



Administrative Conference Recommendation 2023-8

User Fees

Adopted December 14, 2023

Federal agencies charge user fees as part of many programs. For purposes of this Recommendation, a federal agency “user fee” is (1) any fee assessed by an agency for a good or service that the agency provides to the party paying the fee, as well as (2) any fee collected by an agency from an entity engaged in, or seeking to engage in, activity regulated by the agency, either to support a specific regulatory service provided to that entity or to support a regulatory program that at least in part benefits the entity.¹ User fees serve many purposes, for example, to shift the costs of a program from taxpayers to those persons or entities whom the program directly benefits, to supplement general revenue, or to incentivize or discourage certain behavior.

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

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

¹ Erika Lietzan, *User Fee Programs: Design Choices and Processes 6* (Nov. 9, 2023) (report to the Admin. Conf. of the U.S.).

² 31 U.S.C. § 9701.



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

There have been significant developments since ACUS last addressed this topic in 1987. Congress and agencies have continued to expand the collection of and reliance on user fees,⁴ and OMB revised Circular A-25 in 2017 to update federal policy regarding fees assessed for government services, resources, and goods; provide information on which activities are subject to user fees and the basis for setting user fees; and provide guidance for implementing and collecting user fees.

Today, user fee programs serve many purposes and vary significantly in their design. Some are established by a specific statute. Such statutes may specify the fee amount, provide a formula for calculating fees, or prescribe a standard for the agency to use in establishing reasonable fees (e.g., full or partial cost recovery). Some statutory authorizations are permanent, while others sunset and require periodic reauthorization. Other programs are established by agencies on their own initiative under the IOAA or other authority. Some fees are transactional, while others are paid on a periodic basis. Some fees are set to achieve economic efficiency, while others are set to advance other values, goals, and priorities. Other statutes impose requirements that apply to a user fees program unless Congress specifies otherwise; one example is the Miscellaneous Receipts Act, which requires that money received by the government from any source be deposited into the U.S. Treasury.⁵

When designing user fee programs, Congress and agencies must also consider possible negative consequences such as the potential for fees to adversely affect the quality of agency decision making or its appearance of impartiality; their potential to affect the behavior of private persons and entities in unintended ways; the impact of the fees on low-income people, members of historically underserved communities, and small businesses and other small entities; the agency’s revenue stability; and congressional oversight. The Conference consistently has emphasized the potential for public engagement to help policymakers obtain more

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

⁴ See Lietzan, *supra* note 1, at 3.

⁵ 31 U.S.C. § 3302.



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comprehensive information, enhance the legitimacy of their decisions, and increase public support for their decisions.⁶

Given expanded reliance on user fees, the development of new models for user fee programs, and updated guidance on user fees from OMB, the Conference decided to revisit the subject. This Recommendation represents the Conference's current views on the objectives, design, and implementation of user fee programs by Congress and agencies, and supplements and updates Recommendation 87-4.⁷

RECOMMENDATION

General Considerations

1. In creating or modifying user fees, Congress or agencies, as appropriate, should identify the purpose(s) of an agency's user fee program, such as shifting the costs of a program from taxpayers to those persons or entities whom the program benefits, supplementing general revenue, or incentivizing or discouraging certain behavior. Congress or agencies also should consider whether or not there are reasons for waivers, exemptions, or reduced rates.
2. When establishing a user fee-funded program, especially one with a novel fee structure and one that collects fees from regulated entities, Congress or agencies, as appropriate, should consider whether any feature of the program might inappropriately affect or be perceived as inappropriately affecting agency decision making and whether any steps should be taken to mitigate those effects.
3. Congress or agencies, as appropriate, should consider whether a user fee may have a negative or beneficial effect on the behavior of individuals and entities subject to that fee.

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

⁷ This Recommendation does not address what constitutional limits, if any, may apply to fee-supported agency activities even when congressionally approved.



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Congress or agencies also should consider whether the user fee might have other public benefits, such as promoting equity, reducing barriers to market entry, incentivizing desirable behavior, or producing some other socially beneficial outcome, or might have other public costs. Congress or 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.

