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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Assembly of the Administrative Conference of the United States adopted four recommendations at its hybrid (virtual and in-person) Eighty-first Plenary Session: Choice of Forum for Judicial Review of Agency Rules, Individualized Guidance, Senate-Confirmed Officials and Administrative Adjudication, and Managing Congressional Constituent Service Inquiries.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2024–1, Kazia Nowacki; Recommendation 2024–2, Benjamin Birkhill; Recommendation 2024–3, Matthew Gluth; and Recommendation 2024–4, Conrad Dryland. For each of these recommendations the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *www.acus.gov.*

The Assembly of the Conference met during its Eighty-first Plenary Session on June 13, 2024, to consider four proposed recommendations and conduct other business. All four recommendations were adopted. In addition, three separate statements, which are permitted under ACUS's bylaws, were filed by various ACUS members regarding Recommendation 2024–3, *Senate-Confirmed Officials and Administrative Adjudication.*

Recommendation 2024–1, *Choice of Forum for Judicial Review of Agency Rules.* This recommendation provides that, when drafting a statute that provides for judicial review of agency rules, Congress ordinarily should provide that rules promulgated using notice-and-comment procedures are subject to direct review by a court of appeals. The recommendation also identifies common statutory ambiguities that Congress should avoid in drafting new or amending existing statutes that provide for judicial review of agency actions.

Recommendation 2024–2, *Individualized Guidance.* This recommendation offers practices to promote fairness, accuracy, and efficiency in agency processes for providing written guidance in response to requests for advice from members of the public. Among other topics, it will address processes for members of the public to request guidance from agencies; agency practices for drafting responses to guidance requests, including the personnel involved and mechanisms to ensure accuracy and consistency; the public availability of individualized guidance documents; and the extent to which members of the public can rely on legal interpretations and policy statements made in individualized guidance documents.

Recommendation 2024–3, *Senate-Confirmed Officials and Administrative Adjudication.* This recommendation examines, as a legal and practical matter, whether, when, how, and how often agency heads and other Senate-confirmed officials participate in the adjudication of cases across a range of federal administrative programs. For agencies that have decided to provide or are considering providing for participation by Senate-confirmed officials in the adjudication of individual cases, the recommendation identifies principles and practicalities that agencies should consider in structuring such participation and provides best practices for developing and communicating relevant policies regarding such participation.

Recommendation 2024–4, *Managing Congressional Constituent Service Inquiries.* This recommendation identifies best practices for agencies to promote quality, efficiency, and timeliness in their procedures for managing and responding to congressional constituent service inquiries. Among other topics, it addresses the proper scope, content, internal dissemination, and public availability of such procedures; how agencies can use technology to streamline their management and resolution of constituent service inquiries; how agencies should adopt and evaluate constituent service-specific performance goals; and strategies for improving communication with congressional offices and staff.

The Conference based its recommendations on research reports and prior history that are posted at: *https://www.acus.gov/event/81st-plenary-session.*

Authority: 5 U.S.C. 595.

Dated: July 2, 2024.

Shawne C. McGibbon,

General Counsel.

Appendix—Recommendations of the Administrative Conference of the United States

Administrative Conference Recommendation 2024–1

Choice of Forum for Judicial Review of Agency Rules

Adopted June 13, 2024

Final rules adopted by federal agencies are generally subject to review in the federal courts.[1] In a series of recommendations adopted in the 1970s, 1980s, and 1990s, the Administrative Conference sought to identify principles to guide Congress in choosing the appropriate forum for judicial review of agency rules. The most significant was Recommendation 75–3, *The Choice of Forum for Judicial Review of Administrative Action,* which recommended that, in the case of rules adopted after notice and comment, Congress

[1] *See* 5 U.S.C. 702. This Recommendation does not address judicial review of adjudicative orders, including those that announce principles with rule-like effect or agency actions regarding petitions for rulemaking. Additionally, the Recommendation does not address suits challenging agency delay or inaction in promulgating rules. *See Telecomms. Rsch. & Action Ctr.* v. *Fed. Commc'ns Comm'n,* 750 F.2d 70, 72 (D.C. Cir. 1984); *see generally* Joseph W. Mead, Choice of Forum for Judicial Review of Agency Rules (May 9, 2024) (report to the Admin. Conf. of the U.S.).

generally should provide for direct review in the courts of appeals whenever ''an initial district court decision respecting the validity of the rule will ordinarily be appealed'' or ''the public interest requires prompt, authoritative determination of the validity of the rule.'' [2] Subsequent recommendations opposed altering the ordinary rules governing venue in district court actions against the United States,[3] set forth a principle for determining when it is appropriate to give the Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review agency rules,[4] and offered guidance to Congress on the factors it should consider in determining whether to assign responsibility for review to a specialized court.[5] The Conference also addressed the choice of forum for judicial review of rules adopted under specific statutes.[6]

Several years ago, the Conference undertook a study to identify and review all statutory provisions in the *United States Code* governing judicial review of federal agency rules and adjudicative orders.[7] Based on that initiative, ACUS adopted Recommendation 2021–5, *Clarifying Statutory Access to Judicial Review of Agency Action*,[8] which recommended that Congress address statutory provisions that create unnecessary obstacles to judicial review or overly complicate the process of judicial review. That Recommendation also prompted questions regarding ''whether Congress should specify where judicial review should be sought with regard to agency actions that are not currently the subject of any specific judicial review statute.'' [9]

In this Recommendation, the Conference revisits the principles that should guide Congress in choosing the appropriate forum for judicial review of agency rules and in drafting clear provisions that govern the choice of forum. While this Recommendation offers drafting advice to Congress, agencies may also find it useful in responding to congressional requests for technical assistance.[10]

[2] 40 FR 27926 (July 2, 1975).

[3] Admin. Conf. of the U.S., Recommendation 82–3, *Federal Venue Provisions Applicable to Suits Against the Government,* 47 FR 30706 (July 15, 1982).

[4] *Id.*

[5] Admin. Conf. of the U.S., Recommendation 91–9, *Specialized Review of Administrative Action,* 56 FR 67143 (Dec. 30, 1991).

[6] Admin. Conf. of the U.S., Recommendation 76–4, *Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act,* 41 FR 56767 (Dec. 30, 1976); Admin. Conf. of the U.S., Recommendation 91–5, *Facilitating the Use of Rulemaking by the National Labor Relations Board,* 56 FR 33851 (July 24, 1991).

[7] *See* Jonathan R. Siegel, Admin. Conf. of the U.S., Sourcebook of Federal Judicial Review Statutes 33 (2021).

[8] 86 FR 53262 (Sept. 27, 2021).

[9] *Id.* at 53,262 n.7.

[10] *See* Admin. Conf. of the U.S., Recommendation 2015–2, *Technical Assistance by Federal Agencies in the Legislative Process,* 80 FR 78161 (Dec. 16, 2015).

Determining the Court in Which To Seek Review

Absent a statute providing otherwise, parties may seek judicial review of agency rules in a district court. Although this approach may be appropriate in some contexts, direct review by a court of appeals is often more appropriate. For one, district court proceedings are less necessary when an agency has already compiled an administrative record that is adequate for judicial review and further appeal of a district-court decision is likely. Allowing parties to choose the district court in which to seek review also creates opportunities for forum shopping to a greater extent than when review is sought in a court of appeals.[11] For these and other reasons, Congress has in many contexts provided for direct review of agency rules in the courts of appeals. And in a minority of statutes, Congress has required parties to seek review in a single, specified tribunal.

In this Recommendation, the Conference generally reaffirms its earlier recommendations that Congress ordinarily should provide for direct review of agency rules by a court of appeals. The Conference believes that this principle is particularly important for rules promulgated through public notice and opportunity for comment. Such procedures produce a record that is conducive to review by an appeals court without need for additional development or factfinding, and drawing the line at rules promulgated after public notice and opportunity for comment provides a relatively clear jurisdictional rule.

Avoiding Drafting Ambiguities

Courts have faced two sources of ambiguity in interpreting choice-of-forum provisions which this Recommendation addresses.[12] First, some statutes specify the forum for review of ''orders'' without specifying the forum for review of ''rules'' or ''regulations.'' This can lead to uncertainty regarding whether ''orders'' includes rules, particularly because the Administrative Procedure Act defines an ''order'' as any agency action other than a rule.[13] Second, some statutes are unclear as to the forum in which a party may file an action challenging the validity of a rule. A lack of clarity may result from statutory silence or a choice-of-forum provision of uncertain scope.

This Recommendation urges Congress, in drafting new or amending existing provisions governing the choice of forum for the review of rules,[14] to avoid using the term ''orders'' to encompass rules; to state clearly the forum in which judicial review of rules is available; and to state clearly whether such provisions apply to rule-related actions other than the promulgation of a rule.

Recommendation

1. When drafting a statute that provides for judicial review of agency rules, Congress ordinarily should provide that rules promulgated using notice-and-comment procedures are subject to direct review by a court of appeals.

