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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted three recommendations at its Sixty-Ninth Plenary Session. The appended recommendations address: Paperwork Reduction Act Efficiencies; Severability in Agency Rulemaking (formerly titled Minimizing the Cost of Judicial Review; and Electronic Case Management in Federal Administrative Adjudication. A fourth recommendation on the topic of Administrative Judges was recommitted to the committee of jurisdiction for further consideration. A working group convened by the Office of the Chairman presented the Conference's Model Adjudication Rules (rev. 2018).

FOR FURTHER INFORMATION CONTACT: Gisselle Bourns for Recommendations 2018-1 and 2018-2, and Gavin Young for Recommendation 2018-3. For each Recommendation and general information about other projects referenced in this notice, 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. At its Sixty-Ninth Plenary Session, held June 14-15, 2018, the Assembly of the Conference adopted three recommendations.

Recommendation 2018-1, *Paperwork Reduction Act Efficiencies.* This recommendation encourages collaboration between the Office of Information and Regulatory Affairs and federal agencies to maximize opportunities for making the information collection clearance process under the Paperwork Reduction Act more efficient, while still maintaining its integrity. The recommendation also encourages using generic clearances and common forms more frequently, providing more training to agencies, and improving several other aspects of the information-collection clearance process.

Recommendation 2018-2, *Severability in Agency Rulemaking* (formerly titled *Minimizing the Cost of Judicial Review*). This recommendation encourages federal agencies that anticipate litigation over their rules to consider early in the rulemaking process whether a rule is severable—that is, divisible into portions that can and should function independently. It also identifies steps agencies should take if they intend that portions of a rule should continue in effect even though other portions have been held unlawful on judicial review. In addition, it encourages courts reviewing an agency rule to solicit the parties' views on the issue of severability in appropriate circumstances.

Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*. This recommendation offers guidance for agencies considering whether and how to implement an electronic case management system. It provides factors for agencies to consider in weighing the costs and benefits of an electronic case management system; sets forth measures an agency should take to ensure privacy, transparency, and security; and describes ways an electronic case management system may improve adjudicatory processes.

A proposed recommendation addressing agency practices related to the selection, oversight, evaluation, discipline, and removal of administrative judges who are not administrative law judges was also on the agenda of the Sixty-Ninth Plenary Session; however, the Assembly voted to recommit the proposed recommendation to the Committee on Adjudication for further consideration—particularly in light of a then-pending Supreme Court decision that may have had bearing on the recommendation (i.e., *Lucia v. SEC*, 585 U.S. ___ (2018)).

In addition to adopting three recommendations, the Assembly received and commented on a revised version of the Model Adjudication Rules (rev. 2018) prepared by a working group convened by the Conference's Office of the Chairman. The revised Rules offer agencies a complete set of model procedural rules—governing prehearing proceedings, hearings, and appellate review—to improve the fairness and efficiency of their adjudication programs. Once completed, the Rules will be published on the Conference's website and noticed in the Federal Register. Public comment on the revised Rules had been sought previously. *See* 83 Fed. Reg. 2958 (Jan. 22, 2018).

The Appendix below sets forth the full texts of the three adopted recommendations. The Conference will transmit them to affected entities, which may include Federal agencies, Congress, and the Judicial Conference of the United States. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at: www.acus.gov/69thPlenary.

Dated: June 26, 2018

Shawne C. McGibbon,

General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2018-1

Paperwork Reduction Act Efficiencies

Adopted June 14, 2018

The Paperwork Reduction Act (PRA) created the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget to oversee information policy in the executive branch.[1] OIRA's oversight responsibilities include the review and approval of federal agencies' information collections from the public. Information collections are government requests for structured information, such as those requests for information issued through report forms, application forms, schedules, questionnaires, surveys, and reporting or recordkeeping requirements.[2] The goal of the OIRA review process is to ensure that the burden of information collection on the public is justified by the utility of the information to the government. This Recommendation primarily concerns the interaction between agencies and the OIRA review process.

[1] The PRA was enacted in 1980 and has since been amended twice, in 1986 and 1995. *See* Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified at 44 U.S.C. §§ 3501–3521).

[2] 5 C.F.R. § 1320.3(c)(1), (h)(4) (2018). The PRA applies to the collection of structured information, meaning requests for information calling for either answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, or answers to questions posed to agencies which are to be used for general statistical purposes. *See* 44 U.S.C. § 3502(3) (2018).

