of Recommendation 90-2. The recommendation suggests that agencies and Congress consider creating additional ombuds offices where they may be of benefit. It also emphasizes the importance of adherence by ombuds to the three core standards of independence, confidentiality, and impartiality, and identifies best practices for the operation, staffing, and evaluation of federal agency ombuds offices.
- **Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*** offers best practices for agencies dealing with self-represented parties in administrative hearings. Recommendations include the use of triage and diagnostic tools, development of a continuum of services to aid parties, and re-evaluation and simplification of existing hearing practices, where possible. The project builds on the activity of a working group on Self-Represented Parties in Administrative Hearings that is co-led by the Administrative Conference and the Department of Justice's Office for Access to Justice.
- **Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*** offers proposals for improving the accuracy and transparency of the Unified Agenda of Federal Regulatory and Deregulatory Actions. Among other things, it urges agencies to consider providing relevant updates between Agenda reporting periods, offers recommendations for ensuring that Agenda entries are properly categorized by projected issuance date and status, and encourages agencies to provide notice when entries are removed from the Agenda.
- **Recommendation 2015-2, *Technical Assistance by Federal Agencies in the Legislative Process*** offers best practices for agencies when providing Congress with technical drafting assistance. It is intended to apply to situations in which Congress originates the draft legislation and asks an agency to review and provide expert technical feedback on the draft without necessarily taking an official substantive position.

- **Recommendation 2015-3, *Declaratory Orders*** identifies contexts in which agencies should consider the use of declaratory orders in administrative adjudications. It also highlights best practices relating to the use of declaratory orders.
- **Recommendation 2015-4, *Designing Federal Permitting Programs*** describes different types of permitting systems and provides factors for agencies to consider when designing or reviewing permitting programs. It encourages agencies that adopt permitting systems to design them so as to minimize burdens on the agency and regulated entities while maintaining required regulatory protections.
- **Statement #19, *Issue Exhaustion in Pre-Enforcement Judicial Review of Administrative Rulemaking*** examines judicial application of an issue exhaustion requirement in pre-enforcement review of administrative rulemaking.
- **Recommendation 2014-1, *Resolving FOIA Disputes Through Targeted ADR Strategies*** addresses more effective use of alternative dispute resolution (ADR) approaches to help resolve disputes arising under the Freedom of Information Act (FOIA). The OPEN Government Act of 2007 created the Office of Government Information Services (OGIS), a part of the National Archives and Records Administration, to assist in the resolution of FOIA disputes through use of mediation and other ADR techniques. The recommendation suggests ways that OGIS can maximize the effectiveness of its resources for this purpose. The recommendation also suggests steps agencies can take to prevent or resolve FOIA disputes, including cooperating with OGIS and making FOIA staff and requesters aware of OGIS services.
- **Recommendation 2014-2, *Government in the Sunshine Act*** highlights best practices designed to enhance transparency of decision making at multi-member boards and commissions subject to the Government in the Sunshine Act. The recommendation urges covered agencies to provide a description of the primary mechanisms for conducting business, describe substantive business disposed of outside of open meetings subject to the Act (with appropriate protections for information made exempt from disclosure), and exploit new technologies to disseminate relevant information more broadly.
- **Recommendation 2014-3, *Guidance in the Rulemaking Process*** identifies best practices for agencies when providing guidance in preambles to final rules. It suggests ways that agencies can improve the drafting and presentation of these preambles, including making it easier to identify any guidance content. The recommendation also urges agencies to ensure that users of their websites can easily locate the required small entity compliance guides.
- **Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*** provides guidance and best practices to agencies for managing "ex parte" communications between agency personnel and nongovernmental interested persons regarding the substance of informal rulemaking proceedings conducted under 5 U.S.C. § 553.