2. When drafting a statute that provides for judicial review of agency actions, Congress should state explicitly whether actions taken under the statute are subject to review by a district court or, instead, subject to direct review by a court of appeals. If Congress intends to establish separate requirements for review of rules, as distinguished from other agency actions, it should refer explicitly to ''rules'' and not use the term ''orders'' to include rules.

Administrative Conference Recommendation 2024–2

Individualized Guidance

Adopted June 13, 2024

Agencies provide written guidance to help explain their programs and policies, announce interpretations of legal materials and how they intend to exercise their discretion, and communicate other important information to regulated entities, regulatory beneficiaries, and the broader public. When used appropriately, guidance documents—including what the Administrative Procedure Act (APA) calls general statements of policy and interpretive rules [1]—can be important instruments of administration and of great value to agencies and the public. The Administrative Conference has adopted numerous recommendations to help agencies use and develop guidance documents effectively and appropriately, to make them publicly available, and to ensure that such documents are well organized, up to date, and easily accessible.[2]

[11] *See* Mead, *supra* note 1; Admin. Conf. of the U.S., Recommendation 80–5, *Eliminating or Simplifying the ''Race to the Courthouse'' in Appeals from Agency Action,* 45 FR 84954 (Dec. 24, 1980).

[12] The Committee on Judicial Review, from which this Recommendation arose, identified a third source of ambiguity: Many statutes are unclear as to whether choice-of-forum provisions regarding rules apply only to rules promulgated by an agency or whether they apply also to other rule-related actions such as delay or inaction in promulgating a rule or the grant or denial of a petition for rulemaking. This Recommendation does not address this ambiguity. The Committee on Judicial Review has suggested it for future study by the Conference.

[13] 5 U.S.C. 551(6).

[14] This Recommendation provides advice to Congress in drafting future statutes. It should not be read to address existing statutes.

[1] 5 U.S.C. 553(b)(A). Some agencies define or use the term ''guidance'' to include materials that may not qualify as interpretive rules or policy statements under the APA. *See* Admin. Conf. of the U.S., Recommendation 2019–3, *Public Availability of Agency Guidance Documents,* 84 FR 38931 (Aug. 8, 2019).

[2] *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2022–3, *Automated Legal Guidance,* 87 FR 39798 (July 5, 2022); Admin. Conf. of the U.S., Recommendation 2021–7, *Public Availability of Inoperative Agency Guidance Documents,* 87 FR 1718 (Jan. 12, 2022); Recommendation 2019–3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019–1, *Agency Guidance Through Interpretive Rules,* 84 FR 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017–5, *Agency Guidance Through Policy Statements,* 82 FR 61734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014–3, *Guidance in the Rulemaking Process,* 79 FR 35992 (June 25, 2014); Admin. Conf. of the U.S., Recommendation 92–2, *Agency Policy Statements,*

Continued

In many federal programs, individuals may request written guidance from an agency regarding how the law applies to a requester's specific circumstances.[3] Such ''individualized guidance'' goes by a variety of names, including advisory opinions, opinion letters, and letters of interpretation.[4] The Internal Revenue Service issues private letter rulings to provide tax law advice to taxpayers,[5] for example, and the Securities and Exchange Commission issues no-action letters to provide advice regarding whether a product, service, or action may violate federal securities law.[6] In some programs, the provision of individualized guidance is authorized by statute; in others, agencies offer individualized guidance on their own initiative as a public service.

Agency practices vary in several key respects. Some individualized guidance is issued in a relatively formal manner (such as a signed letter on agency letterhead), while other individual guidance may be issued in relatively informal ways (such as in the body of an email).[7] Some individualized guidance is reviewed and issued by agency heads or other senior officials, while other individualized guidance is prepared and issued by lower-level officials. Some individualized guidance has no legally binding effect on the agency or requester, while other such guidance may, for example, provide the requester with a defense to an agency enforcement action.[8]

Individualized guidance offers many benefits. It facilitates communication between an agency and requester, reduces uncertainty, promotes compliance, spurs useful transactions, and can be faster and less costly than other agency actions. For example, agencies may provide individualized guidance to help a regulated party better understand whether its conduct may be permissible, and this may limit the need for future enforcement action. In addition, making individualized guidance publicly available can inform other interested persons about how the agency evaluates issues that may affect them.

At the same time, individualized guidance may raise concerns. Even if an agency does not intend to use individualized guidance to bind the public, requesters or others may nevertheless choose to follow the guidance strictly to limit the perceived risk of sanction in a future agency proceeding. Agencies also risk providing inconsistent guidance if they lack appropriate procedures for developing and reviewing it. In addition, some members of the public may lack equal access to processes for requesting individualized guidance or have limited opportunities to participate in processes for developing individualized guidance that affects them.

These benefits can be increased, and these concerns addressed, through the best practices identified in this Recommendation. The Recommendation encourages agencies, when appropriate, to establish procedures for providing individualized guidance to members of the public. It identifies procedures agencies should use to process requests for such guidance fairly, efficiently, and accurately,[9] and it encourages agencies to make the guidance available to agency personnel and the public. It cautions agencies not to treat individualized guidance as creating binding standards on the public but identifies circumstances in which agencies should consider allowing the public to rely on such guidance (that is, circumstances in which agencies should consider adhering to guidance that is favorable to a person in a subsequent agency proceeding despite the nonbinding character of the guidance). It also urges agencies to involve their ombuds offices in supplementing or improving guidance to the public.[10] Finally, it addresses circumstances in which agencies should use individualized guidance to support development of general rules.

This Recommendation recognizes the wide variation among the programs that agencies administer, the resources available to agencies, and the needs and preferences of persons with whom they interact. Agencies should account for these differences when implementing the best practices below and tailor their individualized guidance procedures accordingly.

Recommendation

Individualized Guidance Policies

1. To the extent of, and in a manner consistent with, their resources, priorities, and missions, agencies should respond to requests from members of the public for written guidance by providing individualized written guidance regarding how the law applies to requesters' specific circumstances.

2. Agencies should not treat individualized guidance as creating standards with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public.

3. Agencies should develop policies regarding whether and when it is appropriate to allow a requester or other individual to rely on individualized guidance. In so doing, agencies should consider factors including:

a. The applicability of constitutional, statutory, or other authorities mandating or prohibiting a party's entitlement to rely on such guidance;

b. The accuracy and completeness of the information the requester provided at the time it sought the guidance;

c. The certainty of the relevant facts and law at the time the agency issued the guidance;

d. Changes in facts or law after initial issuance of the guidance;

e. The formality of the agency's individualized guidance procedure, including the position and authority of the agency officials involved in developing and issuing the guidance;

f. Whether a person other than the requester of individualized guidance may rely on it, which might depend on the similarity of the person's circumstances to the requester's circumstances; and

g. Whether allowing reliance is necessary to prevent significant hardship.

4. Agencies should explain in individualized guidance provided to requesters the extent to which requesters or others can rely on that guidance.

5. Even if agencies do not recognize a right for persons to rely on individualized guidance or encourage them to do so, agencies should, when appropriate and lawful, minimize hardships on persons who nevertheless acted in conformity with the guidance, such as by reducing or waiving any penalty for past noncompliance or taking enforcement action with solely prospective effect.

6. Agencies with ombuds offices should provide opportunities for members of the public to seek assistance from such offices to supplement individualized guidance or to resolve issues related to individualized guidance. Agencies should also involve such offices in efforts to improve agency policies and procedures related to individualized guidance.

Individualized Guidance Procedures

7. Agencies should develop written procedures for requesting and issuing individualized guidance. Agencies should publish such procedures in the **Federal Register** and, as appropriate, codify them in the *Code of Federal Regulations.* Agencies

57 FR 30103 (July 8, 1992); Admin. Conf. of the U.S., Recommendation 76–5, *Interpretive Rules of General Applicability and Statements of General Policy,* 41 FR 56769 (Dec. 30, 1976).

[3] This Recommendation does not cover guidance that is not requested by a member of the public, such as an agency warning letter explaining why the agency believes a regulated party is in violation of a law or regulation.

[4] This Recommendation does not attempt to situate individualized guidance within the APA's categories of ''rule,'' ''order,'' ''license,'' ''sanction,'' or ''relief,'' and it does not seek to define agency processes for providing individualized guidance as ''rulemaking'' or ''adjudication.'' *See* 5 U.S.C. 551. Individualized guidance is distinguished from declaratory orders, which agencies may issue in the context of an adjudication to ''terminate a controversy or remove uncertainty.'' 5 U.S.C. 554(e). Unlike most individualized guidance, declaratory orders are final agency actions and legally binding. *See* Admin. Conf. of the U.S., Recommendation 2015–3, *Declaratory Orders,* 80 FR 78161 (Dec. 16, 2015).

[5] *See* Admin. Conf. of the U.S., Recommendation 75–5, *Internal Revenue Service Procedures: Taxpayer Services and Complaints,* 41 FR 3986 (Jan. 27, 1976).

[6] See Admin. Conf. of the U.S., Recommendation 70–2, *SEC No-Action Letters Under Section 4 of the Securities Act of 1933,* 1 ACUS 34 (1970).

[7] This Recommendation does not address guidance provided orally.