Under the OIRA review process, when an agency seeks to collect structured information from ten or more members of the public,[3] it must follow a series of steps.[4] It must first publish a notice in the Federal Register and give the public sixty days to comment. Once the comment period ends, the agency must submit the proposed information collection to OIRA with a detailed supporting statement, ordinarily using the Regulatory Information Service Center and Office of Information and Regulatory Affairs Combined Information System (ROCIS), the computer system used by agencies to submit information collections to OIRA. At the same time, the agency must also publish a second notice in the Federal Register asking for comments on the information collection it provided to OIRA. After the thirty days for public comments have elapsed, OIRA has another thirty days to decide whether to approve or disapprove the information collection.

Expedited Clearance Processes

The process of obtaining OIRA approval for an information collection can be lengthy.[5] To address this, OIRA has issued a series of memoranda designed to highlight existing processes that shorten the review time of certain types of information collections, while maintaining the integrity of the review process.[6] The memoranda discuss several categories of information

[3] *See* 44 U.S.C. § 3502(3)(A)(i); 5 C.F.R. § 1320.3(c)(4).

[4] *See* 44 U.S.C. §§ 3506–3507; 5 C.F.R. pt. 1320.

[5] Stuart Shapiro, The Paperwork Reduction Act: Research on Current Practices and Recommendations for Reform 26 (Feb. 15, 2012) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-draft-paperwork-reduction-act-report (stating that reviews can take from six to nine months).

[6] *See* Cass Sunstein, OIRA Administrator, Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf; Cass Sunstein, OIRA Administrator, Paperwork Reduction Act – Generic Clearances (May 28, 2010), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf; Cass

collections that may qualify for expedited clearance from OIRA, such as generic clearances, fast-tracks, and common forms.[7] Generic clearances are generally intended for "voluntary, low-burden, and uncontroversial collections," not for ones with substantive policy impacts.[8] The fast track process, a subset of generic clearances, was designed to encourage agencies to solicit feedback about their services, and is generally used for information collections that focus on customer service feedback.[9] Common forms are information collections that can be used by two or more agencies, or government-wide, for the same purpose.[10]

Agencies' Use of Expedited Clearance Processes

Agencies have used the expedited clearance processes offered by OIRA in varying degrees. Agencies' use of new generic clearances and fast tracks increased after OIRA

Sunstein, OIRA Administrator, New Fast-Track Process for Collecting Service Delivery Feedback Under the Paperwork Reduction Act (June 15, 2011), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-26.pdf; Howard Shelanski, OIRA Administrator, Flexibilities under the Paperwork Reduction Act for Compliance with Information Collection Requirements (July 22, 2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/pra_flexibilities_memo_7_22_16_finalI.pdf.

[7] Agencies can also take advantage of expedited approval processes for the following additional categories of information collections: emergencies, non-substantive changes, *de minimis* changes, data search tools and calculators, challenges or prizes, and certain requests for information through social media. *See* Shelanski, *supra* note 6.

[8] When an agency asks for approval of a generic clearance, it is asking for approval of a series of related information collections under a single, umbrella request. The umbrella request describes the individual collections that would fall under it. The umbrella request then goes through the entire PRA process. If OIRA approves the umbrella request for a generic clearance, the individual collections covered by that clearance can be submitted through an expedited approval process in which OIRA reviews the proposed collection within ten days of receipt. *See id.*

[9] The fast track process borrows heavily from the generic clearance process, but fast tracks have a narrower range of uses primarily concerning customer feedback and OIRA reviews requests under the fast-track clearance within five working days. *See id*.

[10] Under the common form approval process, a "host" agency secures approval of the collection from OIRA. Later, other agencies that wish to use the form can avoid the two Federal Register notices required under the PRA and merely inform OIRA of any additional burden on the public that the use of the form might create. *Id.*

publicized them and provided training to agencies on their use in 2011, but has since decreased (although agencies continue to seek OIRA approvals extensively under preexisting generic clearances).[11] This is in part because the most likely candidates for generic clearances and fast-track approval were the first ones submitted by agencies. But these techniques have likely also faded in the consciousness of agencies, particularly with the turnover of agency personnel. There also appears to be very little use of the generic clearance and fast track processes to test the usability of forms or obtain feedback to improve agency websites, even though OIRA has indicated that usability testing is a good fit for these processes.[12]

Common forms could also be used to expedite approval of collections and to promote data sharing among agencies, limiting the need for duplicative information collection. Agencies have not used common forms, however, as often as fast-tracks and generic clearances. This may be due to barriers that make it difficult for agencies to collaborate with one another to develop common forms.[13] There also appears to be confusion at agencies about how they should report the burden created by an information collection conducted through a common form.[14] Finally, agencies sometimes avoid common forms because they want to ask for information to suit

[11] Stuart Shapiro, Paperwork Reduction Act Efficiencies 12–17 (May 14, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/paperwork-reduction-act-efficiencies-final-report.

