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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 five recommendations at its Seventy-second Plenary Session. The appended recommendations address: Agency Economists; Independent Research by Agency Adjudicators in the Internet Age; Acting Agency Officials and Delegations of Authority; Public Identification of Agency Officials; and Recruiting and Hiring Agency Attorneys.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2019-5, Keith Holman; for Recommendation 2019-6, Jeremy Graboyes; for Recommendations 2019-7 and 2019-8, Bobby Ochoa; and for Recommendation 2019-9, Todd Rubin. For each of these actions 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 Seventy-second Plenary Session, held on December 12, 2019, the Assembly of the Conference adopted five recommendations.

Recommendation 2019-5, *Agency Economists*, addresses the placement of economists within rule-writing agencies (e.g., centralized versus dispersed throughout the agency) and describes methods for promoting high-quality economic analysis within each of the potential organizational structures. Each potential structure has strengths and weaknesses that can affect the flow of information between economists and decision-makers. The recommendation does not endorse any one organizational structure over another, but rather identifies steps agencies can take to remove structural barriers that can impede the communication of objective, consistent, and high-quality economic analysis to decision-makers during the rulemaking process.

Recommendation 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*, addresses agency adjudicators' increasing reliance on their own factual research—especially internet research—when conducting hearings and deciding cases. Though such independent research can be an efficient means to acquire facts, it can also raise concerns regarding the accuracy of information uncovered and fairness to the litigants. The recommendation encourages agencies to develop publicly available policies on independent research that identify sources of information that are reliable in all cases, set forth standards for adjudicators to apply when assessing the reliability of other sources, and ensure that litigants have ready access to all sources.

Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, offers agencies best practices for promoting greater transparency and compliance with the Federal Vacancies Reform Act of 1998 when a Senate-confirmed position sits vacant. It also addresses the use of delegations of authority in response to staffing vacancies. It urges agencies to determine whether they are subject to the Vacancies Act and, if so, establish compliance processes; improve transparency by disclosing on their websites information about acting

officials and delegations of authority; and provide additional support and training to agency officials responsible for Vacancies Act compliance.

Recommendation 2019-8, *Public Identification of Agency Officials*, promotes the public availability of real-time information about high-level officials leading federal agencies. It encourages agencies to publish on their websites basic information about high-level agency leaders and identify vacant leadership positions and acting officials. It also recommends that the Office of Personnel Management regularly publish on its website a list of high-level agency leaders, as well as an archival list of former Senate-confirmed presidential appointees.

Recommendation 2019-9, *Recruiting and Hiring Agency Attorneys*, urges agencies to avail themselves of the flexibilities available to them when hiring attorneys and offers best practices for structuring their hiring processes. First, it suggests that the Office of Personnel Management offer training for agencies on the alternative processes and flexibilities available to them when they hire attorneys. Then, among other suggestions, it advises agencies to post and disseminate vacancy announcements widely when seeking broad applicant pools; draft announcements clearly and concisely; communicate to applicants any limitations on the number of applicants they will consider; and establish policies for reviewing applications and interviewing candidates.

The Appendix below sets forth the full texts of these five recommendations. The Conference will transmit the recommendations to affected agencies, Congress, and the Judicial Conference of the United States, as appropriate. 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: https://www.acus.gov/meetings-and-events/plenary-meeting/72nd-plenary-session.

Dated: December 20, 2019.

Shawne C. McGibbon,

General Counsel.

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

Administrative Conference Recommendation 2019-5

Agency Economists

Adopted December 12, 2019

Federal regulatory agencies are subject to various requirements to conduct economic analysis when they prepare new regulations. Executive Order 12,866[1] requires that agencies (other than what it designates as "independent regulatory agencies")[2] conduct a "regulatory impact analysis" (RIA) for their "significant regulatory actions," which include regulations likely to have an annual economic impact exceeding $100 million.[3] The RIAs that accompany these regulations explain the potential benefits and costs of the planned regulation.[4] Many of these agencies, along with several independent regulatory agencies, are likewise required by statutes and other executive orders[5] to conduct some form of economic analysis. The analysis requirements imposed by these statutes and executive orders are cross-cutting in certain cases

[1] Exec. Order No. 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).
[2] It excludes "independent regulatory agencies"—those listed in 44 U.S.C. § 3502(5)—from the requirement to prepare an RIA for their rulemakings. *See* Exec. Order No. 12,866, *supra* note 1 § 3(b). These independent agencies include most regulatory boards and commissions (*e.g.*, the National Labor Relations Board, the Federal Energy Regulatory Commission, and the Consumer Product Safety Commission).
[3] *Id*. § 3(f)(1). "Significant regulatory action" also includes any regulatory action that will (a) adversely affect the economy or segments of the economy, (b) interfere with another agency's actions, (c) materially alter the budget or affect required transfer payments, or (d) raise novel legal or policy issues arising out of legal mandates. *Id*. §§ 3(f)(2)–(4).
[4] *Id*. § 6(a)(3)(B).
[5] *See, e.g.*, Exec. Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 11, 1994), Exec. Order No. 13,132, *Federalism*, 64 Fed. Reg. 43,255 (Aug. 10, 1999), Exec. Order No. 13,272, *Proper Consideration of Small Entities in Agency Rulemakings*, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

(e.g., under the Regulatory Flexibility Act[6] and the Unfunded Mandates Reform Act[7]), and agency- or program-specific in other cases.[8]

The regulatory economic analysis agencies produce can be an extremely valuable tool for anticipating and evaluating the likely consequences of proposed and final regulations and informing agency decisions.[9] Several Conference recommendations have sought to improve the quality and transparency of agency regulatory economic analysis.[10] The Conference has not, however, addressed the organizational structure[11] of the economic analysis function.[12]

[6] 5 U.S.C. §§ 601–612.
[7] 2 U.S.C. § 1501 *et seq*.
[8] *See e.g.*, 7 U.S.C. § 19(a) (Commodity Futures Trading Commission), 15 U.S.C. § 77b(b) (Securities Exchange Commission), 15 U.S.C. § 2058(f) (Consumer Product Safety Commission); *see also* Curtis Copeland, Regulatory Analysis Requirements: A Review and Recommendations for Reform (Mar. 3, 2012) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/curtis-copelands-report-regulatory-analysis-requirements. All federal agencies, moreover, must participate in a regulatory planning process that requires a preliminary impact analysis developed at least in part by agency economists. *See* Exec. Order No. 12,866, *supra* note 1, § 4(c).
[9] The basic elements of this analysis include (1) an assessment of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS (2003). An agency's economic analysis sometimes assesses other potential results of a regulation, such as cost-effectiveness, economic feasibility, or distributional consequences.
[10] *See, e.g.*, Admin Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2139 (Feb. 6, 2019); Admin Conf. of the U.S., Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 Fed. Reg. 41,352 (July 10, 2013); Admin Conf. of the U.S., Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801 (Aug. 10, 2012); Admin. Conf. of the U.S., Recommendation 88-7, *Valuation of Human Life in Regulatory Decisionmaking*, 53 Fed. Reg. 39,586 (Oct. 11, 1988); Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28,364 (July 12, 1985).
[11] The way agencies structure their economic impact analyses can, for example, be influenced by executive orders. Executive Order 12,866 requires that agencies designate a Regulatory Policy Officer who "shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive Order." Exec. Order No. 12,866, *supra* note 1, § 6(a)(2); *see also* Exec. Order No. 13,777, *Enforcing the Regulatory Reform Agenda*, 82 Fed. Reg. 12,285 § 2(a) (Mar. 1, 2017) (requiring agencies to designate a Regulatory Reform Officer and a Regulatory Reform Task Force to "oversee the implementation of regulatory reform initiatives and policies").
[12] An early Conference study by then-Professor Stephen Breyer advocated for a more prominent role for economists in agencies and erecting a centralized apparatus for review of economic analysis (a proposal that came to fruition with the creation of the Office of Information and Regulatory Affairs (OIRA). Stephen G. Breyer, Role of Economic Analysis in the Regulatory Agencies 126, 129 (Oct. 12, 1973) (report to the Admin. Conf. of the U.S.).

