NOTICES

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

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted three recommendations 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.

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

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, comment, or response 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 collection to OIRA. This Recommendation primarily concerns the interaction between agencies and the OIRA review process.

Under the OIRA review process, when an agency seeks to collect structured information from ten or more members of the public, 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 (RICIS), the computer system used by agencies to record 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 comment 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 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 substantial 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 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.


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 4.

When an agency seeks 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.

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.

Under the common form approval process, a “host” agency secures approval of the collection from OIRA. Later, if an agency wishes 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.\(^10\)

Agency studies of the form might create.

\(^{2}\) 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.

\(^{3}\) See id.

\(^{4}\) 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.

\(^{5}\) 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.

\(^{6}\) Id. at 17–19.

\(^{7}\) 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.
agencies nor OIRA are satisfied with it.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20}

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 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.\textsuperscript{21} 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,\textsuperscript{22} 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.\textsuperscript{23} To date, only a handful of agencies have used these severability clauses,\textsuperscript{24} yet many other agencies issue rules that may be good candidates for considering the possibility of severability.

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


\textsuperscript{19}Jennifer Nor & Edward Stiglitz, Regulatory Bundling, 128 Yale L.J. ___ (forthcoming 2018).

\textsuperscript{20}A recent review of OIRA’s database 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).

\textsuperscript{21}The Federal Trade Commission and Environmental Protection Agency have generated the largest volume of severability clauses. Id. at 2318–19.

\textsuperscript{22}See, e.g., Consumer Fin. Prot. Bureau v. The Mortg. Law Grp., LLP, 182 F. Supp. 3d 890, 894–95 (W.D. Tex. 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–GRS, 2014 WL 4747027, 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 733, 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).

\textsuperscript{23}Am. Petroleum Inst. v. EPA, 862 F.3d 50, 72 (D.C. Cir. 2017) (’’If EPA, or any party, wishes to disavow us of our substantive conclusion with a condition for rehearing, we will of course reconsider as necessary.’’), decision modified on reh’g, 863 F.3d 918 (D.C. Cir. 2018).

\textsuperscript{24}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).

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 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 decisions.

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.\(^3\)

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 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 ability 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.

e. 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 adoption of those technologies as they mature in order to ensure the integrity of agency information systems.

d. Ensure 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.

e. 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.

f. 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