

USER FEE PROGRAMS

ERIKA LIETZAN*

INTRODUCTION.....	376
I. BACKGROUND.....	379
A. <i>History of User Fees</i>	381
1. <i>The Independent Offices Appropriations Act</i>	381
2. <i>Constitutional Questions and Judicial Rulings</i>	383
3. <i>Growing Interest in User Fee Programs</i>	389
B. <i>Appropriations and User Fees</i>	393
II. THRESHOLD QUESTIONS.....	397
A. <i>Whether to Assess a User Fee</i>	397
1. <i>Efficiency</i>	398
2. <i>Privatization</i>	400
3. <i>Additional Funding</i>	401
4. <i>Fairness</i>	402
5. <i>Achieving Policy Goals</i>	404
6. <i>Potential for Unintended Consequences</i>	406
B. <i>Whether to Seek Separate Statutory Authorization</i>	409
1. <i>Congressional Oversight</i>	410

* Erika Lietzan is the Timothy J. Heinsz Professor of Law and William H. Pittman Professor of Law at the University of Missouri School of Law. This Article is based on a report prepared for the consideration of the Administrative Conference of the United States. Erika Lietzan, *USER FEE PROGRAMS: DESIGN CHOICES AND PROCESSES* (Nov. 9, 2023) (report to the Admin. Conf. of the U.S.). That report and this Article do not necessarily reflect the views of the Conference (including its Council, committees, or members). The report benefitted from interviews with personnel at the Agricultural Marketing Service (AMS), Customs and Border Protection (CBP), the Environmental Protection Agency (EPA), the Nuclear Regulatory Commission (NRC), the Securities and Exchange Commission (SEC), the United States Citizenship and Immigration Services (USCIS), and the U.S. Patent and Trademark Office (USPTO), as well as the American Intellectual Property Law Association (AIPLA) regarding fees charged by USPTO and Public Citizen regarding prescription drug user fees charged by the Food and Drug Administration (FDA). Special thanks are due to Matthew Graham (University of Missouri School of Law, Class of 2024), Tom Langdon (2025), and Jacob Wood (2025) for research support.

2. <i>Level of Design Decisionmaking</i>	411
3. <i>Ability to Engage in Policymaking</i>	411
4. <i>Using Both</i>	412
III. PROGRAM DESIGN	413
A. <i>Setting User Fees</i>	413
1. <i>Transactional versus Non-Transactional Fees</i>	413
2. <i>Fee Setting Discretion</i>	414
3. <i>Fee Setting Procedures</i>	416
4. <i>Reductions, Waivers, and Exemptions</i>	419
B. <i>Collecting User Fees</i>	422
1. <i>When to Collect User Fees</i>	422
2. <i>Whether and How to Enforce the Obligation to Pay User Fees</i>	425
C. <i>Using Collected Fees</i>	426
D. <i>Reviewing User Fees and Fee Programs</i>	428
1. <i>Reviewing and Adjusting Fees</i>	428
2. <i>Reviewing the Fee Program</i>	430
IV. RECOMMENDATIONS	431
A. <i>Involve Stakeholders and Ensure Transparency</i>	431
B. <i>Address Risk of Distorting Agency Decisions and Private Behavior</i>	433
C. <i>Consider Risk of Revenue Instability</i>	434
D. <i>Consider Values Other than Efficiency</i>	435
APPENDIX: KEY USER FEE PROGRAMS	436

INTRODUCTION

A user fee is a fee assessed by the government when it provides a good or service to a private party. Classic examples include the fee to enter Yellowstone National Park and payment to the U.S. Postal Service for a first-class postage stamp. In these transactions, the government provides a specific benefit to an identifiable recipient, who pays the fee. Although the federal government has assessed user fees since this country's founding, broad authorizing legislation in the middle of the 20th century made it possible for agencies to craft user fee programs on their own initiative. Interest in relying on user fees rather than general revenue (taxes) intensified in the final quarter of the century as the federal courts sorted through issues relating to the constitutionality of user fees and concerns mounted about the growing federal debt.

Today, hundreds of user fees are in place across dozens of agencies,¹ and

1. There is no authoritative public list of federal agency user fees. The Appendix presents a list compiled from public sources, but it is not exhaustive. *See infra* Appendix: Key User Fee Programs.

collections exceed more than \$500 billion per year.² Congress has now supplemented the broad mid-century authorizing legislation with statutes that authorize or require specific agencies to collect user fees. Some enactments are prescriptive (even as to the amount collected), while others specify a formula or objective (such as full cost recovery). Some statutory authorizations are permanent, while others are slated to expire, so continuing to collect fees requires reauthorization. Some agencies are fully funded by user fees, some agencies have discrete programs that are fully funded by user fees, and some agencies receive only modest support from user fees. Some agencies collect more money from fees in a year than they will use that year and maintain the leftover funds in a reserve fund in the event of a shortfall, while others do not. And so on.

This Article examines the design and implementation of user fee programs across the Executive Branch.³ Design means design both at the congressional level (i.e., the drafting of statutory user fee authority) and at the agency level (i.e., the implementing of statutory user fee authority).⁴ This Article discusses design decisions that must be made and the choices available; identifies practical and legal constraints on the choices available; explores the relationship between these choices and core values of administrative law; and explains how program designers might make these choices, as a procedural matter and as a substantive matter. On the basis of this discussion and informed by a series of stakeholder interviews, this Article offers recommendations for agencies and lawmakers relating to user fee design and implementation.

The recommendations are as follows. *First*, transparency during the user fee design process and some degree of stakeholder involvement will be important. The manner and extent of the involvement that is appropriate may vary. *Second*, decisionmakers should pay attention to the possibility that imposing fees, the structure of the fee program, or the fee amounts could distort either agency decisionmaking or private behaviors in undesirable ways. The classic concern would be that collecting fees to support its programs prompts an agency to favor the interests of regulated fee payers, but

2. See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE U.S. GOV'T FISCAL YEAR 2024: ANALYTICAL PERSPECTIVES 197 tbl.18-3 (2023) (showing user fees collected in FY 2022 totaling \$571.6 billion).

3. It does not consider fees assessed by the Judiciary or the Legislative Branch. An example of the latter would be the fees assessed under 17 U.S.C. § 708 by the Copyright Office, which is part of the Library of Congress.

4. This Article uses the term “decisionmakers” (also “planners” or “program designers”) to refer to persons making design decisions, understanding that these individuals might be within the Executive Branch or within the Legislative Branch, depending on the situation. The term “lawmakers” in this Article refers exclusively to the legislature.

this recommendation is meant to cast a wider net. *Third*, attention should be paid to the consequences of an agency being partly or fully dependent on user fees. Decisionmakers may want to create a reserve fund so that important regulatory programs are not placed at risk because collections are hard to predict. Doing so might reduce legislative oversight, however, which might be viewed as unacceptable. *Fourth*, although program designers historically justified user fees on economic efficiency grounds, and some support fees now simply to increase resources available to regulators, there may be reason to take other values into account when deciding whether to collect a fee or how to structure a fee program.

This Article proceeds as follows: Part I tells the history of user fee programs, explains how user fee collections relate to the legislative appropriations process, and explores issues resolved through federal court litigation, especially in the 1970s. Part II discusses threshold questions for decisionmakers: whether to impose a user fee and whether to use the mid-century authorizing statute or seek separate authorizing legislation. Part III works through design and implementation issues, grouped around four topics: setting user fees, collecting user fees, using collected fees, and reviewing user fees and fee programs. Part IV explains the recommendations.

There are significant questions about the constitutionality of statutes that delegate to executive branch entities the power to raise money for their own use. These questions increase if the money is available for an unlimited amount of time without subsequent congressional involvement or if the entity has broad discretion to design its own substantive programs.⁵ These concerns may have additional salience in coming years given the resurgence of both formalism and originalism in the courts. In February 2023, the Supreme Court agreed to review the constitutionality of the Consumer Financial Protection Bureau's (CFPB's) self-funding mechanism, pursuant to which the agency—as described by the U.S. Court of Appeals for the Fifth Circuit—“simply requisitions from the Federal Reserve an amount ‘determined by the Director to be reasonably necessary to carry out’ the Bureau’s functions” and the “Federal Reserve must grant that request so long as it does not exceed 12% of the Federal Reserve’s ‘total operating

5. Among other things, these concerns relate to consistency with the Appropriations Clause and the Origination Clause. *See* U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”); *id.* § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives”). More broadly, these concerns relate to the separation of powers (including nondelegation of legislative power). This Article reserves judgment on all such issues, which were expressly beyond the scope of the underlying report to the Administrative Conference.

expenses.”⁶ Although this is not a user fee arrangement, the outcome of the case could have implications for user fee programs throughout the Executive Branch.⁷ These issues are beyond the scope of this Article but make the research and analysis presented in this Article especially timely.

I. BACKGROUND

The first task is to define “user fee” for purposes of this Article. The classical transactional model described in the Introduction involves payment by a specific beneficiary in exchange for a specific benefit. Today, though, many agencies charge fees to regulated entities. For instance, the U.S. Food and Drug Administration (FDA) collects a filing fee when a drug company submits an application to market a new drug,⁸ and the United States Patent and Trademark Office (USPTO) collects a fee with each patent application.⁹ In a sense, the agency’s service—review of the application—benefits the

6. *Cnty. Fin. Servs. Ass’n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 638 (5th Cir. 2022) (footnote omitted) (first quoting 12 U.S.C. § 5497(a); then quoting 12 U.S.C. § 5497(a)(1)–(2)). The Court of Appeals concluded that this self-funding mechanism “cannot be reconciled with the Appropriations Clause and the clause’s underpinning, the constitutional separation of powers.” *Id.* at 642; *see also id.* at 640 (“An expansive executive agency insulated (no, double-insulated) from Congress’s purse strings, expressly exempt from budgetary review, and headed by a single Director removable at the President’s pleasure is the epitome of the unification of the purse and the sword in the executive—an abomination the Framers warned ‘would destroy that division of powers on which political liberty is founded.’” (quoting Alexander Hamilton, Convention of New York, *in* THE WORKS OF ALEXANDER HAMILTON 61 (Henry Cabot Lodge ed., vol. 2 1904))). For discussion, see Christine Kexel Chabot, *The Founders’ Purse*, 110 VA. L. REV. __ (forthcoming 2024) (arguing that the Fifth Circuit’s analysis missed a critical body of contrary historical evidence and that the CFPB arrangement aligns with Appropriations Clause directive that Congress authorize spending “by law”); *contra* Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988) (arguing the Appropriations Clause means the executive may not raise or spend funds that were not appropriated by explicit legislative action and that Congress has a constitutional duty to limit the amount and duration of each grant of spending authority).

7. Moreover, regardless of the outcome of *Community Financial Services*, the issues will continue to percolate in the courts. *E.g.*, *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022) (affirming National Marine Fisheries Service implementation of industry-funded at-sea monitoring program under the Magnuson-Stevens Act), *cert. granted*, 143 S. Ct. 2429 (2023) (limited to question whether the Court should overrule *Chevron* and not whether the statute granted the agency authority to assess the fee).

8. *See* 21 U.S.C. § 379h(a)(1).

9. *See* 35 U.S.C. § 41.

applicant.¹⁰ But the service—review of new drug and patent applications—also benefits the public.¹¹ And some modern fees are not transactional at all; for instance, every federal credit union pays an annual fee to the National Credit Union Administration (NCUA).¹² Therefore, for purposes of this Article, a user fee is (1) any fee assessed by an agency for a good or service the agency provides to the party paying the fee, as well as (2) any fee collected by an agency from an entity engaged in, or seeking to engage in, activity regulated by the agency, either to support a specific regulatory service provided to that entity or to support a regulatory program that at least in part benefits the entity.¹³

10. The benefit is different in these examples. Review of a patent application benefits the applicant because, if it results in patent issuance, federal law will protect the patent right. *See* 35 U.S.C. § 271. Review of a drug application benefits the applicant only because federal law erects a barrier to market entry—the premarket approval requirement. *See* 21 U.S.C. § 355(a). When Congress enacted FDA’s user fees, negotiators agreed to a fiction that the fees pay for the benefit of faster application review. Each time Congress reauthorizes drug user fees, FDA agrees to non-statutory performance goals that include deadlines for application review. *See infra* Part A. The negotiated deadlines (ten months for most applications) mean FDA decides more quickly than it did previously, but it still does not move as fast as the statute requires (180 days). *See* 21 U.S.C. § 355(c)(1).

11. FDA reviews new drug applications for safety and effectiveness, and its gatekeeping role ensures that a new drug’s benefits outweigh its risks. It also ensures the development of high quality evidence about new medicines and helps to standardize the format and content of information provided to prescribers about those medicines. Issuance of a patent rewards invention by ensuring protection of exclusive rights to the invention for a period of time, while also securing public disclosure of the invention (in the patent document). The prospect of reward stimulates innovative activity, and public disclosure ensures the information will eventually fall into the public domain. Rejection of unworthy patent applications ensures that the public does not pay the price—of having to respect exclusive rights and thus, typically, paying higher prices for commercial embodiments of an invention for a period of time—unless the invention was novel and not obvious.

12. *See* 12 U.S.C. § 1755.

13. Definitions within the Executive Branch vary. *E.g.*, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET 20-12 (2023) [hereinafter OMB CIRCULAR NO. A-11] (defining “user charges” as charges assessed from a person “receiving special benefits from, or subject to regulation by, the program or activity” funded); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-25 REVISED, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS (2017) [hereinafter OMB CIRCULAR A-25 REVISED] (“[F]ees assessed for Government services and for sale or use of Government goods or resources.”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 100 (2005) (“[F]ee assessed to users for goods

A. *History of User Fees*

1. *The Independent Offices Appropriations Act*

Shortly after World War II, Congress passed legislation asking agencies to adopt user fees.¹⁴ Title V of the Independent Offices Appropriation Act (IOAA), enacted in 1951, expressed the “sense of Congress” that benefits, privileges, licenses, permits, and “similar” things of “value or utility” that were provided, prepared, or issued by federal agencies should be “self-sustaining.”¹⁵ Today, § 9701 of Title 31 authorizes every agency (except a mixed-ownership government corporation) to issue regulations establishing the “charge” for a “service or thing of value” provided by the agency.¹⁶ Each

or services provided by the federal government”); *id.* (“User fees generally apply to federal programs or activities that provide special benefits to identifiable recipients above and beyond what is normally available to the public”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. III 12-143 (3d. ed. 2008) [hereinafter GAO-08-978SP] (“[A] price charged by a governmental agency for a service or product whose distribution it controls,’ or ‘any charge collected from recipients of Government goods, services, or other benefits not shared by the public”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-718, FEDERAL USER FEES: KEY CONSIDERATIONS FOR DESIGNING AND IMPLEMENTING REGULATORY FEES 1–2 (2015) (distinguishing between “regulatory user fees” (“a subset of federal user fees that are charged to regulated entities in conjunction with regulatory activities”) and “other types of user fees” (paid by businesses and individuals “in exchange for the receipt of a discrete product or service where the government is not engaging in a regulatory activity”)).

14. The federal government has imposed user fees for far longer. *See* Brief of Professors of Hist. & Const. L. as Amici Curiae in Support of Petitioners at 23, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, No. 22-448 (S. Ct. May 15, 2023) (explaining that the Customs Service, for sixty years after its establishment in 1789, had no appropriations and instead “received fees for transactions like issuing permits”); *id.* at 26 (“In 1792, Congress established a new Post Office. Instead of relying on annually appropriated Treasury withdrawals, Congress empowered the Office to pay its expenses out of its revenue.”); *id.* at 28 (citing additional statutes from the late 1700s and 1800s that funded the Mint, the Patent Office, the Steamboat Inspection Service, and the Office of the Comptroller of the Currency through fees); *see also* Chabot, *supra* note 6 (discussing early Congresses authorizing self-funded customs officers, U.S. attorneys, U.S. marshals, and the Patent Board); Terrence J. Schroepfer, *Fee-Based Incentives and the Efficient Use of Spectrum*, 44 FED. COMMS. L.J. 411, 415 (1992) (noting that “user fees for such items as . . . the maintenance of bridges date back to the Revolution . . .”).