[8] *See generally* Shalini Bhargava Ray, Individualized Guidance in the Federal Bureaucracy (June 4, 2024) (report to the Admin. Conf. of the U.S.).

[9] Paragraph 7(f) of this Recommendation urges agencies to describe any fees they charge for individualized guidance, including circumstances where they will waive or reduce such fees. Agencies should avoid charging fees for such guidance that would impose undue burdens on people of limited means. *See* Admin. Conf. of the U.S., Recommendation 2023–8, *User Fees,* ¶ 3, 89 FR 1516 (Jan. 10, 2024) (recommending that agencies, as appropriate, should ''set forth procedures for waiving or reducing user fees that would cause undue hardship for low-income individuals, members of historically underserved communities, small businesses, and other small entities'').

[10] *See also* Admin. Conf. of the U.S., Recommendation 2016–5, *The Use of Ombuds in Federal Agencies,* 81 FR 94316 (Dec. 23, 2016).

should also make the procedures publicly available on their websites and, if applicable, in other agency publications. The procedures should describe:

a. How members of the public may submit requests for individualized guidance, including the office(s) or official(s) responsible for receiving requests;

b. The type(s) of individualized guidance members of the public may request;

c. Any matters that the agency will not address through individualized guidance, including the rationale for not providing guidance as to such matters;

d. The information that the requester should include with the request for individualized guidance;

e. Whether the agency will make individualized guidance and any related information (including the identity of the requester and information from the request) publicly available as described in paragraphs 10 through 13;

f. Any fees the agency charges for providing individualized guidance, as well as any provisions for waivers of, exemptions from, or reduced rates for such fees;

g. Any opportunities for public participation in the preparation of individualized guidance;

h. The manner in which a response to a request for individualized guidance will be provided to the requester;

i. To the extent practicable, the expected timeframe for responding to requests for individualized guidance;

j. Whether requesters may seek review of individualized guidance by a higher-level official; and

k. The agency's policy, developed as described in paragraph 3, regarding whether and when it is appropriate for a requester or other individual to rely on individualized guidance.

8. Agencies should develop procedures for agency personnel to manage and process requests for individualized guidance, including:

a. Allowing for electronic submission of, and response to, requests;

b. Creating methods for identifying and tracking requests;

c. Maintaining past responses to requests in a manner that allows agency personnel to identify and consider them when developing responses to new requests that present similar or related issues; and

d. Ensuring that relevant personnel receive training in the agencies' individualized guidance procedures.

9. In cases in which members of the public other than the requester are likely to have information relevant to the request or are likely to be significantly affected by the agency's action, agencies should consider soliciting public participation before issuing individualized guidance.

Public Availability of Individualized Guidance

10. Absent substantial countervailing considerations, agencies should make publicly available on their websites any individualized guidance that affects, or may be of interest to, persons other than the requester, including regulated persons and regulatory beneficiaries.

11. When making individualized guidance available on their websites, agencies should, as appropriate:

a. Identify the date, requester, and subject matter of the guidance;

b. Identify the legal authority under which the guidance was issued and under what circumstances other parties may rely on the guidance; and

c. Use other techniques to help the public find relevant information, such as indexing or tagging individualized guidance by general topic area.

12. When making individualized guidance publicly available, agencies should redact any information that is sensitive or otherwise protected from disclosure consistent with the Freedom of Information Act or other relevant information laws.

13. Agencies should keep individualized guidance on their websites current. If an agency modifies or rescinds a publicly available individualized guidance document, it should indicate on the face of the document that it has been modified or rescinded and direct readers to any successor guidance and any explanation for the modification or rescission.

Accessibility of Individualized Guidance Materials

14. Agencies that provide individualized guidance should maintain a page on their websites that provides easy access to the procedures described in Paragraph 7, all individualized guidance that they make publicly available as described in paragraphs 10 through 13, and information about electronically submitting a request for individualized guidance.

Use of Individualized Guidance in Aid of General Rulemaking

15. Agencies should periodically review individualized guidance to identify matters that may warrant the development of a general rule.

Administrative Conference Recommendation 2024–3

Senate-Confirmed Officials and Administrative Adjudication

Adopted June 13, 2024

Tens of thousands of federal agency officials participate in administrative adjudication. Most are members of the career civil service hired and supervised under the civil service laws. Several thousand, like administrative law judges (ALJs) and some administrative judges, are appointed by a department head.[1] Some, like many agency heads, are appointed by the President with the advice and consent of the Senate. It is to such ''PAS'' officials that federal laws typically assign authority to adjudicate matters, and it is PAS officials who—by rule, delegation of authority, and the development of norms, practices, and organizational cultures—work with career civil servants and other officials to structure systems of administrative adjudication and oversee their operation, ensuring some measure of political accountability.

PAS officials often participate indirectly and directly in administrative adjudication. Indirectly, they may establish agency subunits and positions responsible for adjudicating cases. They may appoint and supervise adjudicators,[2] and they may appoint and supervise, or oversee the appointment and supervision of, other adjudicative personnel. PAS officials may coordinate with the President and Congress to help ensure that adjudicative subunits have the resources they need to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.[3] PAS officials may also establish rules of procedure and practice to structure administrative adjudication,[4] and they may develop substantive rules that supply the law in adjudications.

Additionally, PAS officials may participate directly in administrative adjudication, serving as the final, executive-branch decision makers in cases arising under the statutes they administer.[5] Although questions regarding whether, when, and how PAS officials participate directly in the adjudication of cases are not new, they have gained new salience in recent years. Most notably, in *United States* v. *Arthrex*[6] the Supreme Court held that a statute providing for the administrative resolution of certain patent disputes violated the Constitution's Appointments Clause by vesting final decisional authority in adjudicators in the U.S. Patent and Trademark Office's Patent Trial and Appeal Board, whose members are neither PAS officials nor subject to at-will removal. The Court remedied the violation by holding unenforceable the statutory prohibition on the authority of a PAS official, the Director of the U.S. Patent and Trademark Office, to review the Board's decisions.

While Congress has for some programs determined by statute whether, when, and how PAS officials participate directly in the adjudication of cases, for many programs Congress has given agencies the discretion to

[1] *See Lucia* v. *SEC,* 585 U.S. 237 (2018). Under the Constitution's Appointments Clause, art. II section 2, cl. 2, ''Officers of the United States'' must be appointed through presidential nomination and Senate confirmation, except that ''Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.''

[2] *See Lucia,* 585 U.S. at 251 (holding that administrative law judges employed by the Securities and Exchange Commission are ''Officers of the United States'' and must be appointed in accordance with the Appointments Clause).

[3] *See* Admin. Conf. of the U.S., Recommendation 2023–7, *Improving Timeliness in Agency Adjudication,* 89 FR 1513 (Jan. 10, 2024); Admin. Conf. of the U.S., Recommendation 2021–10, *Quality Assurance Systems in Agency Adjudication,* 87 FR 1722 (Jan. 12, 2022).

[4] *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2018–5, *Public Availability of Adjudication Rules,* 84 FR 2142 (Feb. 6, 2019); *see also* Admin. Conf. of the U.S., Recommendation 2023–5, *Best Practices for Adjudication Not Involving an Evidentiary Hearing,* 89 FR 1509 (Jan. 10, 2024); Admin. Conf. of the U.S., Recommendation 2016–4, *Evidentiary Hearings Not Required by the Administrative Procedure Act,* 81 FR 94314 (Dec. 23, 2016).

[5] *See* Admin. Conf. of the U.S., Recommendation 2020–3, *Agency Appellate Systems,* 86 FR 6618 (Jan. 22, 2021).

[6] 594 U.S. 1 (2021).

develop procedures and practices that are effective and appropriate for the specific programs they administer. This Recommendation provides a framework to help agencies develop effective procedures and practices, when required or appropriate, for direct participation by PAS officials in the adjudication of individual cases.

It does not address whether Congress or agencies should, for constitutional or other reasons, provide for direct participation by PAS officials in the adjudication of individual cases under specific programs. Nor does this recommendation address the broader question of whether and when agencies should develop policies through rulemaking, adjudication, setting enforcement priorities, or other means. Of course, Congress and agencies must pay careful attention to such questions and ensure that laws, rules, and policies comport with applicable legal requirements.

To develop effective and appropriate procedures and practices, agencies must consider, in addition to applicable constitutional and statutory requirements, the characteristics of PAS officials and the potential consequences of such characteristics for fair, accurate, consistent, efficient, and timely adjudication. While there is wide variation among PAS positions and PAS officials, at least five characteristics commonly distinguish PAS positions and officials from other agency positions and officials, especially career civil servants.

First, as the Administrative Conference has previously noted, there are often numerous vacancies in PAS positions.[7] Frequent vacancies exist for several reasons, including delays related to the appointments process. When adjudicative functions are assigned to PAS positions, vacancies in those positions can affect the timeliness of adjudication. At some agencies, for example, vacancies or the lack of a quorum have resulted in long delays.[8]

Second, there is relatively high turnover in PAS positions, and PAS officials almost always serve in their positions for a shorter time than career civil servants. Thus, PAS officials may lack preexisting relationships with agency employees, knowledge of agency processes, and the specialized adjudicative expertise that career adjudicators develop as a result of their work and experience in this area.