At present, some agencies[13] task a centralized unit of economists with conducting all regulatory economic analyses ("functional" organization). Examples include the Federal Communications Commission's Office of Economics and Analytics and the Federal Trade Commission's Bureau of Economics.[14] Both units are independent of the offices that write regulations, but they conduct economic analyses to inform decisions about regulations. At other agencies, economists are distributed amongst an agency's program divisions, working alongside other rule development staff ("divisional" organization). At the Department of Energy, for example, the economists who produce RIAs that accompany regulations work under the supervision of the program offices that write the regulations. Still other agencies have economists distributed through various program divisions, as in the divisional mode of organization, but also have economists in a central office that reviews draft regulations and the accompanying economic analyses ("hybrid" organization). Examples of hybrid organizations include the National Center for Environmental Economics at the Environmental Protection Agency, the Office of the Chief Economist in the Department of Agriculture, and the Director of Regulatory Analysis in the Office of the General Counsel at the Department of Transportation.[15] Of course, an agency may have multiple distinct entities tasked with performing economic analysis, and each such entity may fall under a different organizational heading. This is especially true with large or geographically widespread agencies.

Each of these structures has inherent strengths and weaknesses. For instance, a functional organization may limit the number of day-to-day interactions that economists have with rule-

[13] As used in this Recommendation, the term "agency" refers to the specific governmental unit that conducts the regulatory analysis, rather than to a parent agency (e.g., the Occupational Safety and Health Administration rather than the Department of Labor). Of course, when the parent agency is itself issuing a regulation, the term "agency" is intended to encompass it.
[14] Jerry Ellig, Agency Economists 13, 21 (Sept. 3, 2019) (report to the Admin. Conf. of the U.S.) https://www.acus.gov/report/final-report-agency-economists.
[15] *Id*. at 30.

writers, lawyers, and other non-economists within the agency, whereas a divisional organization may impair the objectivity of economic analysis if the economists seek to avoid conflict with their non-economist supervisors. Decision-making authorities, practices, and procedures can be crafted to support the strengths and mitigate the weaknesses of the chosen organizational structure. The challenge for each agency is to find the blend of organizational structure, practices, and procedures that will enable the agency to successfully fulfill its economic analysis objectives.

This Recommendation offers factors for agencies to consider in designing their economic analysis programs. It does not recommend that agencies should afford greater or lesser prominence to economics as compared to any other discipline in the rule development process. It also does not address whether agencies should adopt any form of organization over another and recognizes that each agency will want to tailor its economic analysis program to fit its individual needs. Rather, it focuses on ways to ensure that structure, practices, and procedures complement each other, forming a coherent system for producing high-quality economic analysis that informs regulatory decisions and is consistent with the elements set forth in relevant executive orders, Office of Management and Budget guidance (e.g., Executive Order 12,866 and OMB Circular A-4), and both agency-specific and cross-cutting statutes that require economic analysis.

Recommendation

Agency Consideration of Structure and Function of Economists

1. Agencies that conduct regulatory impact analysis or another form of economic analysis should consider whether their existing organizational structure for economists allows the agency to produce objective, consistent, and high-quality economic analysis. Regulatory Policy Officers (or analogous agency officials) should meet with relevant decision

makers to assess the organizational structure's contribution to the quality and use of economic analysis.

2. In reviewing their organizational structures, agencies should consider how best to allow and encourage their economists to develop objective analysis consistent with best professional practice to ensure compliance with all analytic requirements (such as those contained in Executive Order 12,866 and Office of Management and Budget Circular A-4). The organizational structure should also promote the flow of information among decision makers, rule-writers, economists, and other rule development staff as early in the decision-making process as feasible. Relevant organizational structures that agencies may wish to consider include the following.

    a. Functional organizations, which have a centralized economics unit and tend to have the following strengths and weaknesses:

        1) This structure may enable economists to produce more objective, consistent, and high-quality analysis due to greater independence, collaboration with peers, economies of scale, ongoing professional development, and recruiting advantages; and

        2) This structure may result in economists being physically separated from day-to-day events in the program offices, thereby causing them to be less informed about critical details of pending regulatory issues. The physical separation may also create impediments to collaboration.

    b. Divisional organizations, which locate economists in program offices and tend to have the following strengths and weaknesses:

1) This structure can allow economists to produce analysis that is closely focused on program-specific regulatory issues and can facilitate earlier involvement in the development of regulations; and

2) Economists working within this structure may feel pressure to produce less objective analysis in order to support program office decisions, and they may have fewer opportunities to develop professional skills through interaction with economists located in other offices.

c. Hybrid organizations, which locate economists in program offices but also have a centralized economic review function and tend to have the following strengths and weaknesses:

1) This structure may combine the benefits of divisional organization with a centralized quality control function and expanded opportunities for skill development; and

2) Economists working in program offices may still be marginalized by other rule development staff and face career disincentives to informing the central economics office when they disagree with the quality or objectivity of a regulatory analysis.

3. Agencies that are standing up a new economic analysis unit or that are considering restructuring an existing economic analysis unit may wish to evaluate these potential strengths and weaknesses in deciding what type of structure to adopt. Agencies should further consider taking specific steps to promote high-quality, objective economic analysis. Although these steps may be associated with specific organizational structures,

they may also generally apply to the development of economic analyses across all organizational structures.

4. The following steps can be taken to minimize the risks associated with walling off economists in an independent unit, which are especially likely to emerge when an agency has adopted a functional structure.
    a. The agency should consider including economists on multidisciplinary regulatory development teams, along with other rule development staff, from the outset;
    b. The agency should provide economists with a process to ensure their analysis is provided to higher-level decision makers; and
    c. The agency should provide an avenue for the head of the economics office to express concerns about the quality of economic analysis to the agency head.
5. The following steps can be taken to minimize the risks associated with diluting economists' influence by dispersing them through the agency, which are especially likely to emerge when an agency has adopted a divisional structure.
    a. The agency should ensure that the supervisory structure does not create disincentives for economists to offer objective economic analysis;
    b. The agency, to the extent feasible, should empower a central economics office at the agency level to:
        1) Serve as a quality check on economic analyses developed by the program offices;
        2) In coordination with agency Regulatory Policy Officers (or analogous agency officials), standardize and disseminate high-quality analytical methods; and

3) Conduct longer-term research and development to inform future regulatory proceedings.

c. The agency should provide an avenue for the head of the economics office to express concerns about the quality of economic analysis to the agency head.

Recommendations Applicable to All Organizational Forms

6. To promote meaningful consideration of economic analysis early in the decision-making process, agencies should consider developing guidance clarifying that economists will be involved in regulatory development before significant decisions about the regulation are made. Agencies should make this guidance publicly available by posting it on their websites.
7. Agencies seeking to apply economic analysis in the rulemaking process should involve their relevant economic units in the process of developing agency regulatory plans and budgets under applicable executive orders in order to promote meaningful consideration of economic analysis while a rule is being shaped.
8. Agency Regulatory Policy Officers or other analogous agency officials seeking to apply economic analysis in the rulemaking process should collaborate with agency economists to articulate relevant analytical methods and offer training, workshops, and assistance in economic analysis to others within the agency.

Administrative Conference Recommendation 2019-6

Independent Research by Agency Adjudicators in the Internet Age

Adopted December 12, 2019

A fundamental characteristic of agency adjudications that incorporate a legally required evidentiary hearing is the existence of an exclusive record for decision making.[1] The exclusive record in adjudications regulated by the formal-hearing provisions of the Administrative Procedure Act (APA) consists of the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding."[2] Many other adjudications in which an evidentiary hearing is required by statute, regulation, or executive order, though not governed by those provisions of the APA, also rely on an exclusive record similarly constituted.[3] The exclusive record principle seeks to ensure that parties know and can meet the evidence against them; promotes accurate, evidence-based decision making; and facilitates administrative and judicial review.

Although an exclusive record consists primarily of materials submitted by the parties to a proceeding, it may be appropriate or beneficial in certain circumstances for adjudicators to use information obtained through their own and their staffs' independent research. An "adjudicator," as used in this Recommendation, means any agency official or employee, acting either individually or collectively, who presides over a legally required evidentiary hearing or provides administrative review following an evidentiary hearing.

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[1] *See* Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 20–21 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report.

[2] 5 U.S.C. § 556(e).