15. Independent Offices Appropriation Act, Pub. L. No. 82-137, tit. V, 65 Stat. 268, 290 (1951) (codified at 31 U.S.C. § 9701). Congress revised the statutory language in 1982 when it recodified Title 31. *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, § 9701(a), 96 Stat. 877. For a history of this legislation, see GAO-08-978SP, *supra* note 13, at 12-146 to 12-148.

16. 31 U.S.C. § 9701(b).

charge should be “fair[] and based on the costs to the Government[,] the value of the service or thing to the recipient[, the] public policy or interest served[, and] other relevant facts.”¹⁷ “Regulations prescribed by the heads of executive agencies,” the statute adds, “are subject to policies prescribed by the President and shall be as uniform as practicable.”¹⁸

Since the 1950s, the White House has supplemented this statutory language with circulars describing federal policy on the imposition of user fees. In 1959, the Bureau of the Budget—the Office of Management and Budget’s (OMB’s) predecessor—stated the general policy of the Executive Office of the President that a “reasonable charge . . . should be made to each identifiable recipient for a measurable unit or amount of [g]overnment service or property from which he derives a special benefit.”¹⁹ That is, if “a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed”²⁰ Further, the user fee should be calculated to “recover the full cost to the [f]ederal [g]overnment of rendering that service.”²¹ Examples of special services that should trigger a charge, this Circular added, include a service that enables the beneficiary to “obtain more immediate or substantial gains or values . . . than those which accrue to the general public” (such as “receiving a patent, crop insurance, or a license to carry on a specific business”), as well as a service that provides “business stability or assures public confidence in the business activity of the beneficiary” (such as “safety inspections of craft”).²² Another example would be a service “performed at the request of the recipient” and “above and beyond the services regularly received by other members of the same industry or group, or of the general public” (for instance, receiving a passport or visa).²³ In contrast, however, an agency should *not* charge for a service if “identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public” (such as “licensing of new biological products”).²⁴ This was known as the “public benefit exclusion.”²⁵

17. *Id.*

18. *Id.*

19. BUREAU OF THE BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-25 § 3 (1959) [hereinafter CIRCULAR NO. A-25]. The Bureau of the Budget had earlier addressed user fee issues in Bulletin No. 58-3 (Nov. 13, 1957). *Id.* at § 1.

20. § 3(a)(1).

21. *Id.*

22. § 3(a)(1)(a)–(b).

23. § 3(a)(1)(c).

24. § 3(a)(2).

25. JANET WOODCOCK & SUZANNE JUNOD, PDUFA LAYS THE FOUNDATION:

Today, the “[f]ederal policy regarding fees assessed for [g]overnment services and for sale or use of [g]overnment goods or resources” appears in Circular No. A-25 Revised, which OMB issued in 2017.²⁶ Among other things, OMB has reworded the public benefit exclusion to say that an agency should not charge for a service if “identification of the *specific* [rather than *ultimate*] beneficiary is obscure, and the service can be considered primarily as benefitting broadly the general public.”²⁷ And it deleted the example of licensing new biological products, which FDA performs today—for a user fee.²⁸

2. *Constitutional Questions and Judicial Rulings*

In 1963, the Federal Communications Commission (FCC) established nominal fees for applications filed with the agency.²⁹ For instance, an application for a construction permit for a new television station required a filing fee of \$100.³⁰ The FCC relied on the IOAA for its authority to impose these fees, rejecting arguments that the statute had unconstitutionally delegated legislative power.³¹ The United States Court of Appeals for the Seventh Circuit rejected the delegation argument in 1964.³²

In 1970, the agency proposed a new fee schedule that included fees payable by every cable television system.³³ Cable systems did not need licenses to operate.³⁴ Because it could not assess fees in connection with license applications, the agency took a different approach: (1) filing fees in connection with requests for waivers from applicable regulations and (2) an

LAUNCHING INTO THE ERA OF USER FEE ACTS (2011), <https://www.fda.gov/files/about%20fda/published/PDUFA-Lays-the-Foundation--Launching-Into-the-Era-of-User-Fee-Acts.pdf>.

26. OMB CIRCULAR A-25 REVISED, *supra* note 13. Transmittal Memorandum No. 1 (Oct. 22, 1963), and Transmittal Memorandum No. 2 (Apr. 16, 1974) made targeted amendments to the 1959 bulletin, but the White House rescinded all three in November 2017. *See* CIRCULAR NO. A-25, *supra* note 19; OMB CIRCULAR A-25 REVISED, *supra* note 13.

27. OMB CIRCULAR A-25 REVISED, *supra* note 13, § 6(a)(4) (emphases added); *see also infra* note 122 (describing the current circular’s explanation when a special benefit exists).

28. *See* 21 U.S.C. § 379h(a).

29. 28 Fed. Reg. 10,911 (Oct. 11, 1963).

30. *Id.* at 10,914.

31. *See id.* at 10,911.

32. *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304, 307 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965) (stating that the Independent Offices Appropriation Act (IOAA) has the “constitutional essentials” because it states the legislative objective, the method of achievement, and guiding standards).

33. Notice of Proposed Rulemaking, Docket 18802, 21 F.C.C.2d 502, 509 (Feb. 18, 1970).

34. *Id.* at 504.

annual fee payable by each cable system.³⁵ It set the annual fee at 30 cents per (household) subscriber, a number it reached by estimating its cost of regulating the industry, deducting the money it would receive from filing fees, and dividing the remainder by the total number of subscribers.³⁶

The National Cable Television Association sought review of the annual fee. It argued that the IOAA permits an agency to charge a fee only to “an ‘identifiable recipient’ of a ‘measurable unit’ of service from which [that recipient] obtains a ‘special benefit.’”³⁷ Furthermore, the association said, that fee must be based on the “direct and indirect cost to the [g]overnment, value to the recipient, [and] public policy or interest served” by that service.³⁸ The annual fee imposed by the FCC failed each requirement.³⁹ Regulation of the cable industry provided no special benefit, let alone to an identifiable recipient.⁴⁰ Moreover, most cable systems filed no requests at the FCC over the course of a year, meaning there was no measurable unit of service linked to the fee.⁴¹ Finally, the amount paid was unrelated to any value or special benefit received from the FCC; it was effectively based on the payer’s gross receipts and, therefore, an “illegal tax.”⁴²

The Solicitor General responded that cable television operators enjoy special benefits that warrant fee assessments to recover regulatory costs, including the benefit of authorization to carry television broadcast signals.⁴³ And although the FCC conducts its activities primarily for the public’s benefit, the brief added, nothing in the IOAA or Circular A-25 precluded charges so long as substantial special benefits accrue to members of an industry as a result of the agency’s work.⁴⁴ Moreover, the statute did not limit fees to services specifically rendered to *individual* applicants; an agency could prorate the cost of its regulatory activities among members of a

35. Report and Order, Docket No. 18802, 23 F.C.C.2d 880, 886 (July 2, 1970).

36. Brief for Petitioner at 12, Nat’l Cable Television Ass’n v. United States, 415 U.S. 336 (1974) (No. 72-948) 1973 WL 173866, at *7.

37. *Id.* at *11.

38. *Id.*

39. *Id.* at *11.

40. *Id.* at *18–19.

41. *Id.* at *12.

42. *Id.* at *12–13. A tax would be illegal because Congress had authorized a fee instead. *Id.* at *42 n.41.

43. The agency’s regulatory framework, it argued, provides “general authorization to provide this interstate communication service in accordance with applicable rules and regulations.” Brief for the United States and the Federal Communications Commission at 13, Nat’l Cable Television Ass’n v. United States, 415 U.S. 336 (1974) (No. 72-948) 1973 WL 173867, at *7 (citing Report and Order, Docket No. 18802, 23 F.C.C.2d 880 (July 2, 1970)).

44. *Id.* at *19–20.

benefitting *group*.⁴⁵ The FCC's approach to calculating the fee was a "fair and equitable" way of balancing "value to the recipient" with the other statutory criteria, including direct and indirect cost to the government, public policy, and other pertinent facts.⁴⁶

The Supreme Court sent the matter back to the FCC. The Court construed the statute to authorize only a fee based on the agency providing a service of value to a recipient.⁴⁷ While the regulated companies derived some benefit from the regulatory scheme, the scheme as a whole benefitted the public.⁴⁸ Therefore, the fee had to be recalculated, so that cable systems paid only for the benefit they received and not also for the benefit the public received.⁴⁹

The reasoning of this decision has proven important for the design of subsequent user fee programs and requires elaboration.⁵⁰ Justice Douglas began by drawing a sharp distinction between taxation and fee assessment. "Taxation," he wrote, is a "legislative function," and Congress "the sole organ for levying taxes."⁵¹ A "fee," in contrast, "is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station."⁵² An agency performing these services "normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society."⁵³ He then construed the IOAA as authorizing a "fee" tied to a benefit, noting alignment with the statute's instruction to consider the "value to the recipient."⁵⁴

The Court did not address the constitutional question: whether the IOAA

45. *Id.* at *20–21.

46. *Id.* at *21–22.

47. *Id.*

48. *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 343 (1974) (citing 47 U.S.C. § 151).

49. *Id.* at 343–44.

50. *E.g.*, Margaret Gilhooley, *Drug User Fee Reform: The Problem of Capture and a Sunset, and the Relevance of Priorities and the Deficit*, 41 N.M. L. REV. 327, 340 (2011) (stating that user fees for new drug applications at FDA were characterized as fees in exchange for faster reviews to reflect the *National Cable* decision, because this "avoided issues about Congress's constitutional ability to delegate authority to an agency to impose a tax by reading the statute as authorizing fees based on the value given to the recipient, rather than the public interest").

51. *Nat'l Cable*, 415 U.S. at 340 (citing U.S. CONST. art. I, § 8) The United States Constitution gives Congress the power to "lay and collect Taxes, Duties, Impost and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8.

52. *Nat'l Cable*, 415 U.S. at 340.

53. *Id.* at 340–41.

54. *Id.* at 341.

provided adequate standards for agency action under the Supreme Court's delegation decisions, *Schechter* and *Hampton*.⁵⁵ Nor did it consider a different constitutional question: whether, when Congress uses its *taxing* power, it must provide more concrete guidance to the agency than these precedents otherwise require.⁵⁶ Instead, the Court would "read the Act narrowly to avoid constitutional problems."⁵⁷ The statutory reference to basing the fee on "public policy or interest served, and other pertinent facts," if instead

55. *Id.* at 342 ("Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach"), quoting both *Schechter Corp. v. United States*, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); and then *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

56. It addressed this question in 1989. In *Skinner v. Mid-America Pipeline*, which concerned pipeline safety user fees, the Court rejected an argument that "the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." 490 U.S. 212, 214, 222–23 (1989). Consequently, it did not determine whether the fee, which partially covered administrative costs that "actually inure to the benefit of the public," was for that reason properly characterized as a tax or a fee. *Id.* at 223. Either would have been constitutional. *Id.* Congress need only "indicate clearly its intention to delegate . . . [the] authority to recover administrative costs [that do] not inur[e] directly to the benefit of regulated parties . . ." *Id.* at 224. Relying on this quote, some Courts of Appeal describe *National Cable* and *Skinner* as together setting forth a "clear-statement rule"—distinct from the "intelligible principle" standard for permissible delegation set out in *Hampton*—for user fees to survive nondelegation challenges. *E.g.*, *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1273–74, 1278 (3d Cir. 1993) (holding that costs incurred by government in overseeing a hazardous waste cleanup performed and paid for by a private party under the Resource Conservation and Recovery Act (RCRA) are not recoverable, because the "clear indication mandated by" *National Cable* was lacking); *United States v. Dico, Inc.*, 266 F.3d 864, 876–78 (8th Cir. 2001) (declining to apply "*National Cable* clear statement doctrine" to EPA recovery of oversight costs in connection with cleanup, because statutory scheme is remedial and not a user charge); *United States v. E.I. DuPont de Nemours & Co., Inc.*, 432 F.3d 161, 167–69 (3d Cir. 2005) (overruling *Rohm* and stating that because Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "neither imposes user fees or taxes, nor imposes them on a regulated industry," *National Cable* "does not apply"). For discussion of these issues, see Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 277 (2005) (arguing for more diligent enforcement of the nondelegation doctrine in the context of legislation authorizing agencies to raise and spend revenue directly, though taking the position that if Congress "delegates clearly and with the requisite specificity," it "may delegate responsibility for implementing either a fee or a tax to an administrative agency").

57. *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974).

construed literally, “carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House.”⁵⁸ Such an assessment would be akin to a tax, and constitutional questions would surface. These considerations would be ignored, leaving “value to the recipient” as the basis for the fee authorized.⁵⁹ This, in turn, meant the FCC could not set the fee amount so that regulated companies fully funded their regulatory oversight.

When it released the decision in *National Cable*, the Court also released a companion decision in *Federal Power Commission v. New England Power Co.*⁶⁰ In *National Cable*, the Court had not reached the argument that the FCC impermissibly collected annual fees from companies that did not receive benefits or services.⁶¹ In *Federal Power Commission*, the Court addressed the argument. The Federal Power Commission imposed an annual fee on electric utilities, taking essentially the same approach as the FCC had done; it took the annual cost of administering the Federal Power Act, deducted certain costs (such as the cost of providing services to electric systems that were not subject to its authority), and assessed “the remaining balance . . . [against all companies it regulated] in proportion to their wholesale sales and interchange of electricity.”⁶²

This was impermissible. The IOAA authorizes “only *specific* charges for *specific* services to *specific individuals or companies*”; it does not authorize assessment of fees against an entire industry *as* an industry.⁶³ The problem was not that the agency imposed an annual fee or that it collected the fee from all members of the industry, but rather that it collected fees from companies that “had no proceedings before the [agency] during the year in question.”⁶⁴ Justice Douglas distinguished a hypothetical arrangement in which every member of an industry benefits from a specific service and pays

58. *Id.* at 341. For instance, a lawmaker might “make the assessment heavy if the lawmaker wants to discourage the activity; or it may make the levy slight if a bounty is to be bestowed . . .” *Id.*

59. *See* *Seafarers Int’l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 183–84 (D.C. Cir. 1996) (stating that the Court “essentially read the ‘public policy or interest served’ language out of the statute”).

60. 415 U.S. 345 (1974).

61. It did not reach this issue because it stopped when it found that the agency impermissibly charged companies for benefits accruing to the public. It sent the fee back to the agency to recalculate at this point, without considering which companies could be assessed the fee. *See Nat’l Cable*, 415 U.S. at 344.

62. *See Fed. Power Comm’n*, 415 U.S. at 346–47. It also collected an annual fee from natural gas companies, taking the same basic approach to calculation of each company’s fee. *Id.*

63. *Id.* at 349 (emphasis added).

64. *Id.* at 351.

a corresponding fee.⁶⁵ The Court affirmed the decision of the Court of Appeals to set aside the annual charges.⁶⁶

These rulings tell us three things about the design of user fee programs under the IOAA. *First*, *Federal Power Commission* tells us an agency may not collect a fee from a company that does not receive a special benefit from the agency. This proposition is specific to the IOAA; Justice Douglas distinguished annual fees levied by the Atomic Energy Commission (AEC) and the Securities and Exchange Commission (SEC) under different laws.⁶⁷ *Second*, *National Cable* tells us that a user fee under the IOAA must be based on the service's (or good's) value to the recipient. Two years later, the D.C. Circuit concluded that this means the value *conferred on* the recipient, rather than the value *derived by* the recipient.⁶⁸ In other words, the fees must "bear a reasonable relationship to the *cost* [to the agency] of the services rendered,"⁶⁹ rather than the value of those services to the recipient (which might be reflected in the recipient's gross income). *Third*, an agency may assess a fee under the IOAA even if the service benefits both the feepayer and the public. To be sure, *National Cable* says that an agency may not charge the feepayer for the benefit received by the public, but it also establishes that the

65. *Id.*

66. *Id.* Justice Marshall, joined by Justice Brennan, wrote separately—one opinion for the two cases, dissenting in *National Cable* and concurring in *Federal Power Commission*. Although they were not moved by arguments that the statutes raised constitutional issues, they perceived no specific benefit provided or service rendered to the companies paying annual fees, so they would have ruled in both cases that the IOAA did not authorize the fees. *Id.* at 359.