Third, unlike career civil servants who are hired without regard to political affiliation, activity, or beliefs,[9] PAS officials are often nominated by the President at least in part *because* of their political affiliation, activity, or beliefs. PAS officials are also subject to removal by the President, although a statute may impose for-cause or other limitations on their removal. Unlike officials appointed by a department head or the President alone, however, PAS officials are also confirmed by the Senate, which may make them more attentive to Congress than career agency officials. On the one hand, such exposure to politics may help ensure that agency decision making, including the development of policy through case-by-case adjudication, remains publicly accountable. And given their relationships with the President, other political appointees, and Congress, PAS officials may be well equipped to address systemic problems, identified through the adjudication of cases, that require intra- or interbranch coordination. On the other hand, the involvement of PAS officials in administrative adjudication may raise concerns about the impartiality and objectivity of agency decision making.[10]

Fourth, unlike career adjudicators, who are often appointed based on prior adjudicative or litigation experience,[11] PAS officials are often appointed for other reasons such as prior experience in a particular industry or familiarity with a particular policy domain. PAS officials may have better access to substantive, subject-matter expertise than other agency decision makers, which may improve the quality of policies developed through case-by-case adjudication. On the other hand, they may lack experience or familiarity with the procedural aspects of administrative adjudication.

Fifth, PAS officials often sit atop agency hierarchies, and statutes often assign PAS officials, especially the heads of cabinet departments, a broad range of responsibilities, potentially including the administration of multiple programs and, under any given program, multiple functions (*e.g.,* rulemaking, investigation, prosecution) in addition to adjudication. Such responsibilities can provide PAS officials with a unique opportunity to coordinate policymaking within and across programs, promote consistent decision making, and gain better awareness of the adjudicative and regulatory systems for which they are statutorily responsible. On the other hand, because PAS officials often face many competing demands on their time, they may have less practical capacity to devote to the adjudication of individual cases than other officials whose primary function is to adjudicate cases.[12] Additionally, some have raised concerns in certain contexts that the combination of adjudication and enforcement functions (investigation and prosecution) in a single official may affect the integrity of agency proceedings and that the combination of adjudication and rulemaking functions in a single official may encourage the resolution of important legal and policy issues through case-by-case adjudication, even when general rulemaking offers a better mechanism for resolving such issues.[13]

Considering these and other characteristics, and consistent with statutory and regulatory requirements, agencies must determine whether participation by PAS officials in the adjudication of cases provides an effective mechanism for directing and supervising systems of administrative adjudication and, if it does, what procedures and practices will permit PAS officials to adjudicate cases in a manner that best promotes fairness, accuracy, consistency, efficiency, and timeliness. The Conference has addressed some of these issues in previous recommendations, most notably in Recommendation 68–6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency;*[14] Recommendation 83–3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act;*[15] Recommendation 2018–4, *Recusal Rules for Administrative Adjudicators;*[16] Recommendation 2020–3, *Agency Appellate Systems;*[17] and Recommendation 2022–4, *Precedential Decision Making in Agency Adjudication.*[18] Recognizing that agencies must consider applicable constitutional and statutory requirements and the unique characteristics of the programs they administer, this Recommendation builds on these earlier recommendations but focuses exclusively on identifying best practices to help agencies determine whether, when, and how PAS officials should participate directly in the adjudication of individual cases.

Recommendation

Determining Whether and When Officers Appointed by the President With the Advice and Consent of the Senate—PAS Officials—Should Participate in the Adjudication of Cases

1. When a statute authorizes a PAS official or collegial body of PAS officials to adjudicate matters arising under the statute, and such authority is delegable as a constitutional and statutory matter, the agency ordinarily should delegate to one or more non-PAS adjudicators responsibility for conducting initial proceedings (*i.e.,* receiving and evaluating evidence and arguments and issuing a decision). PAS officials, individually or as a collegial body, should exercise their retained statutory authority to conduct initial proceedings ordinarily only if:

a. A matter is exceptionally significant or broadly consequential, and they have the capacity personally to receive and evaluate evidence and arguments and issue a decision in a fair, accurate, consistent, efficient, and timely manner; or

b. There are unlikely to be disputed issues of fact, the matter to be decided does not require taking much evidence, and resolution of the matter turns on qualitative judgments of a broad nature.

2. When a statute authorizes a PAS official or a collegial body of PAS officials to adjudicate matters arising under the statute or review lower-level decisions rendered by other adjudicators, and such authority is delegable as a constitutional and statutory

[7] *See* Admin. Conf. of the U.S., Recommendation 2019–7, *Acting Agency Officials and Delegations of Authority,* 84 FR 71352 (Dec. 27, 2019).

[8] *See* Matthew A. Gluth, Jeremy S. Graboyes & Jennifer L. Selin, Participation of Senate-Confirmed Officials in Administrative Adjudication 40–42 (June 9, 2024) (report to the Admin. Conf. of the U.S.).

[9] 5 U.S.C. 2301.

[10] *See* Gluth, Graboyes & Selin, *supra* note 8 at 45–50.

[11] *See* Admin. Conf. of the U.S., Recommendation 2019–2, *Agency Recruitment and Selection of Administrative Law Judges,* 84 FR 38930 (Aug. 8, 2019).

[12] *See* Gluth, Graboyes & Selin, *supra* note 8, at 52–56.

[13] *See id.*

[14] 38 FR 19783 (July 23, 1973).

[15] 48 FR 57461 (Dec. 30, 1983).

[16] 84 FR 2139 (Feb. 6, 2019).

[17] 86 FR 6618 (Jan. 22, 2021).

[18] 88 FR 2312 (Jan. 13, 2023).

matter, the agency should determine in which types of cases it would be beneficial for a PAS official or collegial body of PAS officials to review lower-level decisions rendered by other adjudicators and in which it would be more appropriate to delegate final decision-making authority to a non-PAS official (*e.g.,* an agency ''Judicial Officer'') or a collegial body of non-PAS officials (*e.g.,* a final appellate board). If a PAS official or collegial body of PAS officials delegates final decision-making authority to other officials, they should adopt mechanisms to ensure adequate direction and supervision of decision makers exercising delegated authority. Circumstances in which it may be beneficial for an agency to provide for review by a PAS official or a collegial body of PAS officials include:

a. Cases that involve legal or factual issues that are exceptionally significant or broadly consequential;

b. Cases that involve a novel or important question of law, policy, or discretion, such that direct participation by one or more PAS officials would promote centralized or politically accountable coordination of policymaking; and

c. When participation by one or more PAS officials in the adjudication of individual cases would promote consistent decision making by agency adjudicators.

3. When it would be beneficial to provide for review by a PAS official or a collegial body of PAS officials, the agency should, consistent with constitutional and statutory requirements, determine the appropriate structure for such review. Structural options include:

a. *Providing the only opportunity for administrative review of lower-level decisions.* This option may be appropriate when caseloads are relatively low and individual cases frequently raise novel or important questions of law, policy, or discretion.

b. *Delegating first-level review authority to a non-PAS official, such as an agency ''Judicial Officer,'' or an appellate board and retaining authority to exercise second-level administrative review in exceptional circumstances.* This option may be appropriate when caseloads are relatively high and individual cases only occasionally raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.

c. *Delegating final review authority to another PAS official.* This option may be appropriate, for example, when individuals, by virtue of holding another PAS position, have greater access to subject-matter expertise or greater capacity to adjudicate cases in a fair, accurate, consistent, efficient, and timely manner.

d. *For collegial bodies of PAS officials, delegating first-level review authority to a single member or panel, and retaining authority for the collegial body as a whole to exercise second-level (and final) administrative review.* This option may be appropriate when a collegial body manages a relatively high caseload and most individual cases do not raise novel or important questions of law, policy, or discretion or have significant consequences beyond the parties to the case.

Initiating Review by PAS Officials

4. An agency ordinarily should provide that a decision subject to review by a PAS official or a collegial body of PAS officials becomes final and binding after a specified number of days unless, as applicable:

a. A party or other interested person files a petition for review, if a statute entitles a party or other interested person to such review;

b. A PAS official or collegial body of PAS officials exercises discretion to review the decision upon petition by a party or other interested person;

c. A PAS official or collegial body of PAS officials exercises discretion to review the lower-level decision upon referral by the adjudicator or appellate board (as a body or through its chief executive or administrative officer) that issued the decision;

d. A PAS official or collegial body of PAS officials exercises discretion to review the decision upon request by a federal official who oversees a program impacted by a decision, or his or her delegate; or

e. A PAS official or collegial body of PAS officials exercises discretion to review the decision sua sponte.

5. When a PAS official or collegial body of PAS officials serves as a first-level reviewer, an agency should develop a policy for determining the circumstances in which such review may be exercised. Review may be warranted if there is a reasonable probability that:

a. The adjudicator who issued the lower-level decision committed a prejudicial procedural error or abuse of discretion;

b. The lower-level decision includes an erroneous finding of material fact;

c. The adjudicator who issued the lower-level decision erroneously interpreted the law or agency policy;

d. The case presents a novel or important issue of law, policy, or discretion; or

e. The lower-level decision presents a recurring issue or an issue that agency adjudicators have decided in different ways, and the PAS official or officials can resolve the issue more accurately and efficiently through precedential decision making.