[3] Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, ¶ 1, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016). The Conference's recent recommendations divided adjudications into three categories: those governed by the APA's formal-hearing provisions (referred to as Type A in the report accompanying Recommendation 2016-4); those that incorporate a legally required evidentiary hearing not regulated by the APA's formal-hearing provisions (referred to as Type B); and those not subject to a legally required evidentiary hearing (referred to as Type C). This Recommendation addresses only the first two categories.

"Independent research," as used in this Recommendation, refers to an adjudicator's search for, consideration of, or reliance on factual materials, on his or her own initiative, for purposes of resolving a proceeding pending before the agency.[4]

This definition encompasses a diverse range of practices. Official notice offers the most familiar use of independent research practice. Official notice, which is the administrative corollary of judicial notice, permits an adjudicator to accept a fact as true without requiring a party to prove the fact through the introduction of evidence.[5] In appropriate circumstances, an adjudicator may do so on his or her own motion based on information identified through independent research.[6]

In addition, independent research is sometimes used, for example, to learn background information in preparation for a hearing, define terms, assess a party's or witness's credibility, determine an expert's qualifications, assess the reliability of an expert's opinion, or interpret or evaluate existing evidence. The facts identified through independent research may be adjudicative (i.e., "the facts of the particular case") or legislative (i.e., "those which have relevance to legal reasoning and the lawmaking process").[7]

Congress, courts, agencies, and scholars have long debated the extent to which agency adjudicators may and should conduct independent research.[8] While some forms of independent research are firmly rooted in longstanding agency practices, others have proven more controversial in certain circumstances. The growth of the internet has amplified this debate in

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[4] This definition does not include an adjudicator's search for, consideration of, or reliance on materials submitted by a party or an interested member of the public or adduced with a party's participation. Nor does it include the use of legal research materials traditionally consulted by an agency's adjudicators, such as statutes; agency rules, orders, and notices; and decisions of courts and administrative agencies.

[5] 5 U.S.C. § 556(e); 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.6 (6th ed. 2019).

[6] *See* Ohio Bell Tel. Co. v. Pub. Utilities Comm'n, 301 U.S. 292, 300–06 (1937).

[7] FED. R. EVID. 201(a) advisory committee's note.

[8] *See* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 71–73 (1941); Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537 (1949).

recent years as adjudicators now have quicker and easier access to vastly greater amounts of information.[9] Information that is now available to adjudicators includes online versions of print publications and public records, as well as newer forms of information such as openly editable encyclopedias, blogs, social media, and personal and professional websites.

Although information available on the internet can be just as reliable as information available in print publications, the nature of internet publication can make it more difficult for adjudicators to determine the authenticity and reliability of certain internet information. Moreover, the impermanence of web publication may affect the compilation of an exclusive record for administrative and judicial review.

Various sources of law may govern independent research by agency adjudicators. Perhaps the most important is constitutional due process. With regard to official notice, in particular, the Supreme Court has held that an agency must offer parties a reasonable opportunity to rebut an officially noticed fact.[10] Constitutional due process also generally requires that an adjudicator be impartial.[11] Whether an act of independent research will affect an adjudicator's impartiality or raise doubts about the integrity of a proceeding may depend on the specific features of an agency's adjudicatory program.[12]

The APA also governs some aspects of independent research in adjudications conducted according to its formal-hearing provisions. For example, with respect to official notice, the APA provides that "[w]hen an agency decision rests on official notice of a material fact not appearing

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[9] *See generally* Jeremy Graboyes, Independent Research by Agency Adjudicators in the Internet Age 8–11 (Oct. 31, 2019) (report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/report/final-report-independent-research-agency-adjudicators-internet-age.

[10] Ohio Bell Tel. Co., 301 U.S. at 300–06.

[11] Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019); Louis J. Virelli III, Recusal Rules for Administrative Adjudicators 7-8 (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators.

[12] *See* Recommendation 2018-4, *supra* note 11, ¶ 3.

in the evidence of record, a party is entitled, on timely request, to an opportunity to show the contrary."[13] The APA specifies that a party is entitled to "conduct such cross-examination as may be required for a full and true disclosure of the facts."[14] The APA generally prohibits an employee who presides at the reception of evidence from "consult[ing] a person or party on a fact in issue, unless on notice and opportunity for all parties to participate."[15] Unless an exception applies, the APA also generally prohibits an employee who participates or advises in the decision or review of a decision from performing an investigative or prosecutorial function in the same or a factually related case.[16]

Additional legal requirements may derive from agency-specific statutes; agency rules of procedure, practice, and evidence; and agency precedential decisions. Even when independent research would be legally acceptable, policy considerations—such as the need for accuracy, consistency, and administrative efficiency in agency decision making—may counsel in favor of or against its exercise.

Because adjudications vary widely in their purpose, scope, complexity, and effects, a categorical approach to independent research across federal adjudications is neither practicable nor desirable. Some adjudications are adversarial; others are non-adversarial. In some contexts, the government brings an action against a private party; in others, a private party petitions the government, or the government resolves a dispute between private or public parties. A few agencies apply the *Federal Rules of Evidence*, others use it as a guide, and others have developed evidentiary rules to suit their specific need.[17] Adjudicators in some contexts have an affirmative

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[13] 5 U.S.C. § 556(e).
[14] *Id.* § 556(d).
[15] *Id.* § 554(d).
[16] *Id.*
[17] Admin. Conf. of the U.S., Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*, 51 Fed. Reg. 25,642 (July 16, 1986). The APA provides only that "the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).

duty to develop the record or assist unrepresented parties; adjudicators in other contexts have no such obligation. Some adjudicators play an active role questioning parties and witnesses and calling experts; others do not. Adjudicators vary in the degree to which they are viewed as subject-matter experts and the extent to which they have access to the expertise of agency policymakers.

This Recommendation encourages agencies to develop appropriate policies to address independent research conducted by adjudicators. The policies could take different forms depending on the circumstances. In some circumstances, an agency may consider publishing a legislative rule.[18] In other circumstances, an agency guidance document, including an interpretive rule or general statement of policy within the meaning of the APA, may be suitable.[19] An agency may intend for its policy to confer an important procedural right on private parties and bind the agency. Alternatively, it may intend for its policy only to facilitate internal agency processes and not bind the agency except, perhaps, in cases in which noncompliance results in substantial prejudice to a private party.[20] The appropriate form of an agency's policy on independent research will depend on its substance and intended effect and on the unique circumstances of the agency's adjudicatory program.

[18] Legislative rules dealing with agency organization, procedure, or practice are exempt from notice-and-comment requirements. 5 U.S.C. § 553(b)(A). *See generally* Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992).
[19] 5 U.S.C. § 553(a); *see generally* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017).
[20] *See* Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970).

Although the emphasis of this Recommendation is the particular phenomenon of independent internet research, its recommended best practices apply equally to independent research by other means.

Recommendation

Independent research by adjudicators, especially that conducted on the internet, could have unintended results, such as actual or perceived bias, factual errors or misunderstandings, or inefficiencies. Therefore, agencies, to the extent permitted by law, should consider implementing the following best practices in consultation with adjudicators.

1. If agencies identify reliable sources or categories of sources that they determine would be generally appropriate for adjudicators to independently consult, they should publicly designate those sources or categories of sources.
2. When agencies designate sources that are appropriate for independent research, they should consider clearly identifying and, when possible, providing access to the source on their websites.[21] Agencies should ensure that they maintain the most current version of all sources that they host on their websites. If agencies provide hyperlinks to sources that are hosted on websites not maintained by the agency, they should ensure that the hyperlinks remain current and accurate.
3. If agencies permit adjudicators to independently consult sources that are not specifically designated, they should establish publicly available policies to help adjudicators assess the authenticity and reliability of information. Agencies should include indicia of authenticity and reliability, particularly with respect to internet information, that adjudicators may consider if they choose to consult outside sources. Examples of such indicia include:
    a. Whether the information was authored by an identifiable and easily authenticated institutional or individual author who is considered an expert or reputable authority on the subject;
    b. Whether the information references other authorities that help to corroborate its accuracy;
    c. Whether the meaning and significance of the information is clear;

[21] Agencies should be mindful of copyright protections when they provide access to sources on their websites. *See, e.g.*, Am. Soc'y for Testing & Materials v. Public.Resource.Org, 896 F.3d 437 (D.C. Cir. 2018). There may be steps agencies can take to ensure copyrighted materials will be reasonably available to interested members of the public. *Cf.* Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, ¶ 3, 77 Fed. Reg. 2257, 2258 (Jan. 17, 2012).

d. Whether the information is published in a final format rather than as a draft or in a publicly editable format;
e. Whether the information is current or bears a date as of which the information was accurate;
f. Whether the owner or administrator of the website on which the information appears is easily authenticated and is a recognized authority or resource;
g. Whether information that appears on the website undergoes editorial or peer review;
h. Whether other reliable resources contain the same information or cite the original information as reliable or authoritative; and
i. Whether the information is thorough, materially supported, internally consistent, and analytically persuasive.