67. The Atomic Energy Commission assessed an annual fee against operators of nuclear power reactors and operators of other nuclear facilities, and the Securities and Exchange Commission (SEC) assessed an annual fee on registered investment advisors. *Id.* at 350 n.4. After endorsing the proposition—set forth in Circular A-25—that under the IOAA, no charge should be made "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public," Justice Douglas added that this sentence "covers only fees imposed under [the IOAA], not those authorized 'under more specific grants of statutory authority.'" *Id.* at 350, 350 n.4.

68. *Cap. Cities Commc'ns, Inc. v. Fed. Commc'ns Comm'n* (FCC), 554 F.2d 1135, 1138 (D.C. Cir. 1976); *see also Nat'l Ass'n of Broadcasters v. FCC*, 554 F.2d 1128, 1129 n.28 (D.C. Cir. 1976) ("In suggesting that the 'value of benefits bestowed' on a regulatee could be included in the fee, and that same would include factors beyond 'costs,' the concurrence is apparently suggesting that the fee base could go so far as to include values created by licensees out of their grants. . . . [We] do not believe that the quoted Supreme Court decisions permit the inclusion of such factors. When the cost of the benefit conferred is exceeded by any material amount, one immediately gets into the taxing area and the result is revenue and not a fee.").

69. *Cap. Cities Commc'ns, Inc.*, 554 F.2d at 1138 (emphasis in original omitted, different emphasis added).

agency may shift a portion of the cost of regulation to industry, even if the public benefits from that regulation.⁷⁰ Even after these rulings, though, some agencies declined to impose fees under the IOAA for services that provided significant public benefits, citing concerns about the legality of doing so. For instance, leadership at the U.S. Department of Health and Human Services (HHS) raised this issue when rejecting recommendations that FDA impose user fees under the IOAA.⁷¹

3. *Growing Interest in User Fee Programs*

Reliance on user fees—both under the IOAA and under new statutes—increased in the subsequent decades.⁷² For instance, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) included agency-specific user fee authorizations and related provisions.⁷³ Section 5002 amended the Communications Act to require the FCC to assess fees associated with constructing and operating mass media and common carrier services.⁷⁴ Section 7005 directed the Secretary of Transportation to establish

70. *See also* *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 183 (D.C. Cir. 1996) (“[F]ees are valid so long as the agency levies ‘specific charges for specific services to specific individuals or companies.’ Under this test, it does not matter whether the ultimate purpose of the regulatory scheme giving rise to the license requirement (and accompanying user fee) is to benefit the public.”).

71. Bruce N. Kuhlik, *Industry Funding of Improvements in the FDA’s New Drug Approval Process: The Prescription Drug User Fee Act of 1992*, 47 FOOD & DRUG L.J. 483, 484 (1992) (noting disagreement between the Department of Health, Education, and Welfare (HEW), Department of Health and Human Services’ (HHS) predecessor, which “believed that the benefits received by the general public from the services involved were primary and that the benefits received by the manufacturers were secondary” and Government Accountability Office (GAO), which believed that “although the general public accrues immeasurable health benefits, the drug manufacturers acquire benefits through the right to market the approved product for profit”); *see also* James L. Zelenay, Jr., *The Prescription Drug User Fee Act: Is a Faster Food and Drug Administration Always a Better Food and Drug Administration?*, 60 FOOD & DRUG L.J. 261, 275–76 (2005) (noting that GAO recommended in 1971 that FDA implement user fees under the IOAA, but the agency, the Bureau of Budget, and HEW responded that it lacked the authority to do so).

72. *See generally* CONG. BUDGET OFF., THE GROWTH OF FEDERAL USER CHARGES: AN UPDATE (1995), <https://www.cbo.gov/sites/default/files/104th-congress-1995-1996/reports/1995doc32.pdf>.

73. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986).

74. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 118–21 (1986) (codified at 47 U.S.C. § 158).

pipeline safety user fees.⁷⁵ Sections 13031 to 13022 directed the Secretary of the Treasury to collect fees for customs broker permits and other customs services.⁷⁶ Section 7601 directed the Nuclear Regulatory Commission (NRC) to study the feasibility of and need for annual fees from persons licensed under the Atomic Energy Act.⁷⁷ The Omnibus Budget Reconciliation Acts of 1990 (OBRA-90) and 1993 (OBRA-93) authorized more fees; for example, OBRA-93 authorized the FCC to auction licenses for use of the electromagnetic spectrum.⁷⁸ In the 1990s, Congress authorized FDA to collect fees in connection with new drug applications and biologics license applications,⁷⁹ and it has since authorized the agency to collect fees from other industries.⁸⁰

Increased interest in user fee programs partly reflects deregulatory initiatives over multiple presidential administrations, beginning in the 1970s with the Carter Administration.⁸¹ Although different administrations may pursue deregulation for different reasons—one might be motivated by a philosophical preference for smaller federal government, for instance, while another might be motivated by desire to reduce the federal debt—user fee proposals have featured in deregulatory reform proposals for decades.⁸² The

75. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 140 (1986) (codified at 49 U.S.C. app. § 1682a).

76. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 308–10 (1986) (codified at 19 U.S.C. § 58c).

77. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 146–47 (1986) (codified at 42 U.S.C. § 2213).

78. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6003, 107 Stat. 312, 397.

79. Prescription Drug User Fee Act of 1992, Pub. L. No. 102-571, 106 Stat. 4491.

80. See *infra* Appendix: Key User Fee Programs.

81. Alfred C. Aman Jr., *A Global Perspective on Current Regulatory Reforms: Rejection, Relocation, or Reinvention*, 2 IND. J. GLOB. LEGAL STUD. 429, 443 (1995) (“The use of market approaches to regulation and legislative deregulatory reform first began in a major way in [the Carter] administration”); see also Susan Dudley, *Jimmy Carter, The Great Deregulator*, THE REGUL. REV. (Mar. 6, 2023), <https://www.theregreview.org/2023/03/06/dudley-jimmy-carter-the-great-deregulator/> (“President Carter deserves credit for setting in motion a wave of economic deregulation that led to lasting improvements in social welfare.”).

82. Aman Jr., *supra* note 81, at 445 (“There was a significant global backdrop to the deregulatory initiatives of the 1970s and especially the 1980s that gave added impetus to the political viability of these reforms”); *id.* at 445, 450–51, 453 (noting that the National Performance Review written during the Clinton Administration under Vice President Gore’s direction advocates a new “rhetoric for defining the relationship of the individual to the State” with “citizens as customers” and urges “greater reliance on user fees”); Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 797–

Grace Commission Report also played a role in the shift to greater reliance on user fees. President Reagan had requested a private sector study of government waste, and among other things the resulting report proposed changes to user fees. It suggested that they sometimes be based on the value of the service to the recipient and *not* the agency's cost recovery. It also suggested that agencies be permitted to keep the fees they did not spend, which would mitigate resource fluctuation and might also encourage agencies to create user fee programs.⁸³ These suggestions bore fruit in some subsequent user fee schemes.

Lower court rulings since the 1970s have provided additional guidance for program designers. For example, an agency imposing fees under the IOAA may recover the *full cost* of providing a specific benefit to an identifiable beneficiary, even if the public incidentally benefits from the service.⁸⁴ The fee need only be "reasonably related" to the value of the private benefit.⁸⁵ This agency may not, however, recover costs incurred serving an "independent" public interest.⁸⁶ Also, Congress may authorize an agency to recover its costs in providing generic services to members of a regulated industry without tying specific costs to specific services provided to specific companies.⁸⁷ This means

98 (1987) (noting that the Reagan Administration took a keen interest in expanding reliance on user fees); Peter A. Pfohl, *Who Should Pay for Agency Adjudication - A Study of 200,000 Filing Fees at the Surface Transportation Board*, 25 TRANSP. L.J. 57, 60 (1997) (suggesting that President Clinton's proposal that the Surface Transportation Board be funded by user fees reflected his commitment to deregulating the railroads).

83. WOODCOCK & JUNOD, *supra* note 25, at 5. For discussion of appropriations issues, see *infra* Part B.

84. *Miss. Power & Light Co. v. U.S. Nuclear Regul. Comm'n*, 601 F.2d 223, 229-30 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994). A benefit to the public is incidental if it comes at no added cost to the service.

85. *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 730, 732 (D.C. Cir. 1985).

86. *Miss. Power & Light Co.*, 601 F.2d at 230; *Cent. & S. Motor Freight Tariff Ass'n*, 777 F.2d at 732.

87. *Fla. Power & Light v. United States*, 846 F.2d 765, 768 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989). The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) authorized the NRC to collect fees "reasonably related to the regulatory service provided by the Commission." Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 146-47 (1986) (codified at 42 U.S.C. § 2213). The NRC assessed an annual fee from power reactor operators for "generic services" that the agency "concluded were reasonably related to regulating all licensees" in that category. The court of appeals concluded that Congress had not meant to impose the IOAA standard (that a fee reflect the value of the agency's services to that recipient). Under COBRA, the NRC could

lawmakers may authorize non-transactional fees. In this case, the fees do not need to be “reduced by a portion artificially allocated to public benefit;” instead, it suffices that the fees are “reasonably related” to “services provided the feepayers.”⁸⁸ In addition, an agency may collect fees for services that assist a regulated entity in complying with its statutory duty.⁸⁹

Together, these lower court rulings provide ample cover for modern user fee programs in which regulated industries essentially foot the bill for their own oversight by federal regulators.⁹⁰ Although this arrangement is common, it represents a significant departure from the historical efficiency rationale for user fees charged in connection with goods and services, discussed in Part A. And some may still view it as either unconstitutional or problematic as a theoretical or normative matter. The Supreme Court has not considered these issues, and assessing them is beyond the scope of this Article.

“recover generic costs, that is, costs which do not have a specific identifiable beneficiary.” 846 F.2d at 769.

88. 846 F.2d at 769, 771.

89. *Elec. Indus. Ass’n, Consumer Elecs. Grp. v. FCC*, 554 F.2d 1109 (D.C. Cir. 1976).

90. Agencies that are mostly fee funded include the FCC, SEC, Federal Energy Regulatory Commission (FERC), NRC, USCIS, and USPTO. See FED. COMM’NS COMM’N, 2023 BUDGET-IN-BRIEF (2022), <https://docs.fcc.gov/public/attachments/DOC-381693A2.pdf> (“The Commission requests \$390,192,000 in budget authority from regulatory fee offsetting collections.”); U.S. SEC. & EXCH. COMM’N, FISCAL YEAR 2024 CONGRESSIONAL BUDGET JUSTIFICATION AND ANNUAL PERFORMANCE PLAN, FISCAL YEAR 2022 ANNUAL PERFORMANCE REPORT (2023), https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf (“As the SEC’s funding is deficit-neutral, any amount appropriated to the agency will be offset by transaction fees.”); U.S. DEP’T ENERGY, FY 2024 BUDGET IN BRIEF (2023), <https://www.energy.gov/sites/default/files/2023-06/doe-fy2024-budget-in-brief-v5.pdf> (“Regulated entities pay fees and charges sufficient to recover the Commission’s full cost of operations.”); 42 U.S.C. § 2215 (requiring the NRC to recover, to the maximum extent practicable, 100% of its annual enacted budget excluding certain things identified in the statute and subject to any fee relief that the agency decides to grant); *Budget, Planning, and Performance*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/budget-planning-and-performance> (last visited May 10, 2024) (choose “Funding” from dropdown) (“USCIS funding comes primarily from fees we charge applicants or petitioners requesting immigration or naturalization benefits”); U.S. PAT. & TRADEMARK OFF., BUDGET AND FINANCIAL INFORMATION: CONGRESSIONAL BUDGET JUSTIFICATIONS: FISCAL YEAR 2024 USPTO BUDGET (2023), <https://www.uspto.gov/about-us/performance-and-planning/budget-and-financial-information> (“With full access to the fee collection estimate to offset total spending, USPTO will use \$32 million (net) from the combined operating reserves (ORs) in FY 2024, resulting in a net appropriation of \$0.”).

B. Appropriations and User Fees

Government receipts include taxes and money collected in other ways, such as leases, royalties, and interest income. Article I of the Constitution gives Congress the power to “lay and collect taxes, duties, imposts, and excises.”⁹¹ It further provides, in the Origination Clause, that all bills for raising “revenue” must originate in the House.⁹² Conventional wisdom holds that some government receipts are not “revenue” in this sense—meaning that a line can be drawn between “revenue” collected pursuant to the taxing power, on the one hand, and “nonrevenue” collected pursuant to legislation that need not originate in the House, on the other hand.⁹³ Conventional wisdom also holds that the Origination Clause does not apply to legislation authorizing an agency to collect user fees.⁹⁴ Labeling an arrangement “user fees” would not be sufficient to remove it from the ambit of the Origination Clause,⁹⁵ however, and this Article takes no position on the type of

91. U.S. CONST. art. I, § 8.

92. *Id.* § 7, cl. 1.

93. *United States v. Munoz-Flores*, 495 U.S. 385, 397–98 (1990) (“[A] statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a ‘Bill[] for raising Revenue’ within the meaning of the Origination Clause.”).

94. *E.g.*, JAMES V. SATURNO, CONG. RSCH. SERV., R46240: INTRODUCTION TO THE FEDERAL BUDGET PROCESS 9 (Jan. 10, 2023) (“Neither the Origination Clause nor House Rule XXI, clause 5, applies to the consideration of legislation concerning receipts or collections, such as user fees, that are levied on a class that benefits from a particular service, program, or activity.”); *see also* *Sperry Corp. v. United States*, 925 F.2d 399 (Fed. Cir. 1991) (finding that Senate-originated statute—which authorized 1.5 percent deduction from Iran-U.S. claims tribunal awards as “user fees” and classified them as “miscellaneous receipts” for the U.S. Treasury—was nevertheless not intended to “raise revenue” and therefore did not violate the Origination Clause).

95. *Cf.* *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563–74 (2012) (ignoring a statutory label and concluding that the individual mandate in 26 U.S.C. § 5000A reflected an exercise of Congress’s taxing power). *Compare* *Thomson Multimedia Inc. v. United States*, 340 F.3d 1355 (Fed. Cir. 2003) (finding that “Harbor Maintenance Tax” in the Internal Revenue Code, when imposed on domestic and imported commercial cargo unloaded at ports, is a user fee because Congress “seemingly intended” it to be one because the charge is based on the cost of benefits provided, and because the charge is not excessive in relation to the government’s expenditures), *with* *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (finding the same Harbor Maintenance Tax, when applied to commercial goods loaded for export and based on the value of those goods rather than benefits furnished to the exporters, to be a tax rather than a user fee).

arrangement, if any, that would qualify as a fee not subject to the clause.⁹⁶

The Miscellaneous Receipts Act requires that all money received by the government be deposited in the U.S. Treasury.⁹⁷ And pursuant to Article I of the Constitution, funds may be drawn from the Treasury only pursuant to appropriations made by law.⁹⁸ Agencies “obligate” money when they enter into contracts, employ staff, and submit purchase orders.⁹⁹ An “outlay” occurs when the obligation is liquidated, meaning that funds are transferred or disbursed from the Treasury.¹⁰⁰ Congress generally does not directly control agency outlays; instead, it authorizes an agency to act (usually through instructions in an enabling statute) and authorizes the agency to enter into obligations (usually in an appropriations act).¹⁰¹ An appropriations act will provide the agency a specific dollar amount (generally a lump sum) for specific (but broadly worded) purposes and usually for a specific period of time, after which the funds expire.¹⁰² Expired funds cannot be obligated, but they remain available for five years to pay obligations incurred before they expire.¹⁰³ Sometimes, though, Congress allows an agency to obligate

96. In the 1990s, House leadership took the position that the Origination Clause applies to a measure if the funds to be collected could exceed the government’s cost of providing a specific service or if the connection between the payor and the beneficiary were attenuated. JAMES V. SATURNO, CONG. RSCH. SERV., R47292, CONGRESSIONAL RULES AND PRACTICES CONCERNING USER FEES AND OTHER NONREVENUE COLLECTIONS IN THE FEDERAL BUDGET 1 (Oct. 25, 2022) [hereinafter CRS R47292]; *see also* 137 CONG. REC. 66 (Jan. 3, 1991) (statement with Policies of the Chair) (“[I]t should be emphasized that the constitutional prerogative of the House to originate revenue measures will continue to be viewed broadly to include any meaningful revenue proposal that the Senate may attempt to originate.”).