6. When a PAS official or collegial body of PAS officials serves as a second-level reviewer, an agency should determine the circumstances in which such review may be warranted. To avoid multilevel review of purely factual issues, the agency should limit second-level review by a PAS official or collegial body of PAS officials to circumstances in which there is a reasonable probability that:

a. The case presents a novel or important issue of law, policy, or discretion; or

b. The first-level reviewer erroneously interpreted the law or agency policy.

7. When agency rules permit parties or other interested persons to file a petition requesting that a PAS official or a collegial body of PAS officials review a lower-level decision and review is discretionary, the agency should require that petitioners explain in the petition why such review is warranted with reference to the grounds for review identified in Paragraph 5 or 6, as applicable. Agency rules should permit other parties or interested persons to respond to the petition or file a cross-petition.

8. An agency should provide that if a PAS official or collegial body of PAS officials, or a delegate, does not exercise discretion to grant a petition for review within a set time period, the petition is deemed denied.

9. In determining whether to provide for interlocutory review by a PAS official or collegial body of PAS officials of rulings by agency adjudicators, an agency should evaluate whether such review can be conducted in a fair, accurate, consistent, efficient, and timely manner, considering the best practices identified in Recommendation 71–1, *Interlocutory Appeal Procedures.*

10. When a PAS official or collegial body of PAS officials exercises discretion to review a lower-level decision (*e.g.,* by granting a petition or accepting a referral), the agency should:

a. Notify the parties;

b. Provide a brief statement of the grounds for review; and

c. Provide the parties a reasonable time to submit written arguments.

PAS Official Review Process

11. A PAS official or collegial body of PAS officials who reviews a lower-level decision ordinarily should limit consideration to the evidence and legal issues considered by the adjudicator who issued that decision. The PAS official or collegial body of PAS officials should consider new evidence and legal issues, if at all, only if (a) the proponent of new evidence or a new legal issue shows that it is material to the outcome of the case and that, despite due diligence, it was not available when the record closed, or (b) consideration of a new legal issue is necessary to clarify or establish agency law or policy. In situation (a), the PAS official or collegial body of PAS officials should determine whether it would be more effective to consider the new evidence or legal issue or instead to remand the case to another adjudicator for further development and consideration.

12. An agency should provide a PAS official or collegial body of PAS officials discretion to permit oral argument on their own initiative or upon a party's request if doing so would assist the PAS official(s) in deciding the matter.

13. In cases when a PAS official or collegial body of PAS officials will decide a novel or important question of law, policy, or discretion, the agency should provide the PAS official(s) discretion to solicit arguments from interested members of the public, for example by inviting amicus participation, accepting submission of written comments, or holding a public hearing to receive oral comments.

Integrity of the Decision-Making Process

14. To promote impartiality and the appearance of impartiality, each agency at which PAS officials participate in the adjudication of individual cases should have a process for determining if participation by a particular PAS official in a case would violate government-wide or agency-specific ethics standards and hence require recusal. Agencies should also have a process for determining if participation would raise other significant concerns, and if so,

determine whether and in what circumstances PAS officials should recuse themselves from participating in a case based on those concerns.

Coordination of Policymaking and Decision Making by Agency Adjudicators

15. An agency ordinarily should treat decisions of PAS officials as precedential if they address novel or important issues of law, policy, or discretion, or if they resolve recurring issues or issues that other agency adjudicators have decided in different ways. Unless the agency treats all decisions of PAS officials as precedential, in determining whether and under what circumstances to treat such decisions as precedential, the agency should consider the factors listed in Paragraph 2 of Recommendation 2022–4, *Precedential Decision Making in Agency Adjudication.*

16. Each agency periodically should review petitions for review and decisions rendered by PAS officials to determine whether issues raised repeatedly indicate that the agency, its adjudicators, or the public may benefit from rulemaking or development of guidance.

Adjudicative Support for PAS Officials

17. When a PAS official or collegial body of PAS officials adjudicates individual cases, agencies should assign or delegate case-related functions to non-PAS officials, when appropriate, including:

a. Performing routine tasks such as managing dockets and case filings; managing proceedings, including the submission of materials and the scheduling of oral arguments;

b. Responding to routine motions;

c. Dismissing, denying, and granting petitions for review in routine circumstances when such action is clearly warranted, for example when a petition is untimely, a party requests to withdraw a petition, or the parties to a proceeding agree to a settlement;

d. Conducting the preliminary review of lower-level decisions, evidence, and arguments;

e. Conducting the preliminary evaluation of petitions for review and petitions for reconsideration;

f. Identifying unappealed decisions that may warrant review by a PAS official or collegial body of PAS officials;

g. Encouraging settlement and approving settlement agreements;

h. Conducting legal and policy research;

i. Recommending case dispositions;

j. Preparing draft decisions and orders for review and signature by a PAS official or collegial body of PAS officials;

k. Transmitting decisions and orders to parties and making them publicly available; and

l. Staying decisions and orders pending reconsideration by a PAS official or collegial body of PAS officials or judicial review.

18. When a PAS official or collegial body of PAS officials adjudicates individual cases, the agency should determine which offices or officials are best suited to perform assigned or delegated functions such as those in paragraph 17 in a fair, accurate, consistent, efficient, and timely manner. Possibilities include:

a. Adjudicators and staff who serve at an earlier level of adjudication;

b. Full-time appeals counsel;

c. Advisors to a PAS official;

d. The chief legal officer or personnel under his or her supervision; and

e. A Clerk or Executive Secretary or personnel supervised by such officials.

In making such determinations, the agency should ensure adequate separation between personnel who support a PAS official or collegial body of PAS officials in an adjudicative capacity and those who support the PAS official(s) in an investigative or prosecutorial capacity.

Transparency

19. Each agency should provide updated access on its website to decisions issued by PAS officials, whether or not designated as precedential, and associated supporting materials. In posting decisions, the agency should redact identifying details to the extent required to prevent an unwarranted invasion of personal privacy and any information that implicates sensitive or legally protected interests involving, among other things, national security, law enforcement, confidential business information, personal privacy, or minors. In indexing decisions on its website, the agency should clearly indicate which decisions are issued by PAS officials.

20. Each agency ordinarily should presume that oral arguments and other review proceedings before PAS officials are open to public observation. Agencies may choose to close such proceedings, in whole or in part, to the extent consistent with applicable law and if there is substantial justification to do so, as described in Recommendation 2021–6, *Public Access to Agency Adjudicative Proceedings.*

Development and Publication of Procedures for Adjudication by PAS Officials

21. Each agency should publish procedural regulations governing the participation of PAS officials in the adjudication of individual cases in the **Federal Register** and codify them in the *Code of Federal Regulations.* These regulations should cover all significant procedural matters pertaining to adjudication by PAS officials. In addition to those matters identified in Paragraph 2 of Recommendation 2020–3, *Agency Appellate Systems,* such regulations should address, as applicable:

a. Whether and, if so, which PAS officials may participate directly in the adjudication of cases;

b. The level(s) of adjudication (*e.g.,* hearing level, first-level appellate review, second-level appellate review) at which a PAS official or collegial body of PAS officials have or may assume jurisdiction of a case (see Paragraphs 1–3);

c. Events that trigger participation by a PAS official or collegial body of PAS officials (see Paragraph 4);

d. An exclusive, nonexclusive, or illustrative list of circumstances in which a PAS official or collegial body of PAS officials will or may review a decision or assume jurisdiction of a case, if assumption of jurisdiction or review is discretionary (see Paragraphs 5–6);

e. The availability, timing, and procedures for filing a petition for review by a PAS official or collegial body of PAS officials, including any opportunity for interlocutory review, and whether filing a petition is a mandatory prerequisite to judicial review (see Paragraphs 7 and 9);

f. The actions the agency may take upon receiving a petition (*e.g.,* grant, deny, or dismiss it), and whether the agency's failure to act on a petition within a set period of time constitutes denial of the petition (see Paragraph 8);

g. The form, contents, and timing of notice provided to the parties to a case when proceedings before a PAS official or collegial body of PAS officials are initiated (see Paragraphs 9–10);

h. The record for decision making by a PAS official or collegial body of PAS officials and the opportunity, if any, to submit new evidence or raise new legal issues (see Paragraph 11);

i. Opportunities for oral argument (see Paragraph 12);

j. Opportunities for public participation (see Paragraph 13);

k. The process for determining if participation by a PAS official in a case would violate government-wide or agency-specific ethics standards (see Paragraph 14);

l. Circumstances, if any, in which PAS officials should recuse themselves from participating in a case for reasons not addressed in government-wide or agency-specific ethics standards, and the process for determining whether such circumstances are present (see Paragraph 14);

m. The treatment of decisions by PAS officials as precedential (see Paragraph 15);

n. Any significant delegations of authority to agency adjudicators; appellate boards; staff attorneys; clerks and executive secretaries; other support personnel; and, in the case of collegial bodies of PAS officials, members who serve individually or in panels consisting of fewer than all members (see Paragraphs 17–18);

o. Any delegations of review authority or alternative review procedures in effect when a PAS position is vacant or a collegial body of PAS officials lacks a quorum; and

p. The public availability of decisions issued by PAS officials and supporting materials, and public access to proceedings before PAS officials (see Paragraphs 19–20).