- **Recommendation 2014-5, *Retrospective Review of Agency Rules*** examines agencies' procedures for reanalyzing and amending existing regulations and offers recommendations designed to promote a culture of retrospective review at agencies. Among other things, it urges agencies to plan for retrospective review when drafting new regulations; highlights considerations germane to selecting regulations for reevaluation; identifies factors relevant to ensuring robust review; and encourages agencies to coordinate with the Office of Management and Budget, other agencies, and outside entities (including stakeholders and foreign regulators) when designing and conducting retrospective reviews.
- **Recommendation 2014-6, *Petitions for Rulemaking*** identifies agency procedures and best practices for accepting, processing, and responding to petitions for rulemaking. It seeks to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy. Building upon ACUS's previous work on the subject, it provides additional guidance that may make the petitioning process more useful for agencies, petitioners, and the public.
- **Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*** offers practical guidance regarding how best to conduct video hearings, and addresses the following subjects: equipment and environment, training, financial considerations, procedural practices, fairness and satisfaction, and collaboration among agencies. It also provides for the development of a video hearings handbook by ACUS's Office of the Chairman.
- **Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudication*** identifies ways to improve the adjudication of Social Security disability benefits claims before administrative law judges and SSA's Appeals Council, suggests changes to the evaluation of opinion evidence from medical professionals, and encourages the SSA to enhance data capture and reporting. As announced in the Unified Agenda, the Administration is working on proposed regulations that would implement much of this recommendation.
- **Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*** highlights a series of best practices directed at independent regulatory agencies in the preparation of benefit-cost analyses that accompany proposed and final rules.
- **Recommendation 2013-3, *Science in the Administrative Process*** promotes transparency in agencies' scientific decision making, including: articulation of questions to be informed by science information; attribution for agency personnel who contributed to scientific analyses; public access to underlying data and literature; and conflict of interest disclosures for privately funded research used by the agencies in licensing, rulemaking, or other administrative processes.
- **Recommendation 2013-4, *Administrative Record in Informal Rulemaking*** offers best practices for agencies in the compilation, preservation, and certification of records in informal rulemaking, and it supports the judicial presumption of regularity for agency administrative records except in certain limited circumstances.

- **Recommendation 2013-5, *Social Media in Rulemaking*** addresses the various policy and legal issues agencies face when using social media in rulemaking. The recommendation examines whether and when agencies should use social media to support rulemaking activities. It also seeks to identify relevant issues, define applicable legal and policy constraints on agency action, resolve legal uncertainty to the greatest extent possible, and encourage agencies to find appropriate and innovative ways to use social media to facilitate broader, more meaningful public participation in rulemaking activities.
- **Recommendation 2013-6, *Remand without Vacatur*** examines judicial remand of an agency decision for further consideration while allowing the decision to remain in place. It examines this remedy and equitable factors that may justify its application. The recommendation offers guidance for courts that remand agency actions and for agencies responding to judicial remands.
- **Recommendation 2013-7, *Review of GPRA Modernization Act of 2010*** examines the Act's requirements for cross-agency collaboration; identifies existing constraints to collaboration; highlights tools available to help agencies collaborate; and recommends potential new or enhanced avenues of collaboration.
- **Statement #18, *Improving the Timeliness of OIRA Regulatory Review*** highlights potential mechanisms for improving review times of rules under review by the Office of Information and Regulatory Affairs (OIRA), including promoting enhanced coordination between OIRA and agencies prior to the submission of rules, encouraging increased transparency concerning the reasons for delayed reviews, and ensuring that OIRA has adequate staffing to complete reviews in a timely manner.
- **Recommendation 2012-1, *Regulatory Analysis Requirements*** addresses the issue of agencies having to comply with numerous regulatory analysis requirements created by statute and executive orders. The recommendation is supported by an extensive report that includes an appendix charting all of the regulatory analysis requirements of the 100 major rules subject to OMB review in 2010. The goal of the recommendation is to ensure agencies fulfill the regulatory analysis requirements efficiently and to enhance the transparency of the process. Agencies, the Congress, the President, and OMB's OIRA are all encouraged to play a role in this effort.
- **Recommendation 2012-2, *Midnight Rules*** addresses several issues raised by the publication of rules in the final months of a presidential administration and offers proposals for limiting the practice by incumbent administrations and enhancing the powers of incoming administrations to review midnight rules.
- **Recommendation 2012-3, *Immigration Removal Adjudication*** addresses the problem of case backlogs in immigration removals and suggests ways to enhance efficiency and fairness in these cases. Much of the recommendation was incorporated into the bipartisan immigration legislation (S. 744) that passed the Senate in 2013.