97. The Miscellaneous Receipts Act requires a federal official or agent “receiving money for the Government from any source” to deposit it in the Treasury “as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302; *see* Act of Mar. 3, 1849, ch. 110, 9 Stat. 398. The Office of Legal Counsel explains that this statute “codifies the ‘anti-augmentation principle,’ under which ‘an agency may not augment its appropriations from outside sources without statutory authority.’” Applicability of the Miscellaneous Receipts Act to an Arbitral Award of Legal Costs, 42 Op. O.L.C. ___, 2018 WL 3450204, at *2 (quoting Application of the Miscellaneous Receipts Act to the Settlement of False Claims Act Suits Concerning Contracts with the General Services Administration, 30 Op. O.L.C. 53, 56 (2006)).

98. U.S. CONST. art. I, § 9, cl. 7.

99. SATURNO, *supra* note 94, at 6.

100. *Id.*

101. *Id.* at 10. Sometimes, Congress enacts direct spending legislation instead of discretionary spending controlled through the appropriations process. *Id.*

102. Stith, *supra* note 6, at 1353 (referring to appropriations as “lump-sum grants with ‘strings’ attached”).

103. 31 U.S.C. §§ 1552, 1553.

appropriated funds until the funds are exhausted.¹⁰⁴

User fees complicate this straightforward arrangement, and understanding the added complexity requires a brief description of the budgeting process. The Budget and Accounting Act of 1921 requires the President to submit a comprehensive budget proposal to Congress early every calendar year.¹⁰⁵ This budget proposal, for the upcoming federal fiscal year (beginning October 1 and ending September 30), covers the entire U.S. government.¹⁰⁶ Congress considers the President's proposals, often with the benefit of additional and more detailed justifications submitted by agencies, and it develops and adopts its own plan for revenue and spending for the fiscal year.¹⁰⁷ The resulting "concurrent resolution"—which is not enacted law¹⁰⁸—sets forth the congressional budget for the federal government for the fiscal year and usually also addresses several subsequent years.¹⁰⁹ Congress then separately authorizes the corresponding appropriations as part of the regular appropriations process for the fiscal year, and it may also enact direct spending legislation (and changes in tax laws, if warranted).¹¹⁰

In these budget documents, user fees collected by agencies are usually

104. TAYLOR N. RICCARD, CONG. RSCH. SERV., IF12329, EXPIRATION AND CANCELLATION OF UNOBLIGATED FUNDS 2 (2023). The balances in these appropriations accounts are nevertheless cancelled if (1) the head of the agency or the President determines that the purposes for which the appropriation was made have been carried out, and (2) no disbursement has been made against the appropriation for two consecutive fiscal years. *Id.* (citing 31 U.S.C. § 1555).

105. Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921) (codified as amended in 31 U.S.C. ch. 11); *see* 31 U.S.C. § 1105(a).

106. The President's proposal passes along proposals from entities within the Legislative Branch and Judicial Branch as well as certain executive branch agencies (sometimes referred to as "independent" agencies), but the balance of the budget proposal, covering the remaining executive branch agencies, is developed by the President and Office of Management and Budget (OMB). OMB CIRCULAR NO. A-11, *supra* note 13, § 10.4. Agencies submit budget requests to OMB for review, but OMB and the President have the final decision. SATURNO, *supra* note 94, at 15.

107. JAMES V. SATURNO & MEGAN S. LYNCH, CONG. RSCH. SERV., R47106, THE APPROPRIATIONS PROCESS: A BRIEF OVERVIEW 3 (2023).

108. SATURNO, *supra* note 94, at 15 ("Because a concurrent resolution is not a law, the President cannot sign or veto it, and it does not have statutory effect, so no money can be raised or spent pursuant to it. The main purpose of the budget resolution is to establish the framework within which Congress considers separate revenue, spending, and other budget-related legislation.").

109. *E.g.*, S. Con. Res. 5, 117th Cong., (2021) ("[A concurrent resolution] [s]etting forth the congressional budget for the United States Government for fiscal year 2021 and setting forth the appropriate budgetary levels for fiscal years 2022 through 2030").

110. OMB CIRCULAR NO. A-11, *supra* note 13, § 15.3.

offset against outlays, meaning the cost to the agency of producing the goods or services provided to the feepayers.¹¹¹ In other words, the agency's "net" appropriation excludes user fees. User fees are thus called "offsetting" fees.¹¹² But there are two types of offsetting fees: offsetting receipts and offsetting collections. And there is an important difference between the two, as follows.

The Miscellaneous Receipts Act states a default rule that money received by the government must be deposited in the U.S. Treasury. Like other funds in the Treasury, it cannot be obligated without an appropriation. When user fees are processed this way, budget documents call them "offsetting receipts."¹¹³ Conventional wisdom holds that user fees collected under the IOAA are offsetting receipts, must be deposited in the U.S. Treasury, and may not be obligated without additional congressional authorization.¹¹⁴

Although the Miscellaneous Receipts Act provides the default rule, Congress may, in another statute, provide otherwise.¹¹⁵ It takes two other approaches with user fees. *First*, it sometimes authorizes an agency to deposit the fees into a fund or account earmarked for a specific purpose.¹¹⁶ These are still called "offsetting receipts."¹¹⁷ Congress might permanently appropriate the fund in question, or it could decline to do so, in which case the agency would need a separate appropriation before obligating the

111. CRS R47292, *supra* note 96, at 5 ("The definition of budget authority in Section 3(2) of the Congressional Budget Act provides for nonrevenue collections to be treated as negative amounts of budget authority rather than as revenues. As a consequence, the collected funds are presented in the budget as offsets against spending authority.")

112. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-820, FEDERAL USER FEES: FEE DESIGN OPTIONS AND IMPLICATIONS FOR MANAGING REVENUE INSTABILITY 12 (2013) [hereinafter GAO-13-820].

113. GAO-08-9788SP, *supra* note 13, at 12-187 n.133 ("An offsetting receipt is a form of offsetting collection which is credited to a receipt account rather than an appropriation account."); SATURNO, *supra* note 94, at 6 ("In most cases, offsetting collections may be obligated without further legislative action, while offsetting receipts require an explicit appropriation to be available for obligation.")

114. See OMB CIRCULAR A-25 REVISED, *supra* note 13, § 9(a) ("Unless a statute provides otherwise, user charge collections will be credited to the general fund of the Treasury as miscellaneous receipts, as required by 31 U.S.C. 3302."); GAO-13-820, *supra* note 112, at 4 ("Without additional statutory authority to retain collections, fees collected under the IOAA are deposited in the general fund of the U.S. Treasury and are generally not available to the agency or the activity generating the fees.")

115. D. ANDREW AUSTIN, CONG. RSCH. SERV., R45463, ECONOMICS OF FEDERAL USER FEES 9 (2019) ("Over time, Congress set out exceptions to the modern version of the Miscellaneous Receipts Act that let agencies charge user fees, accept gifts, and collect and retain fines and penalties within specified limits or as detailed in appropriations laws.")

116. GAO-08-9788SP, *supra* note 13, at 12-186.

117. *Id.* at 12-187.

funds.¹¹⁸ *Second*, though, it sometimes authorizes an agency to *retain* a user fee for *credit* to its appropriations.¹¹⁹ It uses this approach when the fees are meant to augment whatever additional money is directly appropriated from general revenue. And it uses this approach when the fees reimburse expenses already borne by appropriated funds. Budget documents call these fees “offsetting collections,” and these fees are usually available to the agency without any additional step by Congress.¹²⁰ This arrangement effectively makes the agency’s service self-sustaining.¹²¹

II. THRESHOLD QUESTIONS

The rest of this Article focuses on the design of user fee programs. It begins with threshold questions: whether to assess user fees and (if so) whether the user fee program should be developed under the IOAA or under separate legislation.

A. *Whether to Assess a User Fee*

Existing legislation—the IOAA—expresses the sense of Congress that benefits, privileges, permits, and similar things of value provided by agencies should be self-sustaining. OMB policy states that agencies should charge identifiable recipients for services or privileges from which those recipients derive special benefit.¹²² It also directs agencies to review their activities periodically and recommend legislative changes (to implement user charges) when appropriate. The IOAA does not, however, *require* an agency to impose

118. *Id.*

119. *Id.* at 12-184.

120. *Id.* at 12-186.

121. CRS R47292, *supra* note 96, at 5 (“Some statutes may provide specific authority for fees to be retained by an agency when a service is intended to be operated on a substantially self-sustaining basis.”).

122. According to OMB, a special benefit exists “when a service (or privilege) provides special benefits to an identifiable recipient beyond those that accrue to the general public.” OMB CIRCULAR A-25 REVISED, *supra* note 13, § 6. For instance, a special benefit accrues if the government’s service (1) enables the beneficiary to obtain more immediate or substantial gains or values than those that accrue to the general public (e.g., receiving a patent, insurance, or guarantee provision, or a license to carry on a specific activity or business or various kinds of public land use); (2) provides business stability or contributes to public confidence in the business activity of the beneficiary (e.g., insuring deposits in commercial banks); or (3) is performed at the request of or for the convenience of the recipient, and is beyond the services regularly received by other members of the same industry or group or by the general public (e.g., receiving a passport, visa, or a Custom’s inspection after regular hours). *Id.* § 6-a-1.

user fees when its terms are met; it merely authorizes an agency to do so.¹²³ Even if an agency provides benefits in the form of discrete services or privileges to identifiable recipients and the statute thus clearly applies, decisionmakers at the agency face the question whether to create a user fee program. And in other cases—for instance, if the question is whether to charge regulated entities a fee to cover the cost of administering a regulatory framework—the question becomes whether Congress should enact separate legislation.

There is an enormous literature on the advantages and disadvantages of user financing. Considerations explored in this literature include the following:

1. *Efficiency*

The initial argument in favor of user fees was that assessing fees for services and goods provided by the government serves efficiency goals. Classical economic theory holds that resources are efficiently allocated when a good's price equals its marginal cost of production.¹²⁴ The idea is that shifting to user fees set at marginal cost for government goods and services provided on a transactional basis to individuals and entities—such as stamps and passports—will ensure that these goods and services are neither over-consumed nor under-consumed. With a user fee in place, the potential beneficiary of the good or service “is the one who must pay the opportunity cost”—i.e., the additional cost that society incurs in providing that increment of good or service.¹²⁵ Consumers who do not value the good or service enough will eschew it, and the resulting demand will indicate to the government exactly how much to provide.¹²⁶ In this scenario, therefore, the level of production perfectly reflects consumer preference; exactly the right

123. *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304, 307 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965). Another statute might, however, make an agency's use of the IOAA authority mandatory. *E.g.*, 46 U.S.C. § 2110(a)(1) (applying to the U.S. Coast Guard and stating that “[e]xcept as otherwise provided in this title, the Secretary shall establish a fee or charge for a service or thing of value provided by the Secretary under this subtitle, in accordance with [§ 9701] of title 31”).

124. See Uwe E. Reinhardt, *Reflections on the Meaning of Efficiency: Can Efficiency Be Separated from Equity*, 10 YALE L. & POL'Y REV. 302 (1992).

125. Gillette & Hopkins, *supra* note 82, at 806.

126. *Id.* This happens because user fees “privatize decision-making in that they permit private parties to decide how much of a government good or service to use (and thus how much should be provided) based on whether the good or service is worth the cost imposed by the user fee.” Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1541 (2001).

number of goods or services is produced.¹²⁷

In addition to these allocative efficiency arguments, there are “productive efficiency” (sometimes “production efficiency”) arguments in favor of user fees. Productive efficiency occurs when good and services are produced at the lowest possible cost; within an organization, this efficiency is reached when producing one more unit of the good (or service) would require sacrificing resources (such as time, money, or other finite resources). The U.S. Government Accountability Office (GAO) explains that user fees can foster productive efficiency by “increasing awareness of the costs of publicly provided services” and “therefore increasing incentives to reduce costs where possible.”¹²⁸ In a 1999 report on fee financing of meat and poultry inspections, the U.S. Department of Agriculture’s (USDA’s) Economic Research Service explained the potential for user fees to further productive efficiency. Administering a user fee program can involve generating detailed information about the costs of regulatory activities and sometimes their outcomes, it explains, and this information allows an agency “to operate more effectively by allocating resources to their most productive uses and by identifying reasons for unusual cost overruns.”¹²⁹

Efficiency arguments may support fees assessed in connection with specific goods and services provided to identifiable beneficiaries—the kinds of fees that the IOAA authorizes—but the rationale does not work for programs that collect fees at regular intervals from regulated industries to support the cost of regulating. And even in the transactional setting, whether efficiency arguments support a particular fee imposed by a particular agency will vary. For instance, it is not clear they apply when fees are assessed transactionally for regulatory services—such as to support review of an application that must be approved for market entry. In this situation, one might expect demand for the service to be relatively inelastic to the fee level.¹³⁰ In contrast, a user fee might further

127. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-386SP, FEDERAL USER FEES: A DESIGN GUIDE 2 (2008) [hereinafter GAO-08-386SP] (“By requiring identifiable beneficiaries to pay for the costs of services, user fees can simultaneously constrain demand and reveal the value that beneficiaries place on the service. If those benefiting from a service do not bear the full social cost of the service, they may seek to have the government provide more of the service than is economically efficient.”).

128. *Id.*

129. JAMES M. MACDONALD, FRED KUCHLER, JEAN C. BUZBY, FITZROY LEE & LORNA ALDRICH, U.S. DEP’T OF AGRIC., AGRICULTURAL ECONOMIC REPORT NO. (AER-775): USER-FEE FINANCING OF USDA MEAT AND POULTRY INSPECTION 19 (1999), https://www.ers.usda.gov/webdocs/publications/40973/51055_aer775.pdf?v=8946.7.

130. *Id.* at 18 (“However, because Federal inspection is mandatory for meat and poultry products shipped in interstate commerce, the demand for inspection services will not be

allocative efficiency when it is charged for a good or service that is genuinely optional to consume, and that is also offered in the private market.¹³¹ An example might be the voluntary laboratory testing services offered by the Agricultural Marketing Service (AMS), for which it charges a user fee.¹³²

Even if a particular user fee would contribute to allocative or productive efficiency, decisionmakers may identify social policy reasons to eschew imposition of the fee, i.e., to further values other than economic efficiency. An example might be search and rescue conducted by the United States Coast Guard, for which lawmakers prohibit user fees.¹³³

2. Privatization

Some literature justifies user fees on a related basis: they can stimulate competition from the private sector in the form of alternative or complementary goods and services.¹³⁴ Stimulating this competition may serve efficiency goals, but it could also have a different goal: reducing the deficit (and federal debt) by replacing the government altogether with a private sector actor.¹³⁵ Doing so might be a normative goal, for instance, tied to a view that the federal government's size and role should be more limited than they are. There may, however, be compelling arguments against privatization of some goods and services. Decisionmakers might conclude that consumption of a particular good or service furthers important social values and should be encouraged through subsidization by taxpayer revenue. Some may subscribe

sensitive to the fee. . . . Fees can neither improve nor diminish allocative efficiency in inspection services if they do not affect the volume of services provided.”). *But see* Gillette & Hopkins, *supra* note 82, at 807 (“Even if there is a degree of coercion in the decision to use the service, however, a user fee may have important efficiency advantages.”).

131. MACDONALD et al., *supra* note 129, at 18.

132. 7 U.S.C. § 1622(h) (“To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection.”).

133. 46 U.S.C. § 2110(a)(5) (“The Secretary may not collect a fee or charge under this subsection for any search or rescue service.”).

134. *See* Aman, *supra* note 81, at 456 (“User fees can also serve several other important purposes, beyond simply raising revenues. These purposes include encouraging more efficient allocation of services between government and the private sector as well as encouraging privatization of governmental activities.”).

135. *Id.*

to normative or theoretical arguments that providing certain services, or types of services, is the government's job and should not be handled by the private sector, even if the private sector would be more efficient.

3. *Additional Funding*

User fees constitute an additional source of funds for the federal government. Raising funds from private sector users (e.g., those seeking passports) or regulated parties (including those seeking a marketing authorization required by the government) allows a federal agency to cover some or all of its costs in providing the good or service or performing regulatory activities, without relying on revenue from taxes. A user fee program might shift the agency mostly or entirely to user fee funding, allowing Congress to put general revenue to other purposes or even to reduce taxes. Or the program might supplement appropriations from general revenue with user fee funds, giving the agency more resources to operate. In this case, the agency might be able to improve its performance of its existing responsibilities—for instance, conducting more frequent inspections, training more staff, or enhancing the technology it uses—without placing a burden on the Treasury. Additional funds might also allow the agency to start activities and launch programs that would not be possible otherwise.