If agencies have identified sources or categories of sources that they determine are not appropriate for adjudicators to independently consult, they should publicly designate those sources or categories of sources.

4. Agencies should promulgate rules on official notice that specify the procedures that adjudicators must follow when an agency decision rests on official notice of a material fact. The rules should ensure that parties, upon timely request, are provided a reasonable opportunity to rebut the fact; rebut an inference drawn from the fact; and supplement, explain, or give different perspective to the fact. The precise nature and timing of an opportunity for rebuttal may depend on factors such as whether a fact is general or specific to the parties, whether a factual finding or an inference drawn from a fact is subject to reasonable dispute, whether a fact is central or peripheral to the adjudication,

and whether a fact is noticed for the first time before or at a hearing or in an initial or appellate decision.

5. If agencies intend that specific procedures will apply when adjudicators use independently obtained information for purposes other than official notice of a material fact, such as for background purposes, they should clarify the distinction between official notice and other uses of information independently obtained by an adjudicator and describe the applicable procedures, if any. In particular, agencies should consider distinguishing use of traditional legal research materials from factual research; and material facts from facts that are not material, such as background facts.
6. Agency policies should specify when adjudicators must physically or electronically put independently obtained materials, especially internet materials, in an administrative record and explain what procedures adjudicators should follow to do so to ensure they preserve materials in a stable, permanent form. Agencies should ensure that such policies are consistent with other agency rules of procedure.
7. Agencies should identify those policies that are intended to confer an important procedural right on private parties, noncompliance with which may give rise to grounds for administrative or judicial review, and those that do not and are intended only to facilitate internal agency processes.
8. When adjudicators conduct independent research using sources that are not available to parties on or through an agency website, they should make those sources available to the parties by alternative means.

9. Agencies or agency adjudicators, as appropriate, should take steps to ensure that adjudicative staff are aware of agency policies on independent research, particularly with respect to independent internet research.

Administrative Conference Recommendation 2019-7

Acting Agency Officials and Delegations of Authority

Adopted December 12, 2019

The federal government relies on both political appointees and career civil servants to operate effectively. Federal law provides for over 1,200 agency positions whose occupants must be appointed by the President with the advice and consent of the Senate (PAS positions).[1] But there are often numerous vacancies in these positions—not only at the start of every administration, but also at other times, including after initial appointees leave and particularly during the final months of a President's tenure.[2] Government officials routinely vacate offices before a successor has been chosen. Research has shown that PAS positions in executive departments and agencies are not staffed with Senate-confirmed or recess appointees one-fifth of the time.[3] These pervasive vacancies exist for several reasons, including increasing delays related to the presidential-nomination and Senate-confirmation process.

Vacancies in PAS and other high-level positions may lead to agency inaction, generate confusion among nonpolitical personnel, and lessen public accountability.[4] At many agencies, acting officials can temporarily fill the positions. Indeed, between January 20, 1981, and July 19,

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[1] SEN. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 216 (THE PLUM BOOK) (Comm. Print 2016), *available at* https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf.
[2] Anne Joseph O'Connell, Acting Agency Officials and Delegations of Authority 1 (Dec. 1, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-acting-agency-officials.
[3] *Id.* at 16 (citing ANNE JOSEPH O'CONNELL, BROOKINGS INST., STAFFING FEDERAL AGENCIES: LESSONS FROM 1981–2016 (2017)).
[4] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 920–21 (2008).

2019, there were 168 confirmed cabinet secretaries, 3 recess-appointed cabinet secretaries, and 145 acting cabinet secretaries. In other words, acting officials constituted 46% of all the top leaders in this period, though many of these interim officials served for short periods. Acting officials are also prevalent in lower-level positions throughout the federal government. Similarly, in response to vacancies, agency leadership often can lawfully delegate certain duties that would otherwise be done by a PAS or other high-ranking official to other officials within the agency.

The Federal Vacancies Reform Act of 1998 (Vacancies Act)[5] provides for temporary leadership primarily in single-headed executive departments and agencies. When it applies, the Vacancies Act specifies who can serve in an acting capacity, for how long, and in what positions. Congress has also enacted other agency-specific statutes to address vacancies, which sometimes provide the exclusive succession process. Unfortunately, navigating these statutes can be challenging because their requirements are often complex, and it can be technologically difficult to provide required reports. Currently, the government offers no formal training programs to agencies on the Vacancies Act, other vacancy-related statutes, or delegations of authority in response to staffing vacancies.[6]

The stakes for compliance, however, can be high. Under the Vacancies Act, for instance, certain actions taken by an acting official not serving under its terms "shall have no force or

[5] 5 U.S.C. §§ 3341–3349d.

[6] The Department of Justice's Office of Legal Counsel provided substantial guidance on the Act in 1999, on which agencies continue to rely. *See Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60 (1999); *see also* O'Connell, Acting Agency Officials, *supra* note 2, at 38, 41 (describing interviews with agency officials and noting agencies' continued reliance on OLC guidance from 1999). Certain portions of the 1999 Guidance have been superseded. *See, e.g.*, *Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 179 (2001) (concluding that question 13 of the 1999 Guidance was incorrect in concluding that a first assistant could only serve as an acting officer under section 3345(a)(1) if he or she had served as first assistant before the vacancy arose); NLRB v. SW Gen., Inc., 137 S. Ct. 929 (2017) (holding that the prohibition in section 3345(b) on acting service during a nomination is not limited to first assistants, contrary to OLC's conclusion in question 15 of the 1999 Guidance).

effect" and may be susceptible to legal challenge.[7] Even if the agency does not face legal challenge, moreover, it could receive a formal violation letter from the Government Accountability Office (GAO). The Vacancies Act requires agencies to report vacancies, nominations, and acting officials in covered positions to the Comptroller General; the Comptroller General is charged with reporting violations of the time limits to various House and Senate Committees, the President, and the Office of Personnel Management.[8]

The Vacancies Act

Under the Vacancies Act, acting officials generally may come from three categories of government officials: (1) first assistants to the vacant positions; (2) Senate-confirmed officials designated by the President; and (3) certain senior agency officials designated by the President.[9] The "first assistant" to the vacant job is the default acting official.[10] The Vacancies Act provides two main alternatives to the first assistant for acting service, but the President must actively select them. First, "the President (and only the President) may direct" another Senate-confirmed official—within the agency or outside it—to serve as the acting official.[11] Second, "the President (and only the President)" may select "an officer or employee" who has not been Senate-confirmed to serve in an acting capacity, but only if that person has worked in the agency for at least 90 days during the year-long period before the vacancy arose and earns a salary at the GS-15 level or higher.[12]

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[7] 5 U.S.C. § 3348(d)(1); O'Connell, Acting Agency Officials, *supra* note 2, at 3 n.8. Some positions are excluded from this provision. *See* 5 U.S.C. § 3348(e).
[8] 5 U.S.C. § 3349(b).
[9] *Id.* § 3345(a); *see also* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 936 (2017); O'Connell, Acting Agency Officials, *supra* note 2, at 5. There is a fourth category of allowed acting officials involving holdover appointees: an official serving a fixed term in a covered agency, who may stay in that position in an acting capacity after the term expires if the President has nominated her or him to an additional term. 5 U.S.C. § 3345(c)(1); *see also* O'Connell, Acting Agency Officials, *supra* note 2, at 5 n.24.
[10] 5 U.S.C. § 3345(a)(1).
[11] *Id.* § 3345(a)(2).
[12] *Id.* § 3345(a)(3).