[12] *See id.* at 26–27. Not all types of activities related to testing the usability of forms or website feedback would be covered by the PRA. Direct observations of users interacting with digital services tools are not subject to the PRA. *See* Shelanski, *supra* note 6.

[13] *See* Shapiro, *supra* note 11, at 17–19.

[14] *Id.* Federal "agencies must report their annual burden as part of OIRA's required submission to Congress of an Information Collection Budget." *Id.* at 18 n.38.

particular agency needs.[15] Regardless, it appears that there is a great deal of untapped potential for the use of common forms.[16]

Other Opportunities for Facilitating the Clearance Process

Aside from the expedited clearance processes outlined by OIRA, there are other opportunities for making the information collection clearance process more efficient, while still maintaining its integrity. One possibility would be for an agency to review all of the collections that are coming up for renewal without changes for a particular time period and to consolidate the Federal Register notices for those renewals. While there is a concern that combining unrelated collections might be confusing to the public, there are also offsetting benefits in terms of consistent information collection—especially for those collections that have previously undergone the review process.

Another opportunity to achieve efficiencies is to update the supporting statement that agencies must submit with each submission of a proposed information collection to OIRA for review.[17] The supporting statement is intended to allow OIRA to evaluate the collections against the statutory criteria in the PRA. Developing it is a significant component of the time it takes agencies to prepare information collections for review, especially new collections. Currently,

[15] Sometimes this is because statutes require agencies to collect data elements not on the common form; in other cases, it may be the agency's preference. *Id.* at 17–19.

[16] *Id.* at 17–19, 24.

[17] The supporting statement consists of the answers to eighteen questions. *Id* at 22. For collections with a statistical component, there is a second part to the supporting statement consisting of five additional questions. *Id.*

neither agencies nor OIRA are satisfied with it.[18] Refining the supporting statement with the input of agency PRA clearance officers has the potential to reduce the burden on agencies while increasing the practical utility of submissions to OIRA.

Finally, some agencies have also reported difficulties and confusion in using ROCIS.[19] Improvements to ROCIS could reduce agency burden, make agency submissions more useful to OIRA, and increase the usability of the data collected by ROCIS to agencies and the public.

Recommendation

1. To the extent practicable, the Office of Information and Regulatory Affairs (OIRA) should provide training opportunities for agencies on the Paperwork Reduction Act (PRA). The training topics could include basic administration of the PRA; expedited clearance processes, including generic clearances and the use of common forms; and other new and emerging topics in information collection. The method of training could include in-person training of PRA clearance officers, as well as new training materials.

2. Agencies should make greater use of generic clearances to comply with the PRA when engaging in usability testing of websites and other applications.

3. OIRA should encourage the development of common forms. OIRA should ask agencies to provide a list of potential common forms, and facilitate agency coordination and

[18] Filling out some parts of the form for the supporting statement is perceived by agencies as a *pro forma* exercise, and filling out other parts is perceived as a needlessly time-consuming exercise. From OIRA's perspective, agencies focus too much on discussing burdens of the proposed information collection and not enough time discussing its practical utility. *Id.* at 25.

[19] *Id.* at 22–23, 25–26.

implementation of promising candidates. This list should be included in the Annual Information Collection Budget report that OIRA submits to Congress every year.

4. For information collection requests without changes from previous approvals, OIRA should clarify that agencies may consolidate the first Federal Register notice for extensions by taking the following steps:

    a. The agency would choose a time period (e.g., six months or a year) and review all of its related collections that are coming up for renewal during that period.

    b. The agency would then place a single notice in the Federal Register to inform the public that those collections are available for public comment.

5. OIRA, in consultation with agency PRA clearance officers, should revise the supporting statement requirements on information collection submissions to ensure the requirements minimize preparation time and remain practically useful.