4. Congress or agencies, as appropriate, should ensure user fees are not disproportionate in relation to government costs or to the benefits that users receive.

Considerations for Congress

5. When Congress enacts a specific statute, separate from the Independent Offices Appropriations Act, authorizing an agency to collect user fees, it should specify, as applicable:
 - a. *The manner for setting fee levels.* Congress should either determine the amount of the fee, with or without adjustment for inflation, set a formula for calculating it, or alternatively give the agency discretion to determine the appropriate fee (e.g., to achieve a particular purpose or to recover some or all of the costs of providing a good or service or administering a program);
 - b. *Any circumstances in which the agency may or must charge a fee or, conversely, may or must waive or reduce the fee amount.* Congress should determine whether it is appropriate to reduce or eliminate fees for certain individuals or entities to promote equity, reduce barriers to market entry, incentivize desirable behavior, or produce some other socially beneficial outcome;
 - c. *Any required minimum process for setting or modifying fees,* either through the notice-and-comment rulemaking process set forth in 5 U.S.C. § 553 or an alternative process, including requirements for public engagement;
 - d. *Any authorizations, limitations, or prescriptions pertaining to the manner in which the agency may collect fees;*



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- e. *Any required process for enforcing the obligation to pay user fees and any penalties for failure to pay required fees, including interest (specifying rates);*
 - f. *The availability of collected fees.* Congress should determine whether or not the fees collected by the agency should be deposited in the U.S. Treasury, consistent with the Miscellaneous Receipts Act, 31 U.S.C. § 3302, and made available to the agency only after appropriation;
 - g. *The period during which the agency may expend collected fees.* Should Congress determine that, for reasons of revenue stability, collected fees should remain available to the agency, it should consider, for reasons of oversight, whether they should only be available for a limited period or subject to other requirements or limitations;
 - h. *Any authorizations or prescriptions for the uses for which the agency may expend collected fees;*
 - i. *Any requirement that the agency periodically review its user fees and any required method(s) for doing so (e.g., comparing fee amounts with corresponding costs or recalculating fees based on new developments and information); and*
 - j. *Whether the authority granted under the statute sunsets.*
6. Whenever Congress decides to create a new statutory user fee program, it should reach out to relevant agencies for technical assistance early in the legislative drafting process and it should consider input from interested persons.
 7. Congress should maintain oversight of agencies that operate user fee programs, such as through the appropriations process or authorizing legislation that specifies the purpose, time, and availability for money collected through user fee programs.

Considerations for Agencies

8. When an agency establishes a new user fee program or sets fees under an existing program, it should follow the rulemaking requirements of 5 U.S.C. § 553 unless Congress has specified otherwise. In engaging with interested members of the public, agencies should follow the best practices suggested in Recommendations 2018-7, *Public*



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Engagement in Rulemaking, 2021-3, Early Input on Regulatory Alternatives, and 2023-2, Virtual Public Engagement in Agency Rulemaking.

9. Agencies should communicate clearly to the public the purpose(s) of their user fee programs, the nature of the fee setting process, and the uses for which the agency expends collected fees. Agencies also should be transparent with and engage the public when conducting activities that may affect the design of their user fee programs or the level of their fees, for instance by inviting public participation at early stages such as during cost and demand forecasting and budget formulation.
10. Agencies should maintain an easy-to-find page on their websites describing their user fee-funded programs, identifying and explaining the fees, describing any waivers or exemptions available, identifying the uses for which the agency expends collected fees, and providing links to supporting resources, such as the governing sections of the *United States Code* and the *Code of Federal Regulations*, and recent notices in the *Federal Register*.
11. Agencies should conduct regular reviews, consistent with Recommendation 2021-2, *Periodic Retrospective Review*, of their user fee programs to ensure the programs are meeting their purposes and that the fee levels are appropriate. Agencies also should assess other resulting consequences or effects of the programs, such as those described in Paragraphs 2, 3, and 4.