Acting officials can typically serve and use the title "acting" for 210 days from the vacancy's start.[13] If the vacancy exists when a new President enters office, or occurs within the next 60 days, the limit extends to 300 days. Nominations also extend these limits: an acting official can continue serving through two pending nominations to the vacant job. If the nomination is rejected or returned to the President under Senate rules, a new 210-day period of permitted tenure begins from the date of rejection or return. In other words, an acting official could conceivably serve for 210 (or 300) days before there is a nomination, during the pendency of a first nomination, for 210 days after that nomination is returned, during the pendency of a second nomination, and for a final 210 days if the second nomination is returned as well.[14] These extensions require careful tracking of nominations and Senate actions.

After the time limits established by the Vacancies Act have passed, agencies have continued to perform the functions of the vacant offices through delegations of authority, often by the agency head.[15] If the duties of the Senate-confirmed position are not exclusive to a job—by statute or regulation—they can typically be delegated to a lower-level official. Even if some duties are exclusive to a position, its other duties have been reassigned, leaving the delegate with nearly the same power as an acting official.

The Vacancies Act requires the head of each executive agency to report certain information about vacancies in covered offices and notify the Comptroller General of the United States and each House of Congress.[16] The GAO, headed by the Comptroller General, currently

[13] *Id.* § 3346(a)(1).
[14] O'Connell, Acting Agency Officials, *supra* note 2, at 7. The time limits do not apply when the vacancy has been "caused by sickness." 5 U.S.C. § 3346(a); s*ee also Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 66–67 (1999) (noting that an "acting officer may continue to serve until the sick PAS officer recovers" and is able to resume performing the office's functions and duties).
[15] O'Connell, Acting Agency Officials, *supra* note 2, at 11–12; *see also id.* at 13–15 (identifying several constitutional and statutory issues concerning delegation beyond the scope of this Recommendation).
[16] 5 U.S.C. § 3349(a).

receives this information in hard copy. The GAO maintains these reports in an online searchable database.[17]

Agency-Specific Statutes

In addition to the Vacancies Act, Congress has also enacted various agency-specific statutes that, when applicable, may provide for temporary leadership, including for chairpersons at some independent regulatory commissions.[18] Some statutes may provide the exclusive mechanism for agency succession, whereas other statutes may provide a non-exclusive mechanism.[19] Because these agency-specific statutes vary, it is difficult to draw cross-cutting conclusions about them. Their existence, however, further complicates the use of acting officials and delegations.

The Need for Increased Transparency and Training on Vacancies Act Requirements

As the foregoing description shows, how and when agencies can use acting officials or delegated authority can be complicated. There is often confusion about which positions and agencies the Vacancies Act applies to and how the Act interacts with other agency-specific statutes. Technological shortcomings also make compliance with agency reporting obligations difficult. Some agencies have raised concerns that "[a]lthough the forms are online, the agency must download them, fill them out, and send them in hard copy to the GAO (and to Congress)."[20] Agencies also vary in how transparent they are about their use of acting officials and delegations

[17] O'Connell, Acting Agency Officials, *supra* note 2, at 51–59.
[18] *Id.* at 9–10; *see also id.* at 13–14 (identifying the legal issue of the applicability of the Vacancies Act in many of these circumstances where an agency-specific succession statute exists, which is beyond the scope of this Recommendation).
[19] *Id.* at 9.
[20] *Id.* at 59.

of authority. Some agencies do not disclose publicly acting titles and delegations of authority,[21] and there is currently no good source for comprehensive information about acting officials.

The goals of this Recommendation are to promote compliance with the Vacancies Act and agency-specific succession statutes and, consistent with the Conference's recent efforts to promote access to agency information,[22] to improve transparency regarding the use of acting officials and agency delegations of authority in response to staffing vacancies. This Recommendation does not purport to address any legal questions that may arise in the application of the Vacancies Act.

This Recommendation is a companion to Recommendation 2019-8, *Public Identification of Agency Officials*, which encourages federal agencies and the Office of Personnel Management to publish and maintain on their websites real-time information about a broad range of high-level agency officials.[23]

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[21] *Id.* at 44–46, 64–66. Although some agencies lack disclosure policies, some agencies have a practice of publishing permanent or standing delegations in the Federal Register or on the agency's website. *Id.* at 65; *see also* Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 502–03 (2017) (contrasting agency practices at SEC and EPA).

[22] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2139 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017). Earlier Conference recommendations in accord include Admin. Conf. of the U.S., Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989).

[23] Admin. Conf. of the U.S., Recommendation 2019-8, *Public Identification of Agency Officials*, __ Fed. Reg. _____ (_____).

Recommendation

Acting Officials under the Vacancies Act

1. Agencies should determine if they are subject to the Federal Vacancies Reform Act (Vacancies Act).
2. Agencies with at least one presidentially appointed, Senate-confirmed (PAS) position covered by the Vacancies Act should establish processes and procedures to comply with the Act. Agencies should consider assigning responsibility for compliance with the Vacancies Act to a position within the agency, rather than a particular person, and identify that position on its website.
3. Agencies with at least one PAS position covered by the Vacancies Act should ensure that officials responsible for compliance with the Vacancies Act have adequate training.
    a. Officials assigned to track time limits should understand the Senate confirmation process (including the likelihood of multiple returns) and how to access important dates (official submission dates of nomination, returns, etc.).
    b. Agencies should, when needed, coordinate with the Government Accountability Office (GAO) on their reporting requirements.
    c. A government agency (such as the Office of Government Ethics, the Department of Justice's Office of Legal Counsel, the GAO, or the Office of Personnel Management) or other organization should provide government-wide training on these issues. Agencies should avail themselves of this training.
4. For PAS positions covered by the Vacancies Act but not addressed in a presidential order of succession, agencies should formally name and disclose a first assistant position.

a. If there are multiple deputy positions to a covered position, agencies should specify which deputy position is the first assistant position.
b. In the description of each first assistant position, agencies should explain that the first assistant is the default acting official under the Vacancies Act.

5. Agencies with at least one vacant PAS position covered by the Vacancies Act should communicate the requirements of the Act to the relevant acting official(s).
6. Agencies with at least one vacant PAS position covered by the Vacancies Act should disclose on their websites the names of acting officials and the officials' start dates, and the legal provision under which the appointment was made. If a vacancy is not filled by an acting officer and the agency has identified an official to perform the delegable functions of the office, the agency should disclose that official on its website.

Acting Officials Outside the Vacancies Act

7. Agencies that have PAS positions that are not covered by the Vacancies Act and for which Congress has provided some alternative mechanism for designating acting officials (e.g., acting chairperson) should, to the extent applicable, apply the foregoing recommendations 2 through 6.

Succession Planning

8. Agencies should consider having clear and easily accessible orders of succession on their websites for PAS positions.

Delegations of Authority Related to Staffing Vacancies

9. Agencies should determine which functions and duties, if any, are exclusive to each PAS position and which of the nonexclusive functions and duties, if any, should be delegated in response to staffing vacancies.
10. To the extent reasonably possible, agencies should make their delegations of authority in response to staffing vacancies in PAS positions easily accessible to the public.

GAO's Role Under the Vacancies Act

11. The GAO should consider changing its reporting system so that agencies can report information online for vacancies, acting officials (including start and end dates), and nominations.