6. OIRA, in consultation with agency PRA clearance officers, should make improvements to ROCIS, the internal computer system used to submit information collections to OIRA. OIRA should consider, for example, improvements to the user interface, workflow, and the usability of ROCIS, data to agencies and to the public.

7. OIRA should continue to consult with a working group consisting of agency PRA clearance officers, and with other appropriate experts, to continue improving the PRA clearance process.

Administrative Conference Recommendation 2018-2

Severability in Agency Rulemaking

Adopted June 15, 2018

If a court holds portions of a rule unlawful, and the agency has been silent about severability, then the default remedy is to vacate the entire rule, including those portions that the court did not hold unlawful.[1] This outcome can impose unnecessary costs on the agency, if it chooses to re-promulgate the portions of the rule that the court did not hold unlawful but nonetheless set aside, and on the public, which would forgo any benefits that would have accrued under those portions of the rule.

In recent years, as administrative rules have become more complex,[2] some agencies have adapted the concept of severability originally developed in the legislative context. Specifically, some agencies have included provisions in some of their rules stating that if portions of the rule are held unlawful in court, other portions not held unlawful should be allowed to go into or remain in effect.[3] To date, only a handful of agencies have used these severability clauses,[4] yet many other agencies issue rules that may be good candidates for considering the possibility of severability.

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[1] Admin. Conf. of the U.S., Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,269, 76,272 (Dec. 5, 2013); Ronald M. Levin, *Judicial Remedies*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 251, 251–52 (Michael E. Herz et al. eds., 2d ed. 2015).

[2] Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 YALE L.J. __ (forthcoming 2018).

[3] A recent article on severability clauses identified fifty-nine instances in which agencies had included severability clauses in their rules as of October 2014. Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2349–52 (2015).

[4] The Federal Trade Commission and Environmental Protection Agency have generated the largest volume of severability clauses. *Id.* at 2318–19.

This Recommendation suggests best practices for agencies in addressing severability in a rulemaking. Addressing severability is not appropriate in every rulemaking. Indeed, if agencies include severability clauses without a reasoned discussion of the rationale behind them and how severability might apply to a particular rule, the courts will be less likely to give them much weight. By contrast, addressing severability can be particularly valuable when an agency recognizes that some portions of its proposed rule are more likely to be challenged than others and that the remaining portions of the rule can and should function independently.

It is not yet clear how principles of severability developed in the context of judicial review of legislation should be adapted to judicial review of agency rules. Nor is it clear how much weight the courts will or should give to an agency's expression of its views on severability. The Supreme Court has never addressed the issue, and the lower courts have reached different results in the context of particular rulemakings.[5]

General principles of administrative law suggest that the agency's views on severability should be most persuasive when: (1) the agency includes its severability proposal in the text of the proposed rule and the agency's initial rationale for severability is explained in the preamble to the proposed rule; (2) these initial positions are made available for comment by interested parties; (3) the agency addresses its determination of severability in the text of the final rule; (4) the agency addresses the rationale for severability in the statement of basis and purpose

[5] *See, e.g.*, Consumer Fin. Prot. Bureau v. The Mortg. Law Grp., LLP, 182 F. Supp. 3d 890, 894–95 (W.D. Wis. 2016) (deferring to severability clause on issue of whether the agency intended for the remainder of the rule to stay in effect); High Country Conservation Advocates v. U.S. Forest Serv., No. 13-CV-01723-RBJ, 2014 WL 4470427, at *4 (D. Colo. Sept. 11, 2014) ("I conclude that the severability clause creates a presumption that the North Fork Exception is severable . . . ."); *cf.* MD/DC/DE Broads. v. FCC, 253 F.3d 732, 734–36 (D.C. Cir. 2001) (declining to honor an agency's severability clause because the agency did not adequately explain how the remaining portion of the rule would have served the goals for which the rule was designed).

accompanying the final rule (in the same manner as any other substantive policy issue in the rulemaking); and (5) the agency explains how specific portions of the rule would operate independently. While courts may also be willing to consider the agency's view on severability as expressed in agency briefs or at oral argument,[6] courts may be less likely to agree with the agency if the issue of severability comes up for the first time in litigation because of "'the fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel.'"[7]

Sometimes courts have concluded that an agency's intentions are sufficiently clear to support severability, despite the absence of a severability clause or discussion of the issue in the rulemaking.[8] This outcome is more likely, however, if the agency includes a severability clause in the proposed regulatory text; invites comment; and includes in the rule's statement of basis and purpose a reasoned explanation for why the agency believes some portions of the rule can and should function independently.