In the case of FDA, the statutory language used to ensure prescription drug user fees supplement appropriations has put the agency in a bind because annual appropriations have not kept up with the agency's expanding substantive responsibilities.¹³⁶ The user fee language states that in any particular fiscal year, FDA may collect and use the authorized fees only if (1) its direct appropriation for salaries and expenses for that year equals or exceeds the corresponding direct appropriation in FY 1997, adjusted for inflation, (2) the fee amount is provided in advance in the relevant appropriations acts, and (3) the agency spends at least as much from those appropriated funds for the review of human drug applications as it spent in FY 1997, adjusted for inflation.¹³⁷ In other words, FDA must spend at least as much of its appropriated general revenue funds on application review as it spends in user fees on application review.¹³⁸ Put yet another way, every year, the agency must allocate enough of its annual appropriations to drug application review to maintain its authority to collect the fees in the first instance. As a result, if FDA's other responsibilities increase, particularly if

136. See FDA, *FDA User Fees Explained*, <https://www.fda.gov/industry/fda-user-fee-programs/fda-user-fees-explained> (Oct. 3, 2022).

137. 21 U.S.C. § 379h(f)(1), (g)(1), (g)(2). The reference year was initially 1992.

138. HASSAN Z. SHEIKH, CONG. RSCH. SERV., R44864, PRESCRIPTION DRUG USER FEE ACT (PDUFA): 2017 REAUTHORIZATION AS PDUFA VI (2018).

annual appropriations do not keep the pace, other programs end up suffering while drug application review remains well supported.¹³⁹ The approach taken in the authorizing legislation makes important agency programs vulnerable when Congress, perhaps predictably, increases the agency's workload without providing sufficient new funding. The problem is not the user fee legislation *per se*, but the fact that its drafters did not engage with the fact that subsequent Congresses were likely to tie the agency's hands by increasing its workload without sufficiently increasing its appropriations.

In an era of budget constraints, user fees may be appealing for their potential to increase the resources available to an agency.¹⁴⁰ But there may be reason for caution. To begin with, as already noted, although conventional wisdom holds that some government receipts are not "revenue" for purposes of the Origination Clause, there will continue to be questions about the constitutionality of statutes giving agencies the power to fully fund their own regulatory programs, especially if they also have broad discretion to design those programs.¹⁴¹ Even putting aside constitutional questions that might gain traction today, there could be theoretical or normative concerns. One concern might be that the political challenges inherent in passing new mandates and appropriations to fund those mandates impose helpful discipline on expansion of the administrative state. Another might be that agencies that turn too readily to self-funding in cooperation with regulated industries may undertake programs that benefit those industries without considering the impact on others, including those to whom the fees will be passed.

4. *Fairness*

In an earlier report on user fees to the Administrative Conference, Professors Gillette and Hopkins suggested that "matching" benefits and

139. See Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1766 (2008) ("By 2001, FDA's efforts to rob Peter to pay Paul allocated about 1,000 more full-time equivalents (FTEs) to drug and biologic review activities and 1,000 fewer FTEs to other FDA programs that 'ensure [existing] food safety, approve new medical devices such as heart valves and pacemakers, and monitor devices once on the market'"); see also Peter Barton Hutt, *The State of Science at the Food and Drug Administration*, 60 ADMIN. L. REV. 431, 453-54 (2008) ("But the impact on the FDA as an institution is highly destructive. This system not only creates rich and poor functions within the four centers that have user fees, but it leaves the remaining two centers, CFSAN and the National Center for Toxicological Research (NCTR), and the FDA field force absolutely destitute.").

140. The budget has run a deficit every year since 2001. *What is the National Deficit?*, FISCAL DATA, <https://fiscaldata.treasury.gov/americas-finance-guide/national-deficit/#us-deficit-by-year> (last visited May 10, 2024).

141. See Shapiro & Steinzor, *supra* note 139.

burdens might be compelled by “considerations of fairness.”¹⁴² More recently, a Congressional Research Service (CRS) report on user fees observed that “linking the fiscal burden of publicly provided benefits to those who enjoy those benefits . . . can promote fairness” in addition to efficiency.¹⁴³ Like efficiency arguments, the fairness argument may support fees assessed in connection with specific goods and services provided to identifiable beneficiaries, but the rationale does not work for programs that collect fees from regulated industries to support the cost of regulating. It makes sense if a subset of the public avails itself of services and goods (such as passports, stamps, and access to national parks) offered by an agency. It might also make sense if an agency performs a service for all but offers an enhanced version, at the user’s discretion, for an additional fee.¹⁴⁴ An example might be the user fee charged by the U.S. Citizenship and Immigration Services (USCIS) for premium processing of certain immigration-related forms.¹⁴⁵

In other situations, fairness concerns may cut in the other direction. For instance, Professors Gillette and Hopkins suggest that the “fairness of charging a user fee may be questionable if individuals are required by law to use a service,” calling into question fees assessed in connection with mandatory registration of bicycles.¹⁴⁶ Professor Beermann notes that “some user fees appear to be imposed simply because government can do so and

142. Gillette & Hopkins, *supra* note 82, at 799, 814 (noting assumption “that fair distributions create a correspondence between costs and benefits of governmental provision” and thus “pricing of any governmentally supplied good or service should be set to recover the costs of provision”).

143. AUSTIN, *supra* note 115, at 4; *see also* GAO-08-386SP, *supra* note 127, at 2 (“Equity means that everyone pays their fair share . . .”).

144. *See* Pfohl, *supra* note 82, at 70–71 (“Under the IOAA, user fees can be understood as a useful economic tool used to reduce the subsidization by general taxpayers for aspects of an agency’s operations that are solely enjoyed by beneficiaries of that agency’s services . . . [This is] thought to be ‘fairer’ than paying for certain agency operations through general United States Department of Treasury appropriations.”).

145. Premium processing provides for expedited review of the Form I-129 (petition for a nonimmigrant worker), Form I-140 (immigrant petition for alien worker), Form I-765 (application for employment authorization), and Form I-539 (application to extend or change nonimmigrant status). *See How Do I Request Premium Processing?*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/forms/all-forms/how-do-i-request-premium-processing> (last visited May 10, 2024).

146. Gillette & Hopkins, *supra* note 82, at 818; *e.g.*, *Coal. For Fair & Eq. Reg. of Docks v. FERC*, 297 F.3d 771, 778 (8th Cir. 2002) (“A tax is a general charge not correlated to a particular benefit, whereas a fee is a charge exacted in exchange for a benefit of which the payor has *voluntarily* availed itself.”) (emphasis added).

the group upon whom the fee is imposed cannot use the political process to resist them.”¹⁴⁷ He cites user fees associated with immigration into the United States, as well as user fees imposed on criminal defendants and prisoners at the state level.¹⁴⁸ “It is unclear,” he writes, “whether these fees are motivated by a desire to rationalize consumption or are simply revenue raising measures where there appears to be an easy source of revenue.”¹⁴⁹

5. *Achieving Policy Goals*

User fee programs may enable lawmakers to achieve public policy objectives—incite some behaviors and discourage others—without directly regulating private behavior.¹⁵⁰ The initial decision to charge presents an opportunity to effect policy. If demand for a good or service would be price elastic, decisionmakers can discourage or encourage consumption (and associated behaviors) with the decision to charge or not charge respectively.¹⁵¹ A fee for search and rescue by the National Park Service, for example, might discourage unreasonable risk taking. Another example might be the fees imposed by Presidents Nixon and Ford on importers bringing oil into the country; these fees were prompted by national security concerns tied to the country’s dependence on foreign oil.¹⁵² To give another example, Professor Elliott has proposed that the Environmental Protection Agency (EPA) charge user fees to entities that emit carbon dioxide into the air to discourage doing so.¹⁵³

147. Beermann, *supra* note 126, at 1543.

148. *See id.* at 1543–44.

149. *Id.* at 1544.

150. *See* AUSTIN, *supra* note 115, at 10 (“Statutory texts governing many fees, including those noted above, have evolved over many years and involve substantive policy decisions, often related to industry or programmatic concerns”); *id.* at 6 (discussing possibility, though difficulty, of designing user fees to directly influence activities that generate negative spillover, i.e., comparable to a Pigouvian tax).

151. *See* Aman, *supra* note 81, at 456 (“The expected distributional effect of fee-based governmental service is that less of a service will be demanded so that the decision to reject or employ a user fee is best viewed as based on a desire to induce a socially-optimal amount of the underlying good or service. Setting user fees thus allows government to have an effect on the market without direct regulation.”).

152. The Trade Expansion Act provided that if the Secretary of the Treasury “finds [an] article is being imported . . . in such quantities or under such circumstances as to threaten to impair the national security, . . . the President shall take such action . . . as he deems necessary to adjust the imports” so they will not impair national security. 19 U.S.C. § 1862(b) (1974) (since amended).

153. *See* E. Donald Elliott, *EPA’s Existing Authority to Impose a Carbon “Tax,”* 49 ENV’T L.

In addition to the initial decision to impose a user fee, structural choices within a user fee program can further policy goals. For example, USPTO has structured its patent fees to encourage innovation. It charges fees for patent applications and, once the patent is issued, maintaining the patent right. The front-end fees are fairly low, with the agency mostly dependent on maintenance fees. The agency means to encourage innovation by making the initial patenting steps low-cost; an inventor can then assess, over time, whether continued prosecution and maintenance of the patent is worth the investment.¹⁵⁴ In contrast, a front-loaded fee structure—high patent application fee without (or with low) maintenance fees—would create a high barrier to patenting, which USPTO concluded might discourage innovation. To give another example, the Federal Circuit observed in 2006 that “Congress could rationally set patent fees above USPTO’s funding needs to deter the filing and prosecution of certain types of patent applications.”¹⁵⁵ And the D.C. Circuit in 2010 rejected a challenge to a new Department of Transportation fee policy designed to increase airport landing fees during peak periods to reduce congestion.¹⁵⁶

Some would argue that lawmakers hoping to modify private behavior should regulate that behavior directly rather than indirectly through economic incentives. In the interviews for this project, one person raised what was

REP. 10919, 10919 n.7 (2019) (“If polluters were forced to pay, they would clean up to avoid the cost . . .”). Professor Elliott suggests the IOAA would authorize this user fee, but that seems unlikely. *National Cable* indicates that a user fee under the IOAA must be calculated to reflect the cost to the government of providing the service or good that benefits the user. *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336 (1974). The other factors listed in the statute—“the value of the service or thing to the recipient” and “public policy or interest served”—may not have survived *National Cable*. Further, the benefit provided by EPA would not be air; it would be permission to pollute (to burden a common resource). The IOAA probably authorizes recovery of only the cost of administering the permitting scheme.

154. Interview with Lauren Ailes, Dianne Buie, Nicholas Oettinger & Brett Lockard, U.S. Pat. & Trademark Off. (Aug. 22, 2023) (on file with author); see also *Patent Fee Proposal Detailed Appendix Presented to Patent Public Advisory Committee*, U.S. PAT. & TRADEMARK OFF. 17 (2018), https://www.uspto.gov/sites/default/files/documents/PPAC_Detailed_Appendix.pptx (explaining USPTO’s “Fee Structure Philosophy”).

155. *Figueroa v. United States*, 466 F.3d 1023, 1033 (Fed. Cir. 2006) (“The Supreme Court has recognized that Congress may legitimately impose taxes or fees in order to discourage undesirable behavior.”).

156. *Air Transp. Ass’n of Am., Inc. v. U.S. Dep’t of Transp.*, 613 F.3d 206, 212 (D.C. Cir. 2010) (“These three changes—allowing an airport to include certain costs in the rate base for determining landing fees during congested hours, instituting the two-part fee structure, and permitting landing fees to vary throughout the day—are the basic elements of the [Department of Transportation’s] plan to decrease congestion.”).

essentially a deontological concern about the government pretending to do one thing (charge a fee) when it is really trying to do another (regulate behavior). Others might have a more pragmatic concern; sometimes incentives fail to operate as intended. For example, EPA set differing fees for paper manifests and electronic manifests submitted by hazardous waste receiving facilities to encourage a transition to electronic submission. Because receiving facilities pass the fee to the shippers, however, they have not been motivated to invest in conversion to electronic submissions.¹⁵⁷ Systemwide conversion to electronic manifests may require a formal mandate.

6. *Potential for Unintended Consequences*

Just as a user fee program might accomplish policy objectives other than efficiency and generating additional funds, it might have unintended consequences. Several scholars have raised concerns that fees charged by regulatory agencies to subsidize regulatory services or to provide general support for regulation might skew agency decisionmaking. For instance, in an empirical study, Professors Frakes and Wasserman found that USPTO's fee schedule "biases the [US]PTO toward granting patents" and, moreover, that the effect is more pronounced when USPTO stands to benefit the most from the grant, i.e., when the applications pertain to technologies with high renewal rates or are filed by large entities, and when "markers indicative of an underfunded [US]PTO are present."¹⁵⁸ They attribute this to the fact that USPTO's patent program depends entirely on fees and that it depends mostly on post-allowance fees, which it may collect only if it grants the patent in the first instance.¹⁵⁹

Empirical evidence of statistical bias does not, however, answer the social welfare question. On the one hand, the Frakes and Wasserman findings may mean USPTO issues patents that it should not. It might, for example, issue patents for inventions that were obvious — in which case, society pays the price of a twenty-year patent term when it did not need to.¹⁶⁰ On the other hand, USPTO may be right that lowering the barrier to the patent prosecution process by shifting most of the fees to patent owners rather than patent

157. Interview with Stephen Donnelly, E-Manifest Program Manager, U.S. Env't Prot. Agency (July 17, 2023) (on file with author).

158. Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO's Granting Patterns*, 66 VAND. L. REV. 67, 70 (2013). This use of the term "bias" refers to a statistical finding: distortion of a statistical result due to a factor not meant to be part of its derivation.

159. *Id.* at 69.

160. *Id.* at 71 ("[A] grant-biased [US]PTO is likely to systematically issue patents that end up imposing significant costs on society without bestowing the commensurate benefits of innovation.").

applicants will encourage innovation that benefits the public. Answering the social welfare question requires weighing these offsetting considerations; the mere finding of statistical bias did not resolve the matter.¹⁶¹

Similar concerns have been raised about prescription drug user fees paid to FDA. New drug applicants pay sizeable fees that support drug center salaries, and some believe this creates a conflict of interest resulting in approval of drugs that are less safe or less effective.¹⁶² Some argue for repeal of the agency's user fee authority,¹⁶³ but more realistic proposals focus on reducing its reliance on fees.¹⁶⁴ In this case, though, empirical studies have found that user fees do not affect the quality of drug approval decisions, at least when post-approval drug safety issues are used as a proxy for a poor quality approval decision.¹⁶⁵

161. To give another example, a statistical bias in favor of fee-payers might correct what would otherwise have been an undesirable tendency to favor regulatory beneficiaries. *See* Beermann, *supra* note 126, at 1546–47 (“Beneficiaries, on the other hand, may have a strong incentive to lobby for a benefit, and if the beneficiaries are a small and cohesive group, they may succeed without regard to whether the benefit is politically acceptable generally or socially desirable. Even though some oversight, for example by a legislative committee, is theoretically possible, without anyone with an incentive to complain, under many circumstances it is unlikely that the political process effectively will check government provision of benefits. With user fees financing all or some of the provision of the government good or service, this element of political distortion is less of a problem.”).

162. *E.g.*, Gilhooley, *supra* note 50, at 348 (“The user fees for drug reviews present a special risk of capture because the industry funding supports the salaries of the very individuals who review drugs for approval.”).

163. *See, e.g.*, Michael Carome, M.D., *Outrage of the Month: Congress Reauthorizes FDA-Corrupting User Fees for Five More Years*, HEALTH LETTER (Dec. 1, 2022), <https://www.citizen.org/article/outrage-of-the-month-congress-reauthorizes-fda-corrupting-user-fees-for-five-more-years/> (“Reversing this regulatory capture will require Congress to rescind user-fee-based funding of the agency and restore public—not industry—funding of the agency.”).