Administrative Conference Recommendation 2019-8

Public Identification of Agency Officials

Adopted December 12, 2019

Presidential appointees and the members of the Senior Executive Service (SES) who perform significant leadership responsibilities sit at the highest levels of federal agencies.[1] In December 2016, the federal government included 1,242 Senate-confirmed, presidentially appointed positions (PAS positions) and 472 other presidentially appointed positions (PA positions).[2] The SES included 8,156 individuals in 2016 (7,321 career SES, 737 noncareer SES,

[1] This Recommendation uses the Administrative Procedure Act's definition of "agency." 5 U.S.C. § 551(1).
[2] SEN. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, 114TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 216 (THE PLUM BOOK) (Comm. Print 2016), *available at* https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf.

and 96 limited-term/limited-emergency SES), many of whom act as agency leaders.[3] This group of agency officials helps direct a federal workforce of more than two million employees.[4]

PAS officials often lead federal agencies, and they are often the most visible political appointees.[5] These officials are nominated by the President and confirmed by the Senate. PAS positions are part of the Executive Schedule, which prescribes the basic pay schedule and salaries of most presidential appointees.[6] These officials are among the highest-paid civilian government officials,[7] and a number of statutes and regulations establish special rules, obligations, and restrictions on their activities.[8]

The President directly appoints PA officials. These positions are typically located within the Executive Office of the President, advisory committees, and certain agencies.[9] PA positions are not part of the General Schedule pay system, and they may fall within the scope of several other pay systems, including the Executive Schedule.[10] Similar to Senate-confirmed officials, PA

[3] OFF. OF PERSONNEL MGMT., 2016 SENIOR EXECUTIVE SERVICE REPORT 3 (2017), *available at* https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/ses-summary-2016.pdf.
[4] Bobby Ochoa, Listing Agency Officials 1, 6–8, 48 (Nov. 13, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-listing-agency-officials.
[5] Ochoa, *supra* note 4, at 7–8.
[6] 5 U.S.C. §§ 5311 *et seq.*; *see also* OFF. OF PERSONNEL MGMT., PRESIDENTIAL TRANSITION GUIDE TO FEDERAL HUMAN RESOURCES MANAGEMENT MATTERS 19 (2016), *available at* https://www.opm.gov/about-us/our-people-organization/office-of-the-director/executive-secretariat/presidential-transition-guide-2016.pdf.
[7] *See* 2019 Executive & Senior Level Employee Pay Tables, OFF. OF PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2019/executive-senior-level/ (last visited Nov. 22, 2019) (Salary Table No. 2019-EX, listing salaries ranging from Level V at $156,000 to Level I at $213,600).
[8] *See, e.g.*, 18 U.S.C. § 207 (establishing various communications restrictions on former government officials, including additional restrictions on certain "very senior personnel" and certain restrictions relating to foreign entities); the Hatch Act, 5 U.S.C. §§ 7321 *et seq.* (prescribing rules regulating political activities of federal employees and establishing special provisions and exemptions applicable to PAS officials); 5 C.F.R. § 2634.202 (describing persons required to file public financial disclosure reports); 5 C.F.R. § 2636.303 (describing noncareer officials subject to fifteen-percent limitation on outside earned income); 5 C.F.R. § 2638.305 (describing additional ethics briefing required for PAS appointees within 15 days of appointment).
[9] THE PLUM BOOK, *supra* note 2, at 213–16. Those PA officials within the Executive Office of the President are outside the scope of this Recommendation.
[10] Ochoa, *supra* note 4, at 8, 11.

officials may also be subject to special rules, obligations, and restrictions on their activities, and they also typically resign during a presidential transition.[11]

The SES is a government-wide personnel system covering senior management, supervisory, and top-level policy positions in most federal agencies, and these positions are not part of the General Schedule pay system.[12] These SES officials often direct and monitor the activities of agencies; supervise the work of federal employees; exercise "important policy-making, policy-determining, or other executive functions[;]" and are held accountable for the success of programs and projects.[13] Approximately half of SES positions are reserved for career employees, and the other half are classified as general SES positions, which may be filled by a career appointee, a political appointee, a limited-emergency appointee, or a limited-term appointee.[14] The Office of Personnel Management (OPM) allots and closely regulates the total number of SES positions for each agency.[15] By law, the number of political appointees may not exceed ten percent of government-wide SES positions and may not exceed twenty-five percent of a single agency's total SES positions.[16]

The public often learns the identities of cabinet secretaries, heads of other agencies, and a handful of other very high-ranking officials, if only through news coverage of the individuals. But the public knows far less about the next layers of the executive branch, in part because

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[11] OPM, PRESIDENTIAL TRANSITION GUIDE, *supra* note 6, at 7.
[12] THE PLUM BOOK, *supra* note 2, at 217–18; 5 U.S.C. §§ 3131 *et seq*.; JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 64, 67–68 (2d ed. 2018), *available at* https://www.acus.gov/publication/sourcebook-united-states-executive-agencies-second-edition. There are other, also significant government officials that do not fall within the PAS, PA, or SES. *See* Ochoa, *supra* note 4, at 4–14. For purposes of this Recommendation, we have focused on PAS, PA, and SES officials because the PAS and PA are presidential appointments and the SES is the government-wide personnel system for leadership positions. This Recommendation does not address other executive personnel systems. *See, e.g.*, 5 U.S.C. § 3132 (listing exclusions).
[13] 5 U.S.C. § 3132(a)(2).
[14] THE PLUM BOOK, *supra* note 2, at 217; Ochoa, *supra* note 4, at 6–7.
[15] THE PLUM BOOK, *supra* note 2, at 217–18; 5 U.S.C. §§ 3132 *et seq*.; SELIN & LEWIS, *supra* note 12, at 67.
[16] 5 U.S.C. § 3134.

information can be difficult to locate in a centralized, updated, and comprehensive format.[17] A recent report by the U.S. Government Accountability Office concluded that "there is no single source of data on political appointees serving in the executive branch that is publicly available, comprehensive, and timely."[18] Much of this information is available in private-sector publications, but they are expensive and not readily available to the public.

To be sure, various resources, including *United States Government Policy and Supporting Positions* (the so-called "Plum Book"),[19] the *Official Congressional Directory*,[20] and the *United States Government Manual*,[21] provide periodic snapshots of the occupants of certain high-level agency positions. But these publications serve distinct purposes and objectives and, in all events, given turnover, can quickly become out-of-date.[22] Likewise, although OPM maintains extensive lists of federal employees, those lists are not readily available to the public.[23] Finally, although some agencies provide current information about high-ranking officials on their

[17] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-249, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA AND SOME ETHICS OVERSIGHT PROCEDURES AT INTERIOR AND SBA COULD BE IMPROVED 10–14 (2019), *available at* https://www.gao.gov/assets/700/697593.pdf; Ochoa, *supra* note 4, at 1, 40–42, 50–51.
[18] GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 17 (summarizing "What GAO Found").
[19] THE PLUM BOOK, *supra* note 2.
[20] UNITED STATES CONGRESS, JOINT COMMISSION ON PRINTING, OFFICIAL CONGRESSIONAL DIRECTORY: 115TH CONGRESS (2017).
[21] NAT'L ARCHIVES & REC. ADMIN., THE UNITED STATES GOVERNMENT MANUAL (2016).
[22] *See* GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 17, at 13 ("Until the names of political appointees and their position, position type, agency or department name, start and end dates are publicly available at least quarterly, it will be difficult for the public to access comprehensive and reliable information."); Ochoa, *supra* note 4, at 19–39.
[23] *See* Ochoa, *supra* note 4, at 46–49. OPM's data from agencies is based on the person, rather than based on the specific position or job. As a result, the agency stops sending information about a person and their position when they separate from an agency. With respect to PAS, PA, and SES officials, OPM's data includes information about the name, agency, job title, start date, and type of appointment (PAS, PA, career SES, noncareer SES, limited-term SES, and limited-emergency SES). For these data-related reasons—and because agencies are best positioned to make determinations about which SES officials perform significant leadership responsibilities—the Recommendation to OPM includes all SES officials. OPM's workforce information-reporting function under Civil Service Rule 9 excludes certain agencies and positions. 5 C.F.R. §§ 9.1, 9.2.

websites, practices vary significantly.[24] Detailed information about appointment terms, vacant offices, acting officials, and delegated authority is often even more difficult to find.[25]

Knowing the identities of those who help lead federal agencies is important for promoting transparency and facilitating public participation in the work of government.[26] For instance, members of the public (including reporters and academic researchers), congressional members and staff, White House officials, and officials at other federal and state agencies all sometimes have reasons to know this information.[27]

One of this Recommendation's purposes is to advance the Conference's recent efforts to promote greater access to relevant agency information.[28] This Recommendation is a companion to Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, which promotes compliance with the Federal Vacancies Reform Act of 1998 and other agency-specific succession statutes and encourages federal agencies to improve transparency regarding the use of acting officials and agency delegations of authority in response to staffing vacancies.[29]

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[24] Ochoa, *supra* note 4, at 40–42.

[25] *See, e.g.*, Anne Joseph O'Connell, Acting Agency Officials and Delegations of Authority 16–18 (Dec. 1, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-acting-agency-officials (describing significant data-quality issues).

[26] *See* GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 17, at 13; Ochoa, *supra* note 4, at 3.