- **Recommendation 2012-4, *Paperwork Reduction Act*** addresses a variety of issues that have arisen since the Act was last revised in 1995, including those arising from the emergence of new technologies. The proposal offers suggestions for improving public engagement in the review of information collection requests and for making the process more efficient for the agencies and OMB.
- **Recommendation 2012-5, *Improving Coordination of Related Agency Responsibility*** addresses the problem of overlapping and fragmented procedures associated with assigning multiple agencies similar or related functions, or dividing authority among agencies. This recommendation proposes reforms aimed at improving coordination of agency policymaking, including joint rulemaking, interagency agreements, and agency consultation provisions.
- **Recommendation 2012-6, *Reform of 28 U.S.C. § 1500*** urges Congress to repeal Section 1500, which divests the United States Court of Federal Claims of jurisdiction when a plaintiff has claims against the government based on substantially the same operative facts pending in another court, and replace it with a provision that would create a presumption that in such circumstances, later-filed actions would be stayed. In 2015, the House Judiciary Committee favorably reported a bill in accordance with this recommendation and a companion ABA resolution endorsing the recommendation.
- **Recommendation 2012-7, *Third-Party Programs to Assess Regulatory Compliance*** addresses issues that arise when agencies develop programs in which third parties assess whether regulated entities are in compliance with regulatory standards and other requirements. In some areas of regulation, Congress has directed agencies to develop a third-party program; in others, regulatory agencies have developed programs under existing statutory authority. The recommendation sets forth guidance for federal agencies that are establishing, or considering establishing, such programs.
- **Recommendation 2012-8, *Inflation Adjustment for Civil Penalties*** addresses agency adjustments to civil monetary penalties under the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461 note). The recommendation urges Congress to change the current statutory framework by which agencies periodically adjust their penalties to address three provisions that result in penalty adjustments that may not track the actual rate of inflation. It also advises agencies to adjust their penalties for inflation as required by law. As urged by the Administration, Congress implemented the recommendation in the Bipartisan Budget Act of 2016. The inflation-adjustment provisions of that Act will increase general revenues to the government by \$1.3 billion over the next ten years.
- **Recommendation 2011-1, *Legal Considerations in e-Rulemaking*** addresses legal issues associated with e-rulemaking and recommends best practices in dealing with them. These include whether agencies can require electronic filing, how they should address copyright and privacy concerns, whether and under what framework they can solicit comments through social media, and whether any amendments to the Administrative Procedure Act would be appropriate to address such issues.

- **Recommendation 2011-2, *Rulemaking Comments*** addresses certain best practices for agencies to consider in conducting the “comment” aspect of traditional notice-and-comment rulemaking under the Administrative Procedure Act. The recommendation addresses a possible minimum period for comments, standards for extension of the comment period, availability of comments to the public and provision for reply comments, whether agency delays may require updated comment periods, and the circumstances warranting confidentiality of material filed in public comments.
- **Recommendation 2011-3, *Government Contractor Ethics*** addresses the increasing use of contractors in government and asks the Federal Acquisition Regulation Council to adopt revisions regarding compliance standards for government contractor employees relating to personal conflicts of interest and use of certain non-public information. In February 2013, the American Bar Association’s House of Delegates adopted a resolution—based on Recommendation 2011-3—urging federal action to minimize government contractor personal conflicts of interest.
- **Recommendation 2011-4, *Video Hearings*** addresses best practices for the use of video hearings by federal government agencies with high volume case loads as a means of reducing caseload backlog and conducting more efficient adjudication.
- **Recommendation 2011-5, *Incorporation by Reference*** addresses ways in which agencies publish rules that refer to standards or other materials that have been published elsewhere. The recommendation proposes ways to ensure that materials subject to incorporation by reference are reasonably available to the regulated community and other interested parties, to update regulations that incorporate by reference, and to navigate procedural requirements and drafting difficulties when incorporating by reference. The Office of the Federal Register (OFR), among other agencies, has relied heavily on this recommendation in setting its regulatory policies. In late 2014, in fact, the OFR implemented the recommendation in a final rule modifying its long-standing requirements for incorporation by reference in all federal regulations.
- **Recommendation 2011-6, *International Regulatory Cooperation*** addresses how United States regulators can interact with foreign authorities to accomplish their domestic regulatory missions and eliminate unnecessary non-tariff barriers to trade. The project updates Administrative Conference Recommendation 91-1, *Federal Agency Cooperation with Foreign Government Regulators*. The recommendation includes proposals for enhanced cooperation and information gathering, more efficient deployment of limited resources, and better information exchanges. The key features of this recommendation were incorporated into Executive Order 13,609.
- **Recommendation 2011-7, *FACA in the 21st Century*** addresses the administrative load imposed by Federal Advisory Committee Act (FACA) and offers proposals to Congress, the General Services Administration, and agencies that use advisory committees, to alleviate certain procedural burdens associated with the existing regime, clarify the scope of the Act, and enhance the transparency and objectivity of the advisory committee process.

- **Recommendation 2011-8, *Agency Innovations in e-Rulemaking*** addresses ways in which agency innovations and best practices can engage the public in rulemaking activities at low cost to the government.
- **Recommendation 2010-1, *Regulatory Preemption*** addresses agency procedures for determining whether to preempt state law. The recommendation presents best practices by federal agencies in implementing the requirements of Executive Order 13,132 and the President’s May 2009 memorandum governing agency preemption of state law, including procedures for securing meaningful participation by state and local government officials in the process of considering questions of federal preemption.