164. *E.g.*, Gilhooley, *supra* note 50, at 330 (arguing for “at a minimum, limiting user fee support to half of the cost of the drug approval program, with the rest coming from government appropriations”).

165. Henry Grabowski & Y. Richard Wang, *Do Faster Food and Drug Administration Drug Reviews Adversely Affect Patient Safety? An Analysis of the 1992 Prescription Drug User Fee Act*, 51 J.L. & ECON. 377, 378, 400–01 (2008) (reviewing new drugs introduced from 1992 to 2002 and finding that, while more novel drugs and shorter time between foreign and U.S. approval result in a larger number of serious adverse events, there is no association between FDA review time and adverse events after controlling for these and other factors); Ernest R. Berndt, Adrian H.B. Gottschalk, Tomas J. Philipson & Matthew W. Strobeck, *Industry Funding of the FDA: Effects of PDUFA on Approval Times and Withdrawal Rates*, 4 NAT. REV. DRUG DISC. 545, 545 (2005) (reviewing 25 years of drug approvals and finding no statistical difference between proportion

Even if empirical research does not substantiate concerns about skewed agency decisionmaking, whether, at FDA or another agency, it may be important for program designers to address the concerns if public confidence in the agency's decisions is considered especially important.¹⁶⁶ In the case of FDA, it may help that drug user fees are tied to performance goals that focus on standardizing and streamlining review procedures rather than on the outcome of application review. In addition, FDA negotiates the program goals with not only the companies paying fees, but also representatives of the public interest, and meeting minutes are made public.¹⁶⁷ A recent court of

of approvals followed by safety withdrawals before enactment of user fees and proportion of approvals followed by those withdrawals after enactment); U.S. DEP'T OF HEALTH & HUM SERVS., U.S. FOOD & DRUG ADMIN. & CENTER FOR DRUG AND EVAL. RSCH., 2004 REPORT TO THE NATION: IMPROVING PUBLIC HEALTH THROUGH HUMAN DRUGS 43 (2005), <https://web.archive.org/web/20060616094250/http://www.fda.gov/cder/reports/rtn/2004/Rtn2004.pdf> (comparing the rates of safety-based withdrawals from 1971 to 2005 and finding no meaningful difference between the incidence before and after enactment of user fees); Michael A. Friedman, M.D., Janet Woodcock, M.D., Murray M. Lumpkin, M.D., Jeffrey E. Shuren, M.D., J.D., Arthur E. Hass & Larry J. Thompson, M.S., *The Safety of Newly Approved Medicines: Do Recent Market Removals Mean There Is a Problem?*, 281 JAMA 1728, 1730–31 (1999) (reviewing the regulatory history of five drugs withdrawn from the market for safety reasons and, on the basis of the submission and approval timelines, finding no relationship between reduced review processing time and the removals) (authored by senior agency leadership). Although some work has found that drugs receiving faster reviews have a higher incidence of serious adverse drug reactions in patients, that same work has also found little association between user fees and those drug reactions—suggesting that the primary factor is the review speed, not the user fee. *E.g.*, Mary K. Olson, *The Risk We Bear: The Effects of Review Speed and Industry User Fees on New Drug Safety*, 27 J. HEALTH ECON. 175, 177 (2008) (“Once the effects of review speed are taken into account, the analysis shows little association between user fees and serious [adverse drug reaction] counts, which suggests that the primary impact of user fees or PDUFA on drug risks occurs through review speed.”).

166. See INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, THE FUTURE OF DRUG SAFETY: PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC 195 (Alina Baci, Kathleen Stratton & Sheila P. Burke eds., 2007) (“Many have argued that relying so heavily on industry funds is inherently inappropriate and damaging to the reputation and functioning of CDER, indeed, of any regulatory entity.”); see also Zelenay, *supra* note 71, at 332–34 (arguing that FDA's dependence on user fees “might negatively affect the public's perception of FDA and thereby undermine FDA's ability to engage in certain critical activities,” such as effectively warning consumers about potential dangers in marketed drugs and inducing companies to engage in voluntary recalls).

167. See 21 U.S.C. § 379h-2(f) (describing consultative process for developing recommendations for Congress with respect to reauthorization); 86 Fed. Reg. 47,316 (Aug. 24, 2021) (announcing initial public meeting for negotiation of prescription drug user fee

appeals decision suggests another strategy that Congress could consider; agency decisionmakers may be less susceptible to influence (by the prospect of user fees increasing or decreasing on account of their decisions) if the fees must pass through the U.S. Treasury and be appropriated by Congress pursuant to a budget request prepared by someone else at the agency.¹⁶⁸

Finally, a user fee program might unexpectedly skew private behaviors in ways that are not socially desirable. For instance, twenty years ago, a student note argued that the Bureau of Land Management (BLM) charged an insufficient fee to ranchers grazing their stock on western public lands, which predictably led to overgrazing and environmental injuries, including desertification, endangerment of species, and destruction of riparian areas.¹⁶⁹ To give another example, a GAO study on the use of water in the Columbia Basin Project in the Pacific Northwest found that “if the price charged for water provided to farmers for irrigation purposes were raised to market levels, water would be diverted from farming to the production of electricity, and the value of farmland would drop significantly.”¹⁷⁰

B. *Whether to Seek Separate Statutory Authorization*

If decisionmakers choose to proceed with user fees, they must decide whether the fees should be imposed under the IOAA or under separate statutory authority. Some design preferences may require use of a statute other than the IOAA. Rather than focusing on design details that may dictate whether the IOAA can be used, however, this Part focuses on a broader question: the relative roles of Congress and the agency under the

program for fiscal years 2023 through 2027); *PDUFA VII: Fiscal Years 2023–2027*, U.S. FOOD & DRUG ADMIN. (Apr. 24, 2023), <https://www.fda.gov/industry/prescription-drug-user-fee-amendments/pdufa-vii-fiscal-years-2023-2027> (posting of meeting minutes from more than 100 meetings with industry and more than a dozen meetings with other stakeholders). The agency meets separately with different stakeholder groups, however, and Public Citizen has concerns about not being in the room when the agency meets with industry. Interview with Michael Abrams, Senior Health Researcher, Pub. Citizen (July 10, 2023) (on file with author).

168. *Mobility Workx, LLC v. Unified Pats., LLC*, 15 F.4th 1146, 1154 (Fed. Cir. 2021) (rejecting due process arguments grounded in claim that USPTO administrative patent judges have an incentive to institute proceedings that will lead to cancellation of patents, to collect post-institution fees that will fund the agency, because (1) the USPTO Director, not the patent judges, have responsibility for USPTO’s budget request, and (2) in any case collected fees “do not automatically become available to the agency”).

169. Michelle M. Campana, *Public Lands Grazing Fee Reform: Welfare Cowboys and Rolex Ranchers Wrangling with the New West*, 10 N.Y.U. ENV’T L.J. 403, 403–04 (2002).

170. GAO-08-978SP, *supra* note 13, at 12-146 (citing GAO/PAD-83-10, CONGRESSIONAL ATTENTION IS WARRANTED WHEN USER CHARGES OR OTHER POLICY CHANGES CAUSE CAPITAL LOSSES (1982)).

two options (meaning the IOAA or a separate statute).

1. *Congressional Oversight*

An agency may proceed immediately under the IOAA if it provides goods or services to identifiable beneficiaries. No further congressional action is needed to create a user fee program or set fees. Proceeding directly under the IOAA might avoid a protracted legislative process with an uncertain outcome. It would not, however, avoid congressional involvement altogether. As noted, conventional wisdom states that an agency may not obligate funds collected under the IOAA without an appropriation.¹⁷¹ The appropriations process would provide Congress with an opportunity to impose conditions on the agency's use of the funds.

If lawmakers opted for separate statutory authorization, they could take the same approach and require the agency to wait for an appropriation. Or they could reduce their oversight by eliminating that step with legislation that both authorizes and appropriates.¹⁷² Indeed conventional wisdom says they can authorize the agency to maintain a reserve fund of fees collected but not obligated and even authorize the agency to obligate those fees in future years without limitation. These options would eliminate opportunities for congressional oversight. In contrast, lawmakers could create additional opportunities for oversight by not only requiring appropriation but also including a sunset on the authorizing statute. EPA's pesticide registration fees must be reauthorized every five years, for example, and the same is true for most of FDA's user fees.¹⁷³ Reauthorization provides an opportunity to examine the agency's performance and make changes to its powers and responsibilities. But experience with FDA user fee reauthorization illustrates one risk. The agency depends on fees to operate—would need to furlough drug reviewers if reauthorizing legislation were not enacted—and some believe this gives industry undue leverage during legislative negotiations.¹⁷⁴ The advantage probably varies from cycle to cycle.

171. *See supra* Part B.

172. GAO-13-820, *supra* note 112, at 4 (“Congress may provide agencies with the authority to collect and use a fee within authorizing legislation, within appropriations legislation, or within both.”).

173. *E.g.*, Pesticide Registration Improvement Extension Act of 2018, Pub. L. No. 116-8, § 2, 133 Stat. 484, 484 (2019) (reauthorizing fee authority for fiscal years 2019 through 2023); FDA User Fee Reauthorization Act of 2022, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, § 1003(b)(1)(1), Pub. L. No. 117-180, 136 Stat. 2114, 2143 (2022) (reauthorizing fee authority for fiscal years 2023 through 2027).

174. Gilhooley, *supra* note 50, at 351 (noting that FDA “faces, in effect, a funding sunset for a critical program every five years, and the prospect of having to let go of half of its drug

2. *Level of Design Decisionmaking*

Proceeding with a separate statute will require deciding how many design details should be prescribed by the legislature and how many should be left to the agency's discretion. A detailed statute might specify the fee amounts, for instance, as well as when and how the fees should be collected and how they may be used. A more general statute might broadly authorize the agency to collect its operating costs through user charges. There are examples of both on the books, and the reasons to be prescriptive or instead offer flexibility may vary. For instance, the SEC implements statutory language that is detailed and prescriptive as to fee structure and amounts, and the lack of agency flexibility may provide important reassurances to the market.¹⁷⁵

3. *Ability to Engage in Policymaking*

Decisionmakers may want to accomplish objectives other than economic efficiency with a user fee program. To begin with, a decisionmaker might want to recover less than the agency's full costs of providing a good or service to encourage consumption.¹⁷⁶ To give another example, as noted, USPTO structured its fee program to encourage innovation.¹⁷⁷ Waivers and exemptions might be adopted for substantive policy reasons, including considerations of equity. For example, the National Marine Fisheries Service (NMFS) charges fees for fishing permits, but it has provided by regulation that indigenous persons engaged in angling or spear fishing need not pay the fee.¹⁷⁸ An agency proceeding under the IOAA would not be able to take policy considerations into account; *National Cable* and subsequent court of appeals cases limit an agency to cost recovery. An agency designing its user fee program under a different statute might be able to consider policy issues, but this would depend on whether Congress had given policymaking discretion to the agency in the first instance as well as the instructions in the fee authorizing legislation.¹⁷⁹ In contrast, designing

review staff" and considering "whether the Obama administration might be 'pressured' to accept questionable changes in order to avoid having to layoff needed medical reviewers").

175. Interview with Caryn Kauffman, Elizabeth McFadden, Allen Blume & Michael Barnes, Sec. & Exch. Comm'n (June 28, 2023) (on file with author).

176. Gillette & Hopkins, *supra* note 82, at 799 ("Where consumption of services confers substantial benefits on nonpayers, it may be desirable to charge fees that recover less than full costs in order to avoid disincentives for individuals or firms to engage in socially useful conduct.").

177. *See supra* Part A.

178. 50 C.F.R. § 600.1410(f).

179. For instance, a federal district court enjoined implementation of a USCIS rule implementing fee changes for immigrant benefit requests, citing the agency's reliance on

the program at the legislative level will permit lawmakers to craft a program that achieves a range of policy goals.

4. *Using Both*

Unless Congress directs otherwise, an agency could assess fees under both the IOAA and a separate statute. The NRC, for instance, does both. On the basis of the IOAA, it collects fees for certain services at an hourly rate.¹⁸⁰ Separately, it assesses fees under the Nuclear Energy Innovation and Modernization Act (NEIMA), which requires it to collect 100% of its enacted budget from the entities it regulates, excluding certain things identified in the statute and subject to any fee relief the agency grants.¹⁸¹ But Congress could direct otherwise. For instance, USDA may not collect user fees for meat inspections,¹⁸² and FDA's annual appropriation usually states that it may not supplement its authorized user fees with IOAA fees.¹⁸³ To give another example, appropriations act

factors that “Congress did not intend” the Department of Homeland Security to consider. *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 544, 548 (N.D. Cal. 2020). The agency had for the first time established a nonwaivable fee to apply for asylum, and in the notice of proposed rulemaking, it had stated its purpose to deter frivolous applications. *Id.* at 544 (citing 84 Fed. Reg. 62,280, 62,320 (Nov. 14, 2019)). To give another example, the American Intellectual Property Law Association (AIPLA) has concerns that some of USPTO's user fee program design decisions constitute impermissible policymaking. Letter from Brian H. Batzli, President, Am. Intell. Prop. L. Ass'n, to Hon. Kathi Vidal, Sec'y of Com. for Intell. Prop. & Dir. of the U.S. Patent and Trademark Off., Comments on USPTO Patent Fee Setting and Adjusting Proposal to the Patent Public Advisory Committee (May 25, 2023), https://www.aipla.org/docs/default-source/advocacy/aipla-comments-on-uspto-fee-proposal-052523-final.pdf?sfvrsn=7417752c_1 (noting that USPTO seemed to be considering “significant fee increases or new fees” in connection with continuations and terminal disclaimers and writing that “AIPLA believes there is, at least, an appearance, that the Office is using these more substantial fee increases to implement policy changes and/or modify applicant behavior, rather than recover the cost of the Office's operations”).

180. In 87 Fed. Reg. 37,197, 37,199 (June 1, 2022), the NRC explains how it calculated its most recent hourly rate. Essentially it takes the resources budgeted for the services (salaries, benefits, and indirect program support) and divides that by the number of full-time-equivalent hours needed. *Id.* The fee set for a particular service reflects the hourly rate times an appropriate multiplier—for instance the number of hours it takes, on average, to perform that service. *Id.*

181. Nuclear Energy Innovation and Modernization Act, Pub. L. No. 115-439, § 102(b)(1)(A)–(B), 132 Stat. 5565, 5568 (2019) (codified as 42 U.S.C. § 2215).

182. 21 U.S.C. § 695 (“The cost of inspection rendered on and after July 1, 1948, under the requirements of laws relating to Federal inspection of meat and meat food products shall be borne by the United States . . .”).

183. *E.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, tit. VI, 136 Stat.

restrictions prohibit the Federal Aviation Administration (FAA) from imposing new user fees without specific statutory authority.¹⁸⁴

III. PROGRAM DESIGN

Fee design issues fall into four general buckets: setting user fees, collecting the fees, using the fees, and reviewing and revising the fees and fee program.¹⁸⁵

A. *Setting User Fees*

1. *Transactional versus Non-Transactional Fees*

A user fee program designer must decide whether the agency will assess transactional fees, non-transactional fees, or both. Transactional fees are assessed in connection with a particular good or service provided to an identifiable beneficiary. Examples include the fee for a passport, the fee paid with a patent application, and the fee paid with an application to market a tobacco product.¹⁸⁶ A non-transactional fee is not associated with a specific good or service; an example would be the general assessment paid by financial institutions to the Office of the Comptroller of the Currency (OCC).¹⁸⁷

The choice between transactional fees and non-transactional fees will largely be dictated by the agency's statutory responsibilities and the nature of its interactions with prospective fee payers. The National Park Service (NPS), which manages more than 400 park units, logically charges

4459, 4492 (2022) (“[N]one of these funds shall be used to develop, establish, or operate any program of user fees authorized by 31 U.S.C. § 9701 . . .”).

184. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. K, tit. I, 121 Stat. 1844, 2379 (2007) (“[N]one of the funds in this [Appropriations] Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act . . .”). GAO says this language precludes reliance on the IOAA. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-303SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: ANNUAL UPDATE OF THE THIRD EDITION 12-5 (2015), <https://www.gao.gov/assets/gao-15-303sp.pdf>.

185. GAO divided fee design issues into these four categories in its 2008 guide on user fee design. See GAO-08-386SP, *supra* note 127.