A separate but related question is how parties to a challenge to an agency rule should address the question of severability during litigation. Litigants may be reluctant to address the issue of severability in their briefs because: (1) it is often not clear in advance which portions of

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[6] Am. Petroleum Inst. v. EPA, 862 F.3d 50, 72 (D.C. Cir. 2017) ("If EPA, or any party, wishes to disabuse us of our substantial doubt with a petition for rehearing, we will of course reconsider as necessary."), *decision modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018).

[7] Nat'l Treasury Emps. Union v. Chertoff, 452 F.3d 839, 867 (D.C. Cir. 2006) (quoting Harmon v. Thornburgh, 878 F.2d 484, 494 (D.C. Cir. 1989)). This is an application of the *Chenery* doctrine, which holds that a reviewing court may not affirm an agency decision on different grounds from those adopted by the agency. *See* SEC v. Chenery Corp., 318 U.S. 80, 92–94 (1943).

[8] *See, e.g.*, Virginia v. EPA, 116 F.3d 499, 500–01 (D.C. Cir. 1997); Davis Cty. Solid Waste Mgmt., 108 F.3d 1454, 1455–56, 1459–60 (D.C. Cir. 1997); Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 62 (D.D.C. 2012), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013).

a rule a court may hold unlawful and on what basis; or (2) they may fear that addressing severability would suggest weakness in their positions on the merits.[9]

Recommendation

1. Early in the process of developing a rule, in addition to other programmatic considerations, agencies that anticipate litigation should consider whether a rule is divisible into portions that could and should function independently if other portions were to be held unlawful on judicial review.

    a. If the agency intends that portions of the rule should continue in effect even if other portions are later held unlawful on judicial review, it should draft the rule so that it is divisible into independent portions that reflect this purpose.

    b. In order to provide members of the public an opportunity for comment, agencies should address the issue of severability in the text of the proposed rule and provide a reasoned explanation for the proposal.

    c. Agencies should likewise address their determination of severability in the text of the final rule and provide a reasoned explanation for that determination in the statement of basis and purpose. Agencies should identify which portions, if any, they intend to be severable and explain how they relate to other portions in the event a court holds some portions of the rule unlawful.

[9] Charles W. Tyler & E. Donald Elliott, Tailoring the Scope of Judicial Remedies in Administrative Law 22 (May 4, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/tailoring-scope-judicial-remedies-administrative-law-final-report.

2. When severability becomes an issue on judicial review, and it has not been previously briefed, courts should solicit the parties' views on severability.

Administrative Conference Recommendation 2018-3

Electronic Case Management in Federal Administrative Adjudication

Adopted June 15, 2018

Courts and adjudicative agencies have increasingly come to rely on technology to manage various aspects of their adjudicative activities. Some of these federal agencies have adopted and implemented a form of electronic management for their casework, but others have not done so. Although practical considerations or resource constraints may sometimes weigh against the use of an electronic case management system (eCMS), agencies can often realize considerable efficiencies and reap other benefits by adopting such a system.

Benefits of an Electronic Case Management System

As referred to here, an electronic case management system includes the functions usually associated with a paper-based case management system from the filing of a case to its resolution and beyond, such as: the initial receipt of the claim, complaint, or petition; the receipt, organization, and secure storage of evidence and briefs; the scheduling of hearings or other proceedings; the maintenance of tools to facilitate the analysis and resolution of the case; and the collection and reporting of data relating to the case, including when evidence was received, the time the case has remained pending, employees who have processed the case, and the outcome of the case, including any agency decision.

An eCMS, properly implemented, may perform these functions in a more efficient and cost-effective manner than a paper-based management system.[1] For example, maintaining paper records can be costly with respect to storage space, mailing fees, and staff time for agency employees needed to receive, store, track, and retrieve records, and locate lost or misfiled records. An eCMS may reduce these costs in addition to reducing processing time and improving interactions with litigants and the public. In addition to improving the traditional functions of a paper-based case management system, an eCMS may also provide new functionalities, such as making structured data available for analysis that can be used to improve an agency's operations.