[27] *See* GAO, GOVERNMENT-WIDE POLITICAL APPOINTEE DATA, *supra* note 17, at 13. The Conference has previously addressed related issues. In 1968, the Conference recommended changes to the *U.S. Government Organization Manual*, specifically pointing out deficiencies with the "narrative text submitted" by agencies and encouraging agencies to improve these entries. Admin. Conf. of the U.S., Recommendation 68-2, *U.S. Government Organization Manual* (Dec. 11, 1968). This Recommendation goes much further, offering specific recommendations for making agency information publicly available.

[28] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2139 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017). Earlier Conference recommendations in accord include Admin. Conf. of the U.S., Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989).

[29] Admin. Conf. of the U.S., Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*, __ Fed. Reg. _____ (_____).

Recommendation

Recommendations Applicable to Agencies Generally

1. Agencies should display on their websites updated information about each PAS and PA position, and any SES position that is assigned significant leadership responsibilities, including the name and contact information of the current or acting official, as well as whether it is a PAS, PA, or SES position (and, if SES, whether it is a career or noncareer position). Vacancies for such positions should also be displayed.

Recommendations Applicable to the Office of Personnel Management

2. The Office of Personnel Management (OPM) should regularly publish data about PAS, PA, and SES officials (preferably on a monthly basis) on a public website and ensure the information is easily accessible. This data should include the following fields, if applicable, for each listed PAS, PA, and SES official: Name (first and last); Agency; Job Title; Start Date; and Type of Appointment.
3. OPM should create a separate list of former PAS officials to the extent feasible.

Administrative Conference Recommendation 2019-9

Recruiting and Hiring Agency Attorneys

Adopted December 12, 2019

Attorneys serve crucial roles within federal agencies. They defend agencies in litigation, draft regulations, investigate complaints, and resolve legal issues surrounding information disclosure, among their many functions. Attorneys support nearly all the operations of agencies,

helping to ensure their fair and lawful functioning. Therefore, it is critical that agencies hire a corps of highly qualified attorneys.[1]

This Recommendation offers best practices for the recruitment and hiring of federal agency attorneys in the excepted service (explained below), who comprise the majority of attorneys in the federal government.[2] The laws applicable to excepted service hiring of attorneys are more flexible than those applicable to hiring other federal employees. This Recommendation suggests ways agencies can structure their recruitment and hiring to use these flexibilities to attract highly qualified attorneys.

Background on Federal Personnel Law

Title 5 of the U.S. Code creates three categories of civil service positions: (1) competitive service, (2) excepted service, and (3) senior executive service. Most civil service positions are in the competitive service. The attorney positions addressed in this Recommendation[3] are in the excepted service. As explained below, however, they are not subject to most of the rules governing the hiring of excepted service positions.

Agencies that wish to fill a position in the competitive service must generally offer all U.S. citizens and nationals the opportunity to compete in a public and open examination.[4] The procedures that agencies must follow include (1) posting a vacancy announcement on USAJobs.gov, the federal jobs portal (hereinafter "USAJobs"); (2) using minimum qualifications

[1] The Administrative Conference addressed hiring practices with respect to administrative law judges (ALJs) in Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019).
[2] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES (2016).
[3] Those holding these positions are often referred to as "0905 attorneys" in reference to the occupational series that the Office of Personnel Management assigns to those attorneys who are in the General Schedule pay system. Many agencies use "0905" to refer to attorneys performing equivalent functions in other statutory pay systems. All such attorneys are within the scope of this Recommendation. This Recommendation does not apply, however, to (a) attorney positions provided for in titles of the U.S. Code other than Title 5, (b) attorney positions in the senior executive service, and (c) licensed attorneys who serve in non-attorney positions.
[4] 5 U.S.C. §§ 3304–3319; Civil Service Rule II, VII (5 C.F.R. §§ 2.1, 7.3).

to determine who is qualified and eligible to be rated for an agency assessment; (3) formally assigning numerical ratings to qualified applicants and selecting among the top three candidates[5]; (4) adhering to detailed procedures for giving veterans and certain family members of veterans priority consideration; and (5) hiring only from lists of candidates prepared by OPM or, if OPM has delegated this function to an agency, by the agency's own human resources (HR) office (formally called a "delegated examining unit"). For most excepted service appointments, the rules are generally the same as the above except that agencies need not post an announcement on USAJobs or use OPM-generated minimum qualifications.[6]

Although attorney positions are placed in the excepted service, OPM regulations further exempt agencies from having to formally rank applicants, use detailed procedures for giving preference to veterans and eligible family members, and hire from lists of candidates prepared by the agency.[7] The result is that the laws governing the hiring process for attorney positions are generally much less restrictive than those governing the hiring process for competitive and other excepted service positions.

There are, however, some legal requirements to which agencies must adhere when hiring attorneys. Agencies may not, among other things, make hiring decisions based on protected characteristics (e.g., race, sex, or national origin), nepotism, political affiliation, whistleblower activities, or other factors unrelated to the candidate's ability to perform the work.[8] Agencies also must "follow the [statutory] principle of veteran preference as far as administratively feasible

[5]Alternatively, agencies may adopt a system in which they establish two or more rating categories (e.g., "unqualified," "qualified," and "highly qualified") and place each applicant into one of the categories. Agencies may not offer employment to any candidate in a lower category before they offer it to a candidate in a higher category. *See* 5 U.S.C. § 3319.

[6] *See* 5 U.S.C. § 3320; 5 C.F.R. § 302.103 *et seq.*

[7] *See* 5 C.F.R. § 302.101(c).

[8] *See* 5 U.S.C. § 2302. Among other restrictions on agencies' hiring practices, agencies must not recruit in a way that results in an unlawful disparate impact based on race, sex, or certain other protected characteristics under federal law. *See* 42 U.S.C. § 2000e-2(k)(1)(A).

and, on the request of a qualified and available [veteran or eligible family member of a veteran who is not selected] . . . furnish him/her with the reasons for his/her nonselection."[9]

Practices in Hiring Attorneys

Distinguishing Between Optional and Mandatory Hiring Practices

Many agencies adopt additional hiring practices that are not legally required. They include involving HR officials in screening out applicants based on substantive criteria (e.g., nature of legal experience) and posting announcements exclusively on USAJobs without further disseminating them.[10] Although some agencies undertake these practices knowing they are optional, other agencies adopt them because HR and hiring officials mistakenly believe they are legally required.[11] A possible reason is that, in 1993, OPM stopped publishing the *Federal Personnel Manual*, a compendium of guidance that served as a reference guide for agencies. Successor publications have taken the form of discrete handbooks and operating manuals that are not updated frequently.

Considering Whether to Attract Broad or Discrete Applicant Pools

Agencies may benefit from availing themselves of the flexibility the law affords them in hiring attorneys by using different practices in different situations. Sometimes agencies may wish to attract broad applicant pools, in which case they will typically benefit from posting an announcement in locations likely to reach a large number of qualified potential candidates. Agencies that wish to do so may decide to post the position on USAJobs. There is, however, a monetary cost to posting on USAJobs, and posting an announcement solely on USAJobs without further dissemination may not produce the optimal applicant pool. At other times, agencies might

[9] 5 C.F.R. § 302.101(c).
[10] *See* Todd Phillips & Todd Rubin, Recruiting and Hiring Agency Attorneys 18 (report to the Admin. Conf. of the U.S.), www.acus.gov/report/recruiting-and-hiring-agency-attorneys-final-report (Dec. 4, 2019).
[11] *Id.*

wish to attract discrete candidate pools, consisting of, for example, attorneys who previously worked for the agency, former legal interns, presidential management fellows, or highly recommended candidates. This might be the case when, for example, an agency requires a unique set of skills. In such cases, agencies may not want to post or broadcast an announcement (which the law generally permits).[12]

Drafting Announcements

Whatever approach agencies take, it is important that their job announcements are written clearly and in a way designed to attract qualified applicants. Too often, however, attorney vacancy announcements contain dense language and descriptions of job responsibilities that are difficult to decipher.[13] This problem can arise when hiring officials send announcements to HR after they draft the position's description. Once HR employees receive the announcements, they sometimes insert language that does not apply to hiring attorneys (e.g., language applicable only to competitive service hiring). In addition, when HR employees post the announcement through a talent acquisition system (i.e., a system that allows government officials to post vacancy announcements and track applicants on USAJobs), the HR officials may select generic agency-developed job vacancy announcement templates, which populate language that may be incorrect or inapplicable to the hiring of attorneys. If HR officials do not remove or correct that language, the announcements can be confusing or incorrect for specialized positions such as attorneys. Hiring officials might not realize that inapplicable language has been inserted until after the announcements have been posted.