186. 22 U.S.C. § 214(a)–(b)(1) (passport); 35 U.S.C. § 41(a)(1)(A)–(F) (patents); 21 U.S.C. § 387s(a) (tobacco).

187. 12 U.S.C. § 16 (“The Comptroller of the Currency may collect an assessment, fee, or other charge from any entity described in section 1813(q)(1) of this title, as the Comptroller determines is necessary or appropriate to carry out the responsibilities of the Office of the Comptroller of the Currency.”). See generally *Office of the Comptroller of the Currency Fees and Assessments: Calendar Year 2023 Fees and Assessments Structure*, OFF. OF THE COMPTROLLER OF THE CURRENCY (Dec. 1, 2022), <https://www.occ.treas.gov/news-issuances/bulletins/2022/bulletin-2022-25.html>.

transactional fees: entrance fees to the national parks, as well as amenity fees for campground sites and commercial use authorization fees for concessioners operating in the park units.¹⁸⁸ An agency that regulates industry—such as EPA, FDA, and the NRC—may have both options, depending on the nature of its responsibilities.

Collecting non-transactional fees will require an authorizing statute other than the IOAA. Courts have interpreted the IOAA to authorize only fees for discrete services or goods provided to identifiable beneficiaries,¹⁸⁹ and use of a separate statute—whether or not for non-transactional fees—can be a way to achieve policy goals other than cost recovery and economic efficiency. Collecting non-transactional fees can also be a way for an agency to become fully fee-funded or, at least, to generate significant collections that might replace or supplement regular appropriations.

2. *Fee Setting Discretion*

An agency proceeding under the IOAA must set fees to recover from each beneficiary the cost of providing a specific benefit to that beneficiary.¹⁹⁰ According to OMB, this rule—which derives from *National Cable, Federal Power Commission*, and the lower court cases that followed—applies when the government is acting in its capacity as sovereign. When the government is not acting in its capacity as sovereign—for example, when it leases space in federally owned buildings—the fee should be based on market prices.¹⁹¹

188. See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-166: NATIONAL PARK SERVICE: REVENUES FROM FEES AND DONATIONS INCREASED, BUT SOME ENHANCEMENTS ARE NEEDED TO CONTINUE THIS TREND (2015).

189. See *supra* Part 2.

190. *Nat'l Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1107 (D.C. Cir. 1976) (“Thus, the IOAA must be interpreted to limit the Commission to assessing fees at a rate which reasonably reflects the cost of services performed or the expense of other value transferred to the payor”); *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985) (“[T]he fee must be reasonably related to and may not exceed the value of the service to the recipient”); *Cap. Cities Commc'ns, Inc. v. FCC*, 554 F.2d 1135, 1138 (D.C. Cir. 1976) (“This standard is not met where the persons who receive essentially the same physical services from the agency are charged a grossly variable fee solely for the reason that some are larger or have more income than others”); *Elec. Indus. Ass'n v. FCC*, 554 F.2d 1109, 1116 (D.C. Cir. 1976) (“[W]e interpret the statute and the Supreme Court decisions to require reasonable particularization of the basis for the fees, accomplished by an allocation of costs to the smallest unit that is practical.”).

191. OMB CIRCULAR A-25 REVISED, *supra* note 13, § 6-a-2(a)–(b). The distinction between acting as sovereign and acting as a contractor, for IOAA user fee calculation purposes, finds support in *Yosemite Nat'l Park & Curry Co. v. United States*, 686 F.2d 925,

If lawmakers enact a different statute to authorize fee collection, they must decide how much discretion to allow the agency when fee setting. Congress could set the fees by statute. This is uncommon, but one example is the statutory requirement that U.S. Customs and Border Protection (CBP) collect \$7 for the immigration inspection of each passenger arriving at a port of entry in the United States.¹⁹² Another approach is to lay out a formula. For instance, lawmakers set a fee of 1.5% of the first \$5 million and 1% of any amount over the first \$5 million from every award by the Iran-United States Claims Tribunal in favor of a U.S. claimant to cover the government's costs of participating in the claims program.¹⁹³

Alternatively, lawmakers could direct an agency to set fees to achieve a particular goal—for instance, to collect an aggregate amount equaling its appropriation for the year. The Securities Exchange Act states that every national securities exchange must pay a fee to the SEC “at a rate equal to \$15 per \$1,000,000 of the aggregate dollar amount of sales of securities” transacted on the exchange.¹⁹⁴ It then directs the SEC to adjust this number to a “uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales” for the fiscal year, is “reasonably likely to produce aggregate fee collections” equal to the SEC's regular appropriation for the fiscal year.¹⁹⁵

Another variation directs an agency to set fees to recover the “reasonable” or even “full” costs of providing a particular service, or even regulating more generally. For instance, the Federal Land Policy and Management Act authorizes the Department of the Interior to recover the “reasonable costs” of processing applications for rights of way; it adds that the Secretary “may” consider factors such as the monetary value of the rights or privileges sought by an applicant, the portion of the cost incurred for the benefit of the general public rather than for the exclusive benefit of the applicant, and the public service provided.¹⁹⁶ The Hazardous Waste Electronic Manifest Establishment Act directs EPA to establish an electronic manifest system and authorizes it to impose “on users such reasonable service fees as the Administrator determines to be necessary to pay costs incurred in developing, operating, maintaining,

935 (Ct. Cl. 1982). *See also* Nat'l Park Serv., B-307319, 2007 WL 2416433, at *9 (Comp. Gen. Aug. 23, 2007) (finding “nothing in IOAA to prohibit an agency from setting a fee in a commercial or proprietary transaction that reflects the market price”).

192. 8 U.S.C. § 1356(d).

193. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 502(a), 99 Stat. 405, 438 (1985).

194. 15 U.S.C. § 78ee(b).

195. 15 U.S.C. § 78ee(j).

196. 43 U.S.C. § 1734(b).

and upgrading the system.”¹⁹⁷ Lawmakers also directed EPA to determine the “fee structure that is necessary to recover the full cost . . . of providing system-related services.”¹⁹⁸ The agency used rulemaking to develop a formula for calculating the user fee.¹⁹⁹ The regulations do not state the actual fees, however. Instead, in consultation with a federal advisory committee, EPA runs the formula and publishes fee schedules on its website every two years.²⁰⁰

3. *Fee Setting Procedures*

An agency that assesses fees under the IOAA must write regulations. The statute authorizes an agency to “*prescribe regulations establishing the charge* for a service or thing of value provided by the agency.”²⁰¹ The Federal Circuit’s predecessor concluded decades ago that this means an agency may impose fees under the statute only after issuing regulations.²⁰² OMB policy similarly states that user charges under the IOAA should be instituted through regulations.²⁰³

The courts have not considered whether any exceptions to notice-and-comment might apply, either to the initial design of a user fee program under the IOAA or subsequent fee schedule updates.²⁰⁴ But it is hard to avoid concluding that an agency should use notice-and-comment when designing an IOAA fee program because the statute does not require a fee program in the first instance. And agencies generally do so, though some eschew notice-

197. Hazardous Waste Electronic Manifest Establishment Act, Pub. L. No. 112-195 § 3024(b)–(c)(1), 126 Stat. 1452, 1453 (2012) (codified at 42 U.S.C. § 6939g(c)(1), (g)).

198. § 3024(c)(3)(A).

199. 83 Fed. Reg. 420, 420–21 (Jan. 3, 2018); *see* 40 C.F.R. § 264.1312 (user fee calculation methodology applicable to owners and operators of hazardous waste treatment, storage and disposal facilities).

200. 40 C.F.R. § 264.1313(a) (2023) (describing biennial update); 85 Fed. Reg. 85,631, 85,631–32 (Dec. 29, 2020) (announcing public meeting to seek input on user fees for FY 2022 and FY 2023).

201. 31 U.S.C. § 9701(b) (emphasis added).

202. *Sohio Transp. Co. v. United States*, 766 F.2d 499, 502 (Fed. Cir. 1985) (stating, after agency implemented fees under the IOAA and the Mineral Leasing Act of 1920, that “[i]t is uncontested here that under these two statutes the Secretary is required to issue regulations”); *Alyeska Pipeline Serv. Co. v. United States*, 624 F.2d 1005, 1009 (Ct. Cl. 1980) (“The general rule applicable to all agencies, as provided in the Independent Offices Appropriation Act, is that the government may obtain reimbursement of its expenses in issuing licenses or permits only pursuant to authorizing regulations”).

203. OMB CIRCULAR A-25 REVISED, *supra* note 13, § 7(a).

204. *But see* *Five Flags Pipe Line Co. v. U.S. Dep’t of Transp.*, No. 89-0119 JGP, 1992 WL 78773 (D.D.C. Apr. 1, 1992) (notice-and-comment required for user fee schedule under COBRA, because user fees are a “rule” and exception from notice-and-comment for interpretive rules does not apply).

and-comment for subsequent fee updates. For example, the Federal Energy Regulatory Commission's regulations explain that it will "update its fees each fiscal year according to the formula" laid out in the regulations, publishing the new fees in the Federal Register.²⁰⁵ In an interview, staff of one agency suggested that notice-and-comment procedures would be prudent for annual fee setting under the IOAA—even if not required—to avoid reversal if the resulting fees were challenged as arbitrary and capricious.²⁰⁶

In another fee authorizing statute, though, Congress could take a different approach. If lawmakers did not specify a procedure for the agency to follow, the Administrative Procedure Act would control, requiring notice-and-comment unless an exception (such as "good cause") applied.²⁰⁷ But lawmakers could specify different procedures.²⁰⁸ And sometimes there might be little point to requiring elaborate proceedings at the agency. If the statutory instructions are so precise that the agency exercises little discretion at the fee-setting stage, mandating notice-and-comment might impose costs on the agency—and impose delay—without any corresponding benefit. For example, as already mentioned, the SEC implements statutory language that is detailed and prescriptive as to fee structure and amounts,²⁰⁹ and the

205. 18 C.F.R. § 381.104(a).

206. *Cf. Ayuda v. Att'y Gen.*, 551 F. Supp. 33 (D.D.C. 1987) (rejecting "arbitrary and capricious" challenge to filing fees assessed under IOAA for services rendered by Immigration and Naturalization Services, noting that the fees "were established through appropriate administrative procedures after adequate cost analysis and with opportunity for public participation"), *aff'd*, 848 F.2d 1297 (D.C. Cir. 1988) (describing district court decision "that the increased fees readily withstood appellants' arbitrary-and-capricious challenge in view of the two-year, agency-wide process of review, complete with elaborate cost accounting and notice-and-comment procedures").

207. Actions taken by the agency to implement the statute—including fee setting, if Congress required it to be done at the agency level—would constitute "rules" under the APA. *See* 5 U.S.C. § 551(4); *Five Flags Pipe Line Co. v. DOT*, No. 89-0119, 1992 WL 78773 (D.D.C. Apr. 1, 1992) (finding that natural gas pipeline user fees imposed pursuant to COBRA constitute a rule within the meaning of the APA and noting the definition includes "approval or prescription for the future of rates"); *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 343 (D.C. Cir. 2019) (decision of United States Postal Service to raise the price of the Forever Stamp by five cents was a "rule" to which the "notice and comment guarantees of section 553 of the APA apply"); *see also* 5 U.S.C. § 553(b)(3) (stating that notice-and-comment are not required "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

208. *E.g., Asiana Airlines v. Fed. Aviation Admin. (FAA)*, 134 F.3d 393 (D.C. Cir. 1998) (rejecting argument that FAA was required to conform to APA notice and comment procedures when implementing fees under Federal Aviation Reauthorization Act, which instead directed an interim final rule and then final rule).

209. *See supra* Part B.

Securities Exchange Act states that the agency is not required to follow notice-and-comment procedures when setting transaction fees payable by the national securities exchanges.²¹⁰ The SEC, therefore, issues a fee rate advisory when it adjusts its fee rates.²¹¹ In contrast, USPTO's statutory instructions direct it to match its aggregate patent fees with its aggregate patent costs, which gives the agency broad flexibility in implementation, and Congress mandated a process that includes two rounds of engagement with the public—initial high-level discussions with an advisory committee and in a public hearing, followed by notice-and-comment.²¹² The additional step allows the agency to refine its approach before publishing a notice of proposed rulemaking in the Federal Register. This allows USPTO to make more significant adjustments in response to initial public input than would be possible—under the “logical outgrowth” doctrine—in a final rule after one round of public comment.²¹³

If an agency is tasked with setting fees to recover all the direct and indirect costs of its regulatory program, and if it also projects those costs and thus sets the target number itself as part of the annual budget process, some may worry it has an incentive to overstate its costs or conversely no incentive to restrain its expenditures.²¹⁴ That said, various accounting principles, standards, and requirements, and associated federal guidelines, may impose helpful discipline on cost projections.²¹⁵ Transparency when translating the aggregate target number into specific user fees may also alleviate some concerns. When it calculates user fees each year, for example, the NRC posts work papers and a downloadable spreadsheet on its website to supplement

210. 15 U.S.C. § 78ee(j)(3).

211. *E.g.*, Press Release, U.S. Sec. & Exch. Comm'n, Fee Rate Advisory #1 for Fiscal Year 2022 (Apr. 8, 2022), <https://www.sec.gov/news/press-release/2022-60>.

212. USPTO's authority to set patent user fees—which was amended by the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284—appears at 35 U.S.C. § 41. Sections 10(d) and (e) of the AIA, which were not codified, require the multistep public process. § 10(d),(e), 125 Stat. at 317–18.

213. Interview with Lauren Ailes, Dianne Buie, Nicholas Oettinger & Brett Lockard, U.S. Pat. & Trademark Off. (Aug. 22, 2023) (on file with author). In simple terms, if a reviewing court finds the final rule to be a “logical outgrowth” of the proposed rule, the court will find the original notice of proposed rulemaking adequate. Conversely, if the final rule is not a logical outgrowth of the proposed rule, it would find the original notice inadequate.

214. GAO-13-820, *supra* note 112, at 11 (noting stakeholders have expressed this concern).

215. *Id.* (“Further, federal agencies must also follow guidelines regarding their cost accounting information, providing some safeguards against artificial inflation of program costs.”).

both its proposed rule and its final rule.²¹⁶ In some cases, it may be appropriate to include stakeholders when forecasting costs as part of the budget process, both to refine the forecasts and to discuss significant new obligations (such as new technology) that will be passed along through fees.

An agency fully funded by regulatory fees may need to develop fee structures for prospective new entrants with emerging technologies (who are not yet regulated), without having collected fees (from those new entrants) to support the work of developing the fee structures. The NRC, for instance, developed a new annual fee structure for certain small modular reactors after the companies interested in developing these reactors told the agency that the reactors would not be economical at the annual fee set for larger reactors.²¹⁷ But no such reactors had been built yet, which meant that staff work developing the fee structure had to be supported by fees paid by other companies—actual licensees. In these situations, considerations of equity (for fee-paying licensees) might conflict with the need to provide certainty for innovators (future licensees considering investing in technology but uncertain about the user fees they might face).²¹⁸ Transparency in these situations is important, but agency staff may need to defer some work until after fees are paid to achieve an acceptable balance between fairness and certainty.

4. *Reductions, Waivers, and Exemptions*

Program designers also face the question whether to institute fee reductions, waivers, and exemptions, and, if so, on what grounds, and whether they should be automatic or assessed by agency staff on a case-by-case basis.²¹⁹ These arrangements typically reflect policy decisions unrelated to economic efficiency and increasing the funds available to the agency. Examples follow. By statute, a company that submits a marketing application for a drug intended to treat a rare disease need not pay the \$4

216. Interview with Brian Harris & Anthony Rossi, Nuclear Regul. Comm'n (June 28, 2023) (on file with author); *see, e.g.*, NUCLEAR REGUL. COMM'N, FY 2023 FINAL FEE RULE WORK PAPERS (2023), <https://www.nrc.gov/docs/ML2313/ML23136A575.pdf>; NUCLEAR REGUL. COMM'N, FY 2023 FINAL COMPARISONS BY DIRECT RESOURCES (2023), <https://www.nrc.gov/about-nrc/regulatory/licensing/fy2023-final-comparisons-by-direct-resources.xlsx> (listing different programs within the NRC and reporting total value of budgeted resources for different fee classes).

217. *See* 88 Fed. Reg. 39,120, 39,132 (June 15, 2023) (discussing changes to 10 C.F.R. § 171.15).