Perhaps more importantly, an eCMS can assist adjudicative agencies in fulfilling their duties under various laws that impose requirements related to paperwork reduction, agency efficiency, public access to records, and technology management. For example, the Government Paperwork Elimination Act requires that federal agencies use electronic forms, electronic filing, and electronic signatures to conduct official business with the public, when practicable.[2] Further, the E-Government Act of 2002 directs agencies to establish "a broad framework of measures that require using Internet-based information technology to improve citizen access to government information and services."[3] And finally, beyond statutory requirements, an eCMS can also assist

[1] Felix F. Bajandas & Gerald K. Ray, Implementation and Use of Electronic Case Management Systems in Federal Agency Adjudication (May 23, 2018) (report to the Admin. Conf. of the U.S.), https://acus.gov/report/final-report-implementation-and-use-electronic-case-management-systems-federal-agency.

[2] Government Paperwork Elimination Act, Pub. L. No. 105-277, 112 Stat. 2681-749 (1998) (codified at 44 U.S.C. § 3504 note).

[3] E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified at 44 U.S.C. § 101 note).

an agency's implementation of best practices for public access and participation, consistent with the objectives of past ACUS recommendations relating to both adjudication and rulemaking.[4]

Considerations in Adopting an Electronic Case Management System

Despite the advantages of an eCMS, the decision to implement an eCMS must be carefully considered. It may not be cost efficient for every adjudicative agency to implement an eCMS given agency-specific factors such as caseload volume. For example, there may be significant costs associated with the development, purchase, and maintenance of new hardware and software. Further, the need to train agency staff in new business processes associated with the eCMS may also be significant, as the new operations may be substantially different. In addition, an agency may need to allocate resources to ensure that any new eCMS complies with existing legal requirements, such as the protection of private information about individuals, as required by the Privacy Act.[5]

If, after considering the costs, an agency decides to implement an eCMS to partially or fully replace a paper-based case management system, the agency must consider a number of factors in deciding *what* particular eCMS features are to be used and *how* they are to be designed and implemented. Planning for an eCMS implementation thus requires a comprehensive understanding of an agency's structure and business process. Agencies considering implementing or enhancing an eCMS may find further benefit in studying the experiences of

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[4] *See* Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039, 31,039 (Jul. 5, 2017); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269, 76,269 (Dec. 17, 2013); and Admin. Conf. of the U.S., Recommendation 2011-1, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2,257, 2,264 (Jan. 17, 2012).

[5] Privacy Act of 1974 (codified at 5 U.S.C. § 552a), as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (codified at 5 U.S.C. § 101 note).

other agencies' eCMS implementations, and they should examine those experiences carefully, due to the highly fact-specific nature of a consideration of the costs and benefits of an eCMS.

The implementation or expansion of an eCMS deserves full and careful consideration by federal adjudicative agencies, with recognition that each agency is unique in terms of its mission, caseload, and challenges. This Recommendation suggests that agencies implement or expand an eCMS only when they conclude, after conducting a thorough consideration of the costs and benefits, that doing so would lead to benefits such as reduced costs and improved efficiency, accuracy, public access, and transparency without impairing the fairness of the proceedings or the participants' satisfaction with them.

Recommendation

1. Federal adjudicative agencies should consider implementing electronic case management systems (eCMS) in order to reduce costs, expand public access and transparency, increase both efficiency and accuracy in the processing of cases, identify opportunities for improvement through the analysis of captured data, and honor statutory requirements such as the protection of personally identifiable information.

2. Federal adjudicative agencies should consider whether their proceedings are conducive to an eCMS and whether their facilities and staff can support the eCMS technology. If so, agencies should then consider the costs and benefits to determine whether the implementation or expansion of an eCMS would promote the objectives identified in Recommendation 1 as well as the agency's statutory mission without impairing the fairness of proceedings or the participants' satisfaction with them. This consideration of the costs and benefits should include the following non-exclusive factors:

a. Whether the agency's budget would allow for investment in appropriate and secure technology as well as adequate training for agency staff.

b. Whether the use of an eCMS would reduce case processing times and save costs, including printing of paper and the use of staff resources to store, track, retrieve, and maintain paper records.

c. Whether the use of an eCMS would foster greater accessibility and better public service.

d. Whether users of an eCMS, such as administrative law judges, other adjudicators, other agency staff, parties, witnesses, attorneys or other party representatives, and reviewing officials would find the eCMS beneficial.

e. Whether the experiences of other agencies' eCMS implementations provide insight regarding other factors which may bear on the manner of an eCMS implementation.