22. An agency should provide updated access on its website to the regulations described in Paragraph 21 and all other relevant sources of procedural rules and related guidance documents and explanatory materials.

Separate Statement for Administrative Conference Recommendation 2024–3 by Senior Fellow Christopher J. Walker and Public Member Melissa F. Wasserman

Filed June 27, 2024

We are pleased to see the Administrative Conference adopt such an important and timely recommendation concerning best practices for agency-head review in administrative adjudication. We write separately to address that which the Administrative Conference prudentially chose not to: ''whether Congress or agencies

should, for constitutional or other reasons, provide for direct participation by [presidentially appointed, Senate-confirmed (PAS)] officials in the adjudication of individual cases under specific programs.'' Our answer is yes.

Elsewhere, we have made the case for why the ''standard model'' for agency adjudication does and should include agency-head final decisionmaking authority. *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication,* 107 Calif. L. Rev. 141 (2019). In our view, agency-head review is valuable because it assists the agency to make precedential policy, to increase consistency in adjudicative outcomes, to gain greater awareness of how a regulatory system is functioning, and to make the agency's adjudicatory efforts more politically accountable.

Regardless of whether one is convinced by our normative arguments, agency-head review is likely now a constitutional requirement. If the Supreme Court did not so conclude in *United States* v. *Arthrex,* 594 U.S. 1 (2021), it came quite close. And the Court is bound to expressly embrace that constitutional rule in the near future. Accordingly, it would be wise for every agency—and Congress, where statutory fixes are required—to ensure some form of direct review by the agency head.

As agencies (and Congress) revisit adjudication systems in light of this constitutional requirement, two parts of the Recommendation are worth underscoring.

First, a constitutional requirement of agency-head final decisionmaking authority does not mean the agency head must review every decision in every case. Especially in higher-volume adjudication systems, agencies should design appellate systems to conduct such review, including the issuance of precedential decisions where appropriate. *See generally* Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.); Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.). In our view, such delegation of final decisionmaking authority would be constitutional under the Supreme Court's evolving approach to separation of powers so long as the agency head preserves the authority to intervene and issue a final decision when necessary.

Second, it is critical, as the Recommendation advises, that ''the agency ordinarily should delegate to one or more non-PAS adjudicators responsibility for conducting initial proceedings (*i.e.,* receiving and evaluating evidence and arguments and issuing a decision).'' Although the Administrative Procedure Act allows the agency head to preside over an evidentiary hearing, that is not—and should not be—the norm. The standard model for agency adjudication has two key structural features: the possibility of a final decision by a politically accountable agency head, as noted above, and an initial hearing and decision by a decisionally independent, tenure-protected agency adjudicator. *See* Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication,* 103 Tex. L. Rev. (forthcoming 2025).

This standard model enables a specific method for political control of agency adjudication, which is both transparent and circumscribed. Importantly, it ensures that an impartial agency adjudicator compiles the administrative record and makes the initial findings and decision. In a world where the Constitution requires political control of final agency adjudication decisions, it becomes all the more important that the hearing-level adjudicator bases the initial decision on the law and a matter's individual facts—and not out of a fear of being fired or otherwise punished for not sharing the politics or policy preferences of the agency head.

Separate Statement for Administrative Conference Recommendation 2024–3 by Public Member John F. Duffy, Joined by Public Members Jennifer B. Dickey, Jennifer L. Mascott, and Kate Todd

Filed June 27, 2024

I respectfully dissent from the promulgation of this Recommendation. The Recommendation instructs agencies that, in many common circumstances, they ''should'' delegate adjudicative power downward into the bureaucracy—*i.e.,* away from officers appointed by the President with the advice and consent of the Senate (''PAS officials'') and toward agency officials not so appointed (''non-PAS'' officials). To make matters worse, the Recommendation tells agencies that they ''should'' limit review by PAS officials so that the lower-level officials will often have the last word in adjudicating many issues, including important factual determinations.

The overall tenor of the Recommendation is, in my view, entirely too much in favor of pushing responsibility away from top agency officials (whose appointment process is controlled by the democratically accountable President and Senators) and toward a far less accountable set of lower-level officials in the bureaucracy. The Recommendation thereby encourages top officials to shun responsibility for the decisions of their agencies. In my view, a body such as ACUS—which is statutorily charged with helping formulate recommendations for action ''by proper authorities'' for ensuring that ''Federal responsibilities may be carried out expeditiously in the public interest'' (5 U.S.C. 591(1))—should be encouraging responsibility, not irresponsibility, at the very highest levels of government.

The Recommendation's encouragement of the downward diffusion of power is particularly evident in six paragraphs. First, paragraph 1 tells agencies that they ''ordinarily should delegate'' to lower-level officials initial adjudicatory responsibilities, including the crucial functions of ''evaluating evidence'' and ''issuing a decision.'' Agencies may well be able lawfully to delegate powers downward into the bureaucracy, but it merely encourages the shirking of responsibility at the top to tell agencies that they ''should''—indeed, ''should ordinarily''—delegate so as to empower an unaccountable or tenuously accountable bureaucracy.

To make matters worse, paragraph 1 goes further to recommend that top-level PAS officials ''should'' exercise initial adjudicative authority ''only if'' a case presents one of two uncommon circumstances, namely, (i) where the matter is ''exceptionally significant or broadly consequential'' or (ii) ''[t]here are unlikely to be disputed issues of fact.'' Thus, the suggested limit on top agency officials engaging in crucial adjudicatory functions such as ''evaluating evidence'' should be limited, outside of ''exceptionally significant or broadly consequential'' circumstances, to those cases where there's very little adjudication of evidence to do. That's not merely permitting higher officials to shun responsibility. It's telling those officials that they ''should'' do so and that any attempts to take back adjudicatory power from the bureaucratic depths ''should'' occur ''only'' in highly unusual and exceptional times.

Second, paragraph 2 continues the pro-delegation push by encouraging agencies to enact policies that, in some class of cases, would ''delegate final decision-making authority to a non-PAS official (*e.g.,* an agency ''Judicial Officer'') or a collegial body of non-PAS officials (*e.g.,* a final appellate board).'' I think the class of such cases should be the null set. In fact, legally it *is* the null set. Even where agency rules appear to delegate ''final'' decisional power to lower-level officials, such delegations can be undone at any time and in any case. Procedural agency rules (*i.e.,* those governing ''agency organization, procedure, or practice'') can be repealed in the blink of an eye—without either notice-and-comment rulemaking or a 30-day waiting period to take effect. *See* 5 U.S.C. 553(c) & (d). Thus, even if an agency previously enacted rules purporting to delegate ''final'' authority to non-PAS officers, such a delegation is an illusion because, under the Constitution, some PAS officer must ''have the discretion to review decisions'' so that ''the President remains responsible for the exercise of executive power.'' *United States* v. *Arthrex,* 594 U.S. 1, 27 (2021). Agencies that follow this ACUS Recommendation and purport to delegate final power down into the bureaucracy are merely misleading the public by disguising the lines of ultimate authority that must remain in the control of PAS officers.

Third, paragraph 5 suffers from a different flaw than the one in paragraphs 1 and 2. While paragraphs 1 and 2 encourage agencies to delegate responsibility downward, paragraph 5 is insufficiently aggressive in instructing agencies when, if power is delegated, review by high-level officers should occur. The Recommendation states that agencies should promulgate policies concerning where such high-level review ''may be exercised'' and that review ''may be warranted'' in several circumstances. In my view, the permissive word ''may'' is precisely wrong. The paragraph should be phrased in terms of ''should'' and not merely ''may.''

A quick review of the circumstances where the Recommendation tells agencies that review ''may be warranted'' demonstrates the point. Where a ''lower-level decision includes an erroneous finding of material

fact'' or ''erroneously interpreted the law or agency policy,'' the higher-level PAS officers in the agency really should intervene and correct the lower-level decision. This ACUS recommendation tells high level agency officers that they ''may'' want to review such decisions, but it's not really necessary to do so. The paragraph is thus consistent with the overall thrust of the Recommendation to push power down into the bureaucracy and to diffuse responsibility, but it's also utterly inconsistent with a Constitution designed to foster transparency, responsibility and accountability at the highest levels of the Executive Branch.

Fourth, paragraph 6 continues the theme of encouraging agencies to curtail higher-level review and responsibility. Where PAS officers serve as ''second-level'' reviewers, this paragraph encourages agencies once again to promulgate policies concerning circumstances in which review ''may be warranted,'' and it then tells agencies that they ''should'' limit second-level review of factual issues to two narrow sets of circumstances: (i) where ''[t]he case presents a novel or important issue of law, policy, or discretion,'' and (ii) where ''[t]he first-level reviewer erroneously interpreted the law or agency policy.'' Importantly, neither of those two circumstances involve incorrect factual determinations.