218. Interview with Brian Harris & Anthony Rossi, *supra* note 216.

219. This Article does not distinguish between “waiver” and “exemption.” The terms are used widely, and usage does not appear to be consistent.

million user fee that other applicants pay.²²⁰ Congress also directed FDA to waive or reduce the user fee if doing so is necessary to protect the public health.²²¹ Lawmakers directed the U.S. Postal Service to set subsidized rates for certain classes of mail users, such as the blind.²²² When authorizing the Secretary of the Interior to collect recreation fees on federal recreational lands, Congress prohibited fees for use of overlooks or scenic lookouts as well as fees for parking and picnicking along roads.²²³ Members of Gold Star Families—next of kin of a member of the U.S. Armed Forces who lost his or her life in a war, terrorist attack, or qualifying situation²²⁴—receive lifetime passes that cover entrance fees at national parks and wildlife refuges as well as day use fees at national forests and grasslands and on lands managed by the National Park Service, U.S. Fish and Wildlife Service, U.S. Forest Service, Bureau of Land Management, Bureau of Reclamation, and U.S. Army Corps of Engineers.²²⁵ To encourage victims to come forward and work with law enforcement and other appropriate agencies, USCIS charges no fee when administering the T visa (for victims of a severe form of trafficking in persons) and the U visa (for victims of certain criminal activities, including domestic violence, sexual assault, hate crimes, human trafficking, involuntary servitude, and certain other serious offenses).²²⁶ In many of these cases, arguments for economic efficiency that would lead to strict cost recovery have yielded to other social priorities or arguments about equity.

220. 21 U.S.C. § 379h(a)(1)(A)(F); 88 Fed. Reg. 48,881 (July 28, 2023) (rates for FY 2024).

221. 21 U.S.C. § 379h(d)(1)(A). FDA has explained in guidance how it will make this determination. U.S. DEP'T OF HEALTH AND HUM. SERVS., U.S. FOOD & DRUG ADMIN., CTR. FOR DRUG EVALUATION & RSCH, CTR. FOR BIOLOGICS EVALUATION & RSCH., GUIDANCE FOR INDUSTRY: PRESCRIPTION DRUG USER FEE ACT WAIVERS, REDUCTIONS, AND REFUNDS FOR DRUG AND BIOLOGICAL PRODUCTS 5–6 (2019), <https://www.fda.gov/media/131797/download>.

222. 39 U.S.C. § 3403.

223. 16 U.S.C. § 6802(d)(1).

224. See DEP'T OF DEF., INSTRUCTION 1348.36: GOLD STAR LAPEL BUTTON, SERVICE FLAG, AND SERVICE LAPEL BUTTON 5 (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/134836p.pdf> (listing the qualifying criteria for a next of kin to wear a Gold Star Lapel Button).

225. See *Free Entrance to National Parks for Current Military, Veterans, and Gold Star Families*, NAT'L PARK SERV. (Nov. 30, 2023), <https://www.nps.gov/planyourvisit/veterans-and-gold-star-families-free-access.htm>.

226. Interview with Samantha Deshommes & Philip D. Elder, U.S. Citizenship & Immigr. Servs. (June 21, 2023) (on file with author); *Victims of Human Trafficking and Other Crimes*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 21, 2023), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes>; see DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS, USCIS FORM G-1055: FEE SCHEDULE (2024), <https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf>.

Also, many regulatory user fee programs have lower rates for small entities. This may reflect concern that the fee would otherwise operate as a barrier to entry for these entities and a choice—perhaps grounded in equity considerations or perhaps grounded in economic theory—to facilitate their market entry and thus competition with larger organizations.²²⁷ Sometimes, Congress mandates small business waivers and fee reductions by statute.²²⁸ Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), for example, a small business applicant is eligible for a partial waiver of the pesticide registration user fee otherwise payable to EPA.²²⁹ In other instances, the agency has made the choice itself; the NRC’s modified annual fee structure for small modular reactors, discussed above, provides one example.²³⁰

There may be reason for caution, however, when embedding waivers, exemptions, and reduced rates into a user fee program. At a fully fee-funded agency, other payers will have to subsidize the services provided to (or regulation of) the non-payers. Moreover, if the waiver, exemption, or reduction is administered on a case-by-case basis, fee payers will also have to subsidize the cost of performing individualized assessments to determine *whether* to provide relief in the first instance. This could raise fairness concerns, which could be exacerbated if the fee modification also increases consumption of the service or good. Fairness concerns would have to be balanced with the values furthered by the modification. Increased demand due to the fee modification could also cause the agency’s costs to exceed its collections—a situation known as “revenue instability.”²³¹ For these reasons, a public process may be helpful in exploring potential waivers, exemptions, and reduced rates and in shaping those decisions. In developing its alternative approach for non-

227. GAO-15-718, *supra* note 13, at 12 (“This can be an equity consideration that takes into account small entities’ ability to pay the regulatory user fee and compete with larger businesses and organizations.”).

228. When an agency uses rulemaking to set fees, the Regulatory Flexibility Act requires that it consider the impact of its proposal on small entities. 5 U.S.C. §§ 601–12. An agency setting fees under the IOAA, however, may not set a different fee rate for small entities simply because they are small entities. *Cap. Cities Commc’ns, Inc. v. FCC*, 554 F.2d 1135, 1138 (D.C. Cir. 1976).

229. 7 U.S.C. § 136w-8(b)(7)(F).

230. *See* 88 Fed. Reg. 39,120, 39,132 (June 15, 2023) (discussing changes to 10 C.F.R. § 171.15); *see also* GAO-15-718, *supra* note 13, at 13 (“NCUA and OCC—which have broad authority to set their fees—take into account the amount of assets held by the financial institutions that they regulate when setting their fee amounts. As a result of this fee structure, smaller financial institutions with fewer assets pay a lower amount than larger ones.”).

231. GAO-13-820, *supra* note 112, at 30 (“In programs where fees for some activities subsidize the costs for other activities, payers’ overuse of the subsidized activity may affect the agency’s ability to cover costs.”).

light water reactor small modular reactors, for example, the NRC held several public meetings and considered a position paper from the Nuclear Energy Institute, before conducting an informal rulemaking.²³²

B. Collecting User Fees

Decisions about collecting user fees fall in two categories: decisions relating to when and how payment will be made and decisions relating to how the obligation to pay will be enforced. The agency's statutory responsibilities and the nature of its interactions with feepayers will dictate some answers. For instance, an agency collecting entrance fees from individual visitors to a national park (NPS) will have different choices than an agency collecting annual fees from licensed nuclear reactors (NRC) or an agency collecting application fees in connection with patent applications (USPTO).

1. When to Collect User Fees

A transactional user fee could be collected before the good or service is provided, as is the case for passport applications, new drug applications, and patent applications.²³³ Or it could be collected after the good or service is provided, pursuant to an invoice. The NRC invoices reactors for regulatory services it performs.²³⁴ EPA invoices hazardous waste receiving facilities on a monthly basis based on the number of manifests they submit.²³⁵ If an agency invoices users for services provided at an hourly rate over a period of time, transparency about the number of hours (and total fee) likely to be reflected on the invoice will be important.²³⁶ In some cases, it may make sense for users to track their own consumption of an agency service and pay at regular intervals. CBP takes this approach, directing airlines to report and

232. 88 Fed. Reg. at 39,132.

233. For transactional fees imposed under the IOAA, OMB states a preference for collection "in advance of, or simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services." OMB CIRCULAR A-25 REVISED, *supra* note 13, § 6-a-2-c.

234. Interview with Brian Harris & Anthony Rossi, *supra* note 216. See 10 C.F.R. § 170.12 (2023) (quarterly invoicing).

235. Interview with Stephen Donnelly, *supra* note 157.

236. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-362, NUCLEAR REGULATORY COMMISSION: FEE-SETTING, BILLING, AND BUDGETING PROCESSES HAVE IMPROVED, BUT ADDITIONAL ACTIONS COULD ENHANCE EFFORTS 21–22 (2020) (reporting that NRC project managers "do not always communicate about that status of regulatory actions, which can cause the licensees' bills for NRC's oversight to be higher than expected").

remit the immigration inspection fees they collect from passengers.²³⁷ In contrast, non-transactional user fees are collected at intervals. They can be assessed annually or more often, such as quarterly, and they can be assessed at the same time for every user or at differing times. While companies with approved new drug applications pay an annual fee to FDA by the first business day after October 1,²³⁸ some nuclear reactor licensees pay their annual fee to the NRC on the anniversary of their licensing date, while others pay their annual fee in quarterly installments.²³⁹

When setting a schedule for fee collection, decisionmakers will need to ensure that the agency has sufficient funds to operate through the year. Congressional decisions about the relationship between the agency's user fee authorization and its appropriations may be relevant. As noted earlier, for example, lawmakers could authorize the agency to retain its fees for credit to its appropriations, structuring the program so that fees reimburse expenses already borne by those appropriations. In this case, the agency would be able to obligate funds even if fees fall below forecasted amounts, and the timing of fee collection would not create a risk of revenue instability.²⁴⁰ The agency's statutory responsibilities and practices may also be relevant. If an agency enters into significant obligations early in the fiscal year, for example, it might need to front-load fee collection, unless Congress again provides authority to obligate appropriated funds and reimburse the U.S. Treasury.²⁴¹ Finally, decisionmakers will need to consider administrative burdens on the agency and the users. An agency

237. Interview with James Cohee, Senior Att'y, U.S. Customs & Border Prot. (June 26, 2023) (on file with author); 8 C.F.R. § 286.4 (2023) ("It is the responsibility of the air or sea carriers, travel agents, tour wholesalers, or other parties, which issue tickets or documents for transportation . . . to collect the fee . . . from all passengers transported to the United States . . ."); § 286.5 ("Fee remittances shall be sent to the Immigration and Naturalization Service, at a designated Treasury depository, for receipt no later than 31 days after the close of the calendar quarter in which the fees are collected . . ."); *see also* 19 C.F.R. § 24.22(g) (2023) ("[A] fee . . . must be collected and remitted to CBP for services provided in connection with the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside the United States . . .").

238. 21 U.S.C. § 379h(a)(2)(A)(i). FDA sends an invoice in August. *See* 88 Fed. Reg. 48,881 (July 28, 2023) (discussing prescription drug user fee process for FY 2024).

239. Annual fees under \$100,000 are paid annually, and annual fees over \$100,000 are paid quarterly. 10 C.F.R. § 171.19.

240. Interview with Caryn Kauffman, Elizabeth McFadden, Allen Blume & Michael Barnes, *supra* note 175.

241. GAO-13-820, *supra* note 112, at 28 (noting that USCIS enters into yearlong contracts at the start of the fiscal year and needs collections equal to the full contract amount when it enters into the contract).

will need to audit its user fee program, for instance, to ensure that all users are charged appropriately and submit their fees, and different approaches to collection timing may be more or less burdensome to audit.

Most funds collected by agencies, including user fees, are collected using electronic methods such as: wire transfer, automated clearing house (ACH) transfer, or credit or debit card payments.²⁴² Electronic collection is said to reduce administrative burden, reduce costs for both agencies and payers, increase processing speed and accuracy, and reduce the risk of theft.²⁴³ GAO thus recommends electronic collection of user fees.²⁴⁴ For fees collected under the IOAA, OMB says that “[e]very effort should be made to keep the costs of collection to a minimum.”²⁴⁵ Sometimes, additional efficiencies can be achieved by collecting fees from users through a regulated intermediary. As noted, although CBP collects user fees from airline passengers for immigration services, these fees are administered by the airlines and remitted directly to the U.S. Treasury.²⁴⁶

Reducing administrative costs achievable through electronic collection might need to be balanced against other social values. Electronic collection could erect a barrier to use of a good or service. In these cases, if program designers wanted to encourage use of the good or service to effect a particular social policy, a different means of collection might need to be used. Moreover, an agency collecting fees from individuals may need to consider accessibility issues, which could limit its freedom to implement electronic collection. But if an agency is meant to be fully fee-funded, the increase in administrative costs from permitting non-electronic fee payment would have to be recouped in the fees.

242. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-11, BUDGET ISSUES: ELECTRONIC PROCESSING OF NON-IRS COLLECTIONS HAS INCREASED BUT BETTER UNDERSTANDING OF COST STRUCTURE IS NEEDED 8 (2009) (“Fully electronic payments accounted for more than 80 percent of dollars collected by agencies other than IRS for fiscal years 2005 through 2009, with \$441 billion of the almost \$509 billion collected using fully electronic methods in fiscal year 2009.”).

243. *See generally id.* *See also* GAO-15-718, *supra* note 13, at 16 (noting that the SEC and OCC reported that switching to electronic collection of user fees reduced their administrative burden).

244. GAO-15-718, *supra* note 13, at 16.

245. OMB CIRCULAR A-25 REVISED, *supra* note 13, § 7(e-f).

246. 8 C.F.R. § 286.5(b)(1). In 2008, the Federal Circuit held that American Airlines was not required to remit fees it was unable to collect, for instance because the tickets were issued by travel agents in countries that prohibit collection of U.S. user fees at the time of ticketing. *Am. Airlines v. United States*, 551 F.3d 1294, 1303 (Fed. Cir. 2008) (“We affirm the ruling that the statutes and regulations governing the Immigration User Fee and the AQI User Fee do not impose liability on the carrier for payment of the fees that are not actually collected from passengers.”).

2. *Whether and How to Enforce the Obligation to Pay User Fees*

Program designers will need to decide whether and how the agency will enforce the obligation to pay user fees. A decisionmaker considering whether and how aggressively to enforce the obligation should assess the impact of late payment and nonpayment on the agency's ability to operate. Payment should generally be pursued, but in some situations, enforcement may not be a high priority. For instance, if the agency imposes late fees proportional to the size of the missing payment, a small user fee might not be worth chasing down.²⁴⁷ Depending on the service, decisionmakers may conclude that it is more important to encourage consumption of the good or service—because use of the good or service furthers other social values—than to enforce the user fee.²⁴⁸

The options available will vary. In the case of fees for services, it may be not only simple but effective to decline service until payment has occurred. FERC's regulations, for example, provide that a filing is "deficient" if it is not accompanied by the appropriate fee (or a petition for waiver), and the agency will not process a deficient filing.²⁴⁹ If an agency collects non-transactional fees, though, or if it collects transactional fees after providing service, withholding service will not be an option. In these cases, a penalty—such as interest on the charges or doubling the fee—may discourage late payment or nonpayment.²⁵⁰ If late fees might be ineffective, decisionmakers may want to consider other options. For example, CBP collects an international carrier bond, and its regulations authorize liquidated damages when an airline fails to pay the passenger processing fee equal to "two times the passenger processing fees that were required to be collected."²⁵¹ FDA has even more powerful tools; for example, if a generic company fails to pay its annual fee within twenty calendar days of the due date, the agency (1) places the parent company on a publicly available arrears list, (2) refuses to receive any subsequent generic application from the company, and (3) deems every drug marketed by the company to be "misbranded," which triggers enforcement options including potential criminal prosecution for introducing the drugs into commerce.²⁵²

247. Interview with Stephen Donnelly, *supra* note 157 (noting that although few hazardous waste receiving facilities are late with payment, the late payers are typically smaller entities with fewer manifests and thus lower user fees in the first instance).

248. Interview with Elizabeth Kruman, Erin Morris & Melissa Bailey, Agric. Mktg. Serv. (July 12, 2023) (on file with author).

249. 18 C.F.R. § 381.103 (2022).

250. GAO-13-820, *supra* note 112, at 29 ("In the event payers do not remit fees in a timely manner, the agency may need tools such as penalties to ensure remittance compliance.").

251. 19 C.F.R. § 113.64 (2022).

252. See *Generic Drug User Fee Amendments*, U.S. FOOD & DRUG ADMIN. (Dec. 21, 2023), <https://www.fda.gov/industry/fda-user-fee-programs/generic-drug-user-fee-amendments>.

C. Using Collected Fees

As noted, an agency needs authorization to obligate collected fees in addition to authorization to collect the fees. If it collects fees under the IOAA, the authority to obligate those fees will be a separate appropriation from the U.S. Treasury. If it collects fees under another law, there are three possibilities: (a) the ordinary rule could apply, meaning authority to collect appears in fee-authorizing legislation, and authority to use appears in a separate appropriation