3. The following possible eCMS features, currently implemented by some federal adjudicative agencies, should be considered by other agencies for their potential benefits:

    a. Web access to the eCMS that allows parties the flexibility to file a claim, complaint, or petition; submit documents; and obtain case information at any time.

    b. Streamlining of agency tasks in maintaining a case file, such as sorting and organizing case files, providing simultaneous access to files and documents by authorized users, tracking deadlines and elapsed age of a case, notifying parties of new activity in a case, and pre-populating forms with data from the case file.

    c. The comprehensive capture of structured and unstructured data that allows for robust data analysis to identify opportunities for improving an agency's operations, budget formulation, and reporting.

    d. Streamlined publication of summary data on agency operations.

4. Federal adjudicative agencies that decide to implement or expand an eCMS should plan and manage their budgets and operations in a way that balances the needs of a sustainable eCMS with the possibility of future funding limitations. Those agencies should also:

    a. Consider the costs associated with building, maintaining, and improving the eCMS.

    b. Consider whether the adoption of an eCMS requires modifications of an agency's procedural rules. This would include addressing whether the paper or electronic version of a case file will constitute the official record of a case and whether filing methods and deadlines need to be changed.

c. Consider whether to require non-agency individuals to file claims, complaints, petitions, and other papers using the eCMS. Such consideration should include the accessibility, suitability, usability, and burden of the eCMS for its likely user population, and whether creating exceptions to electronic filing procedures would assist in maintaining sufficient public access.

d. Create a map or flow chart of their adjudicative processes in order to identify the needs of an eCMS. This involves listing the tasks performed by employees at each step in the process to ensure the eCMS captures all of the activities that occur while the case is pending, from initial filing to final resolution. It also includes identifying how members of the public or other non-agency users will access and interact with the eCMS. To the extent practical, this effort should also involve mapping or flow-charting the legal and policy requirements to decisional outcomes.

e. Put in place a management structure capable of: (1) restoring normal operations after an eCMS goes down (incident management); (2) eliminating recurring problems and minimizing the impact of problems that cannot be prevented (problem management); (3) overseeing a new release of an eCMS with multiple technical or functional changes (release management); (4) handling modifications, improvements, and repairs to the eCMS to minimize service interruptions (change management); and (5) identifying, controlling, and maintaining the versions of all of the components of the eCMS (configuration management).

f. Establish a "service desk," which is a central hub for reporting issues with the eCMS, providing support to eCMS users, and receiving feedback on the

resolution of problems. A service desk should gather statistics of eCMS issues in order to help guide future improvements of the eCMS. A service desk could also enable eCMS users to offer suggestions for improving the eCMS.

g. Plan adequate and timely training for staff on the use of the eCMS.

5. Federal adjudicative agencies that decide to implement or expand an eCMS must do so in such a way that appropriate protections for privacy, transparency, and security are preserved by:

    a. Ensuring that the agency's compliance with the Privacy Act, other statutes protecting privacy, and the agency's own privacy regulations and policies remains undiminished by the implementation or expansion of an eCMS.

    b. To the extent it is consistent with Recommendation 5(a) above, making case information available online to parties and, when appropriate, the public, taking into account both the interests of transparency (as embodied in, for example, the Freedom of Information Act's proactive disclosure requirements) as well as the benefits of having important adjudicative documents publicly available.

    c. Adopting security measures, such as encryption, to ensure that information held in an eCMS cannot be accessed or changed by unauthorized persons.

    d. Ensuring that sensitive information is not provided to unintended third parties through private email services, unsecured data transmission, insider threats, or otherwise.

    e. Keeping track of the evolution of security technologies and considering the adoption of those technologies as they mature in order to ensure the integrity of agency information systems.

6. Federal adjudicative agencies that decide to implement or expand an eCMS should consider how to analyze and leverage data that is captured by the eCMS to improve their adjudicative processes, including through the use of natural language processing, machine learning, and predictive algorithms. Agencies should consider:
    a. Evaluating how eCMS features could generate the types of data that would be useful for evaluating the effectiveness of their adjudicative processes and policies.
    b. Capturing and analyzing such data about adjudicative processes and policies to detect and define problem areas that present opportunities for improvement.
    c. Upon identification of areas for improvement in the adjudication process, taking corrective action, refining performance goals, and measuring performance under the newly improved process.
    d. Hiring staff trained in data science to facilitate data analysis and giving that staff access to subject matter experts within agencies.
    e. Collaborating with other agencies on best practices for data analytics.

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