Thus, in a garden-variety case in which the lower-level decision does not get the law or policy wrong, but the supervising PAS officers believes the lower-level decision may be wildly wrong on the facts, this paragraph recommends that agencies ''should limit'' the review in order to ''avoid multilevel review of purely factual issues.'' For a party aggrieved by a lower-level decision that poorly adjudicated the facts, this paragraph encourages supervising PAS officers to tell the aggrieved party ''too bad—the buck stops at the lower-level official.''

Fifth, while paragraph 11 has a meritorious general goal of preventing parties from withholding evidence and arguments from a lower-level adjudicator where power is delegated downward, it is too restrictive in the set of circumstances in which new matters might be considered by the higher-level official. The first sentence of the paragraph 11 states the unobjectionable principle that higher-level officials engaging in review of a lower-level decision ''ordinarily should limit consideration to the evidence and legal issues considered by the adjudicator who issued that decision.'' That's ''ordinarily'' a good rule, but the next sentence purports to limit exceptions to the ordinary rule to two circumstances ''only.'' Indeed, the sentence emphasizes exceptions begrudgingly, stating that PAS officials should consider new evidence and legal issues ''if at all'' only in the two circumstances set forth. Once again, the tenor of the Recommendation is to restrict the power of higher-level officers to limited categories. That's the wrong approach. Higher-level officers should be told in clear terms that they bear ultimate responsibility for their agencies' actions and that they should engage in all the review they deem necessary in order to make sure that they are comfortable bearing that responsibility.

Sixth, paragraph 17 closes out the pro-delegation theme of the Recommendation by advising that, even where PAS officers do adjudicate individual cases, agencies ''should'' delegate certain case-related functions to non-PAS officials. Some of those case-related functions are truly mechanical, such as ''[t]ransmitting decisions and orders to parties and making them publicly available,'' but many are much more important, such as ''[c]onducting legal and policy research,'' ''[r]ecommending case dispositions,'' and ''[p]reparing draft decisions and orders for review and signature by a PAS official or collegial body of PAS officials.'' Research into law and policy and the subsequent drafting of decisions are crucial functions of adjudication, and the high-level PAS officers in an agency should be afforded the time and resources to perform those functions. They should not be relegated merely to supplying the ''signature'' to validate decisions researched and drafted by others.

President Harry Truman famously had a sign on his desk reading: ''The buck stops here!'' See *https://www.trumanlibrary.gov/education/trivia/buck-stops-here-sign* (setting forth images of Truman's wooden desk sign). That principle is not merely folksy wisdom; it has constitutional dimension. As the Supreme Court recently reaffirmed in *United States* v. *Arthrex,* the Take Care Clause and other features of Article II require that the President be ''responsible for the actions of the Executive Branch'' and that he ''cannot delegate [that] ultimate responsibility or the active obligation to supervise that goes with it.'' 594 U.S. 1, 11 (2021) (internal quotations omitted). A corollary of that principle is that, as the *Arthrex* decision confirms, high-level PAS officers cannot be relieved of ''responsibility for the final decisions'' of the subordinate officers under their supervision. Id. at 15. In short, the tenor of the *Arthrex* decision is to prevent the diffusion of responsibility deep into the bureaucracy. For decisions within an Executive agency, the buck has to stop with the PAS officers and, ultimately, with the President who has to bear ultimate responsibility.

The thrust of this ACUS Recommendation is the exact reverse of those principles. High-level PAS officers are encouraged to push down adjudicatory responsibility and then to limit their review of the resulting lower-level decisions. That's a charter for the diffusion of power in the depths of the bureaucracy, and the very opposite of responsible administration within the Executive Branch.

Separate Statement for Administrative Conference Recommendation 2024–3 by Public Member Jennifer L. Mascott

Filed June 28, 2024

I signed onto the concerns raised by Professor John Duffy and joined by Kate Todd and Jenn Dickey because the Appointments Clause requirements of Article II of the U.S. Constitution are an important constraint ensuring that government officials exercise authority in a way that is accountable back to elected officials and ultimately the American public. Therefore, under the Appointments Clause, ''officers of the United States'' who exercise that authority must be selected by the President subject to Senate consent or by the President alone, a department head, or a court of law. U.S. Const. art. II, section 2, clause 2 (''He . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.'').

This ACUS recommendation inverts that hierarchy by recommending that decisions be pushed lower into the administrative bureaucracy rather than ensuring that appointed officials must take responsibility for the outcomes of executive adjudication. Today the United States Supreme Court recognized the importance of this democratic accountability structure by removing certain decisions from adjudicators within the Securities and Exchange Commission, noting that common-law securities fraud claims must be resolved by Article III courts with jury trial protections. *See SEC* v. *Jarkesy,* _ _S. Ct. __(2024). In instances where common law judicial authority is being exercised in adjudication, the Article III presidentially appointed judicial, and jury system, must resolve those claims at the federal level. In instances of executive adjudication, ultimately the President must take responsibility for final outcomes by supervising officers whose nomination and appointment he oversees and directs. Congress further has a role by constitutionally being required to create the offices those decisionmakers fill.

Therefore, I respectfully dissent from the June 2024 ACUS Recommendation addressing the Participation of Senate-Confirmed Officials in Administrative Adjudication.

Administrative Conference Recommendation 2024–4

Managing Congressional Constituent Service Inquiries

Adopted June 13, 2024

Since the country's earliest years, constituent services have been a cornerstone of the representational activities of members of Congress. Thousands of people each year contact their elected representatives for help accessing federal programs or navigating adjudicative and other similar administrative processes. Elected representatives and their staff often submit requests to federal agencies on behalf of their constituents in such situations. This Recommendation refers to such requests as constituent service, or ''casework,'' [1] requests. In most circumstances, the resolution of an individual's issue should not require the assistance of the individual's elected

[1] This Recommendation and the best practices it identifies are intended to assist agencies with improving their management and resolution of congressional casework requests. Agency management of congressional requests directed towards programmatic or policy oversight is beyond the scope of this Recommendation.

representative or his or her staff.[2] However, these casework requests often appear to be helpful in ensuring appropriate agency action. For agencies, congressional casework requests may reveal broader, systemic problems with their policies and procedures. For Congress, casework requests may also play an important role in oversight of executive-branch agencies, allowing members of Congress to gain greater awareness of the operation and performance of the programs Congress authorizes and funds.

Today, every member of Congress employs ''caseworkers,'' both in Washington, DC, and in local offices, who help constituents with requests ranging from the simple, such as assistance with government forms, to the complex, such as correcting errors in veterans' service records. While nearly all agencies receive congressional casework requests, the agencies most frequently contacted include the Department of Veterans Affairs, Internal Revenue Service, Social Security Administration, Department of State, and U.S. Citizenship and Immigration Services.[3]

Agencies have developed practices for receiving, processing, and responding to requests and interacting with congressional caseworkers. There is significant variation in these practices across a number of dimensions.

Organization: Some agencies assign responsibility for managing casework requests to a centralized congressional liaison office, while others assign that responsibility to regional offices and staff that are empowered to work directly with caseworkers located in members' state or district offices.

Technology: Some agencies continue to use ad hoc, legacy systems to receive, process, and respond to casework requests, while others employ new technologies like internal electronic case management systems[4] and public-facing, web-based portals[5] to receive, process, and respond to casework requests in a more accurate, efficient, transparent, and timely manner.

Procedures: Many agencies have developed standard operating procedures (SOPs) for managing casework requests and made them available to caseworkers and the public. These SOPs vary widely in their content, scope, and level of detail. Some agencies have also produced handbooks and other informational materials like flowcharts and plain-language summaries of their SOPs to educate and assist caseworkers.

Agencies are also subject to differing legal requirements that affect when, how, and what agency personnel can communicate to congressional caseworkers in responding to a casework request. These legal requirements, including the Privacy Act of 1974 and the Health Insurance Portability and Accountability Act of 1996 typically bar agencies from sharing records or information that contain protected or personally identifiable information with congressional caseworkers unless the constituent provides an executed expression of consent.[6]

Recognizing the unique and important role that constituent services play in agency-congressional relations and congressional oversight of federal programs, this Recommendation offers best practices to help agencies receive, process, and respond to congressional casework requests in an accurate, efficient, transparent, and timely manner. Of course, agencies differ with respect to the volume of casework requests they receive, the communities they serve, their operational needs, their statutory requirements, and the resources available to them. This Recommendation recognizes that when adopting or reviewing practices for receiving, processing, and responding to casework requests and interacting with congressional caseworkers, agencies may need to tailor these best practices to their unique circumstances.