[12] Recruitment "should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society." 5 U.S.C. § 2301(b)(1).
[13] For examples of such announcements, see Phillips & Rubin, *supra* note 10, at 28–30.

Resources exist to help agencies draft position announcements in plain language, including Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*,[14] and the *Federal Plain Language Guidelines*.[15]

Recruiting Interns and Using Honors Programs

Agencies' recruitment efforts might include recruiting former interns to work as attorneys. Hiring these candidates allows agencies to employ those who have previously worked in the agency and have proved that they can successfully carry out the agency's work. Such hiring is akin to summer associate programs at some law firms, in which firms hire students to work for the summer after their second year of law school and then, after observing the students' work, may offer them permanent employment upon graduation.

Agencies, however, cannot extend an offer of employment as an attorney to an applicant until after he or she has been admitted to a bar, which can take nearly a year or longer after graduation from law school. If an agency wishes to hire an applicant for an attorney position before he or she has been admitted to a bar, the agency must hire him or her as a "law clerk trainee." The law clerk trainee position is a temporary excepted service appointment in which a candidate for an attorney position could serve while waiting to be admitted to a bar. The appointment can last no more than 14 months.[16]

Some agencies regularly use the law clerk trainee hiring authority by hiring through honors programs, which are generally two-year employment and training programs for recent law school graduates. Applicants generally apply to an honors program in their final year of law school or during a clerkship and, if they are accepted, may join the agency as a "law clerk

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[14] Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).
[15] PLAIN LANGUAGE ACTION & INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES (Rev. ed. 2011), http://www.plainlanguage.gov/guidelines/.
[16] 5 C.F.R. § 213.3102(d).

trainee" if they are not yet admitted to a bar. Licensed attorneys supervise law clerk trainees in honors programs until they are admitted to a bar, at which time they may be appointed to attorney positions.

Accruing Merit Systems Protection Board (MSPB) Rights

Once an attorney is hired, he or she must, in general, continuously serve for two years (or one year, if the person is a veteran or an eligible family member of a veteran) before accruing the right to challenge a removal before the MSPB.[17] Supervisors may evaluate the appointee's performance during this period and decide whether to retain the appointee.

Hiring Procedures for Non-ALJ Adjudicators

The Administrative Conference recognizes that specific attorney positions may require additional procedures to screen for certain attributes. One important example arises when an agency hires an adjudicator other than an administrative law judge (ALJ). Non-ALJ adjudicators, like ALJs, must demonstrate an ability to discharge the duties of an adjudicator with impartiality.[18] There may be additional procedures agencies need to adopt to screen for this attribute and others specific to attorneys hired as non-ALJ adjudicators.

Recommendation

Ensuring Agencies Know Which Procedures Are Required and Which Are Optional

1. The Office of Personnel Management (OPM), in conjunction with the Merit Systems Protection Board (MSPB) and the Office of Special Counsel as necessary, should offer, and agencies should request, training on the minimum procedural requirements in statutes, regulations, and executive orders for hiring attorneys. That training should, in

[17] *See* 5 U.S.C. § 7511. In the competitive service, adverse action rights accrue at the end of a probationary or trial period, or after completion of one year of current continuous service under other than a temporary appointment limited to one year or less. 5 C.F.R. § 315.803.
[18] *See* Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).

particular, clarify the distinction between hiring attorneys and hiring other kinds of employees and explain the alternative processes and flexibilities available for hiring attorneys. Such training could take any number of forms, including providing written materials and in-person presentations and webinars.

Helping Agencies Recruit Qualified Applicants

2. When hiring attorneys, agencies should recognize that they have flexibility in recruiting. They should recognize that, among other things, they can employ recruitment strategies designed to reach either a broad or narrow pool of applicants as they deem appropriate.
3. When seeking broad applicant pools for attorney positions, agencies should post vacancy announcements in multiple locations where they are likely to reach qualified applicants. Options for posting include agencies' own websites, job recruiting websites, or USAJobs.gov, the federal hiring portal. In addition to posting announcements, agencies should widely disseminate such announcements to a variety of sources, such as bar associations, other professional legal associations, law school career offices, professional listservs, former and current agency employees and interns, other agencies, and other professional networks.
4. When seeking narrower applicant pools, agencies should consider limiting the posting of vacancy announcements to the agencies' websites and specialized forums.

Drafting Vacancy Announcements

5. Agencies should ensure that hiring officials take the lead in drafting and reviewing final vacancy announcements for agency attorney positions.
6. Attorney vacancy announcements should be written in plain language, adhering closely to the principles in Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*, and the *Federal Plain Writing Guidelines*.
7. Announcements should specify exactly and clearly which documents are required to constitute a complete application; distinguish between mandatory and desirable criteria; and include under mandatory criteria only essential elements, such as bar membership and citizenship status.
8. Announcements should not include language that is applicable only to competitive service positions or that is otherwise inapplicable to attorney positions.
9. If agencies intend not to consider additional applications after receiving a certain number, the announcement should so indicate and specify the limit.
10. Agencies should recognize that they have the option of requiring a conventional résumé from applicants instead of requiring applicants to create a USAJobs résumé. Agencies that require a conventional résumé should so state in the vacancy announcement.
11. If, after drafting a vacancy announcement, hiring officials send the announcement to human resources (HR) officials to be posted on USAJobs or elsewhere, hiring officials should collaborate with HR officials to review and approve the final version of the announcement exactly as it will appear to the public. Hiring officials should review the announcement to ensure that it is consistent with Paragraphs 6 through 10 before it is posted.

12. Hiring officials should continue to review open-ended or long-term vacancy announcements to ensure they do not become outdated.

Improving OPM's Talent Acquisition System

13. OPM should instruct agencies that HR users developing job vacancy announcement templates in the talent acquisition system used to post announcements on USAJobs and to track applications must specify exactly and clearly which documents are required to constitute a complete application; distinguish between mandatory and desirable criteria; and include under mandatory criteria only essential elements, such as bar membership and citizenship status, as specified in Paragraph 7.
14. OPM should clearly inform agencies to exclude from their vacancy announcement templates any language inapplicable to attorney hiring.
15. OPM should include a link on its talent acquisition system to the *Plain Language Guidelines* and to Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*, and encourage agencies to apply all relevant provisions to their drafting of vacancy announcements, as specified in Paragraph 6.
16. OPM should make clear in the instructions for its talent acquisition system that agencies have the option of requiring applicants to submit a conventional résumé instead of a résumé generated by USAJobs.

Evaluating Applicants for Attorney Positions

17. Agencies should develop policies or processes governing how attorney applications will be reviewed and assessed. These policies or processes may include creating teams to select applicants for interviews or recommend applicants for appointment.
18. Agency leadership should decide which responsibilities HR officials should have in evaluating applications. If HR officials will screen applicants, hiring officials should determine the screening criteria and clearly communicate them to the screeners.
19. If feasible, agencies should ensure applicants are notified when their applications have been received and when the agency has made a hiring decision.
20. Supervisors should be aware that most newly hired attorneys accrue the right to challenge removal before the MSPB after two years (or one year, if the person is a veteran or an eligible family member of a veteran). HR officials should send reminders to supervisors approximately three to six months before such rights accrue for any given attorney.

Using Law Clerk Trainee Positions and Honors Programs to Hire Attorneys

21. Agencies with honors programs should encourage successful interns to apply to them. Agencies without honors programs should consider hiring high-performing legal interns after graduation but before they have been admitted to a bar, using the authority to hire a law clerk trainee who can be appointed to an attorney position upon admission to a bar.

Ensuring Impartiality of Attorneys Hired as Non-Administrative Law Judge (ALJ) Adjudicators

22. Agencies' guidelines and procedures for hiring attorneys who will act as non-ALJ adjudicators should be designed and administered to ensure that those hired will act

impartially and maintain the appearance of impartiality, as suggested in Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*.

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