Recommendation

Adopting Standard Operating Procedures

1. Agencies, especially those that receive a large volume of congressional casework requests, should develop standard operating procedures (SOPs) for tracking and managing such requests. Topics that SOPs should address include, as appropriate:

a. The agency office(s) or title(s) of personnel responsible for receiving, processing, and responding to congressional casework requests and interacting with congressional caseworkers, and the responsibilities of such office(s) or personnel;

b. The procedure by which congressional caseworkers should submit casework requests to the agency, including releases, waivers, or other documentation required by law;

c. The procedure by which agency personnel receive, process, and respond to requests, including: (i) intra-agency assignments of responsibility for the preparation, review, and approval of draft responses; (ii) constraints on agency personnel's ability to provide information in response to a casework request; (iii) circumstances in which a casework request should be elevated for review by program or agency leadership; and (iv) the process by which agency personnel responsible for handling casework requests communicate with other agency personnel, including ombuds, when working to resolve a casework request, consistent with ex parte rules;

d. The agency's use of electronic case management or other systems employed for managing casework requests and status updates, including the use of a trackable unique identifier such as a docket number or case number (see Paragraph 6);

e. The agency's procedures for monitoring the progress of responses to each casework request (see Paragraphs 10–11);

f. The major legal requirements, if any, that may restrict the agency's ability to provide information to a congressional caseworker;

g. The types of communications that the agency provides to congressional caseworkers upon receiving a casework request (*e.g.,* a notice acknowledging receipt), while processing a request (*e.g.,* periodic status updates), and in responding to a request (*e.g.,* a letter, email, or other communication that explains action taken by the agency to resolve the request);

h. Circumstances in which agency personnel will prioritize certain casework requests, including on a temporary basis to address emergencies, and how the agency's processing of prioritized requests differs from its handling of non-prioritized requests;

i. The kinds of assistance or relief that the agency can and cannot provide in response to a casework request; and

j. Performance goals and measures for responding to casework requests (see Paragraph 9).

2. Agencies should make their SOPs on matters described in Paragraphs 1(a)–1(i) publicly available on their websites as a single, consolidated document along with plain-language materials that succinctly summarize them.

3. Agencies should provide regular training designed for both new and experienced agency personnel involved in receiving, processing, and responding to congressional casework requests to ensure their familiarity and compliance with agency SOPs.

Managing Casework Requests

4. Agencies should not automatically close out incoming casework requests that do not include information or documentation required for the request to be processed. Instead, agency personnel should notify congressional caseworkers that their submissions are incomplete and cooperate with the congressional caseworkers' efforts to remedy the deficiency.

5. When agencies complete a casework request, they should provide written notice to the congressional caseworker or office, unless the caseworker or office has indicated that no written response is necessary.

Using Technology To Streamline Request Management and Resolution

6. Consistent with their resources, agencies that receive a large volume of congressional casework requests should adopt systems, such as electronic case management systems and web-based portals, to receive, process, and respond to requests in an accurate, efficient, transparent, and timely manner. Such systems should allow agency personnel to receive, process, and respond to casework requests consistent with established SOPs and allow managers to monitor the status of requests and evaluate key performance goals and measures.

7. When considering adoption or development of an electronic case management system or web-based portal,

[2] Many agencies provide avenues for members of the public to seek assistance or redress of grievances directly from the agency, such as through agency ombuds. *See* Admin. Conf. of the U.S., Recommendation 2016–5, *The Use of Ombuds in Federal Agencies,* 81 FR 94316 (Dec. 23, 2016).

[3] *See* Sean J. Kealy, Congressional Constituent Service Inquiries 20 (June 5, 2024) (report to the Admin. Conf. of the U.S.).

[4] *Cf.* Admin. Conf. of the U.S., Recommendation 2018–3, *Electronic Case Management in Federal Administrative Adjudication,* 83 FR 30686 (June 29, 2018).

[5] *Cf.* Admin. Conf. of the U.S., Recommendation 2023–4, *Online Process in Agency Adjudication,* 88 FR 42682 (July 3, 2023).

[6] *See* Kealy *supra* note 3, at 11–12.

agencies should consult with similarly situated agencies or units with particular expertise that may be able to share lessons learned during the adoption or development of similar systems.

8. In developing and modifying electronic case management systems and web-based portals, agencies should solicit feedback and suggestions for improvement from agency managers and personnel and, as appropriate, congressional caseworkers.

Measuring Agency Performance

9. Agencies should adopt performance goals for processing congressional casework requests and, for each goal, objective measures that use data collected consistent with Paragraph 10 to evaluate whether agency personnel are processing and responding to congressional casework requests successfully.

10. Agencies should collect data (to the extent possible, in a structured format) to allow managers to track and evaluate, as applicable:

a. Processing times for casework requests;

b. The congressional offices or caseworkers from which requests originate;

c. Agency actions taken in response to casework requests;

d. The nature, timing, and substance of communications between agency personnel and members of Congress and their caseworkers regarding specific casework requests;

e. The frequency with which members of Congress and their caseworkers resubmit the same request, for example, because the agency prematurely closed a previous request without fully responding to the caseworker's inquiry, and the reason(s) for the resubmission;

f. Training and other assistance that agency personnel provide to members of Congress and their caseworkers regarding casework generally;

g. The identities and roles of agency personnel who work on casework requests; and

h. Any other data the agency determines to be helpful in assessing the performance of their processes for receiving, processing, and responding to casework requests.

11. Agencies should evaluate on an ongoing basis whether they are meeting performance goals for processing congressional casework requests and, as appropriate, identify internal or external factors affecting their performance, identify opportunities for improvement, and predict future resource needs.

12. Agencies periodically should reassess performance goals and measures, and update them as needed, to ensure that they continue to serve as accurate indicators of good performance consistent with available resources, agency priorities, and congressional expectations. Additionally, agencies periodically should reassess their data collection practices and update them as needed to ensure managers can track and evaluate performance accurately over time.

13. Senior agency officials regularly should consider whether issues raised in congressional casework requests indicate broader policy issues or procedural hurdles facing members of the public which the agency should address.

Communicating Effectively With Congress

14. Agencies should foster strong working relationships with congressional caseworkers and maintain open lines of communication to provide information to and receive input from caseworkers on agency procedures and facilitate efficient resolution of casework requests. Options for fostering such relationships include:

a. Providing a point of contact to whom caseworkers can direct questions about individual casework requests or casework generally;

b. Maintaining a centralized web page on the agency's website, consistent with Paragraph 2, where caseworkers can access the agency's SOPs; any plain language materials that succinctly summarize the agency's SOPs; and any releases, waivers, or other documentation that caseworkers must submit with requests;

c. Providing training or other events—in person in Washington, DC, or regionally, or online in a live or pre-recorded format—through which agency personnel can share information with congressional caseworkers about the agency's procedures for receiving, processing, and responding to congressional casework requests (and, for agencies that frequently receive a high volume of casework requests, holding these events regularly and either in person or live online, to the extent practicable, in a manner that facilitates receipt of user experience feedback);

d. Participating in training or other casework-focused events organized by other agencies and congressional offices, including the Office of the Chief Administrative Officer of the House of Representatives and the Senate's Office of Education and Training; and

e. Organizing periodic, informal meetings with congressional offices and caseworkers with whom the agency regularly interacts to answer questions.

15. Agencies periodically should solicit input and user experience-related feedback from congressional caseworkers on the timeliness and accuracy of agencies' responses to casework requests.

16. When communicating with congressional caseworkers in the course of receiving, processing, or responding to casework requests, agencies should ensure that each communication identifies, as appropriate, any applicable legal constraints on the agency's ability to provide the information or assistance requested.

17. Congress should consider directing its training or administrative offices, such as the Office of the Chief Administrative Officer of the House of Representatives and the Senate's Office of Education and Training, to create a web page that consolidates links to agencies' SOPs in one place for ready access by congressional caseworkers. Agencies should cooperate with any such effort, including by alerting the designated offices to any changes to the web page at which their SOPs may be accessed.

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BILLING CODE 6110–01–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Food Distribution Program: Value of Donated Foods from July 1, 2024 Through June 30, 2025

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the national average value of donated foods or, where applicable, cash in lieu of donated foods, to be provided in school year 2025 (July 1, 2024 through June 30, 2025) for each lunch served by schools participating in the National School Lunch Program (NSLP), and for each lunch and supper served by institutions participating in the Child and Adult Care Food Program (CACFP).

DATES: Implementation date: July 1, 2024.

FOR FURTHER INFORMATION CONTACT: Ruth Decosse, Program Analyst, Policy Branch, SNAS Policy Division, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Place, Alexandria, VA 22314, or telephone 703–305–2746.

SUPPLEMENTARY INFORMATION: These programs are located in the Assistance Listings under Nos. 10.555 and 10.558 and are subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V, and final rule related notice published at 48 FR 29114, June 24, 1983.)

This notice imposes no new reporting or recordkeeping provisions that are subject to Office of Management and Budget review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) and thus is exempt from the provisions of that Act. This notice was reviewed by the Office of Management and Budget under Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

National Average Minimum Value of Donated Foods for the Period July 1, 2024 Through June 30, 2025

This notice implements mandatory provisions of sections 6(c) and 17(h)(1)(B) of the Richard B. Russell National School Lunch Act (the Act) (42 U.S.C. 1755(c) and 1766(h)(1)(B)). Section 6(c)(1)(A) of the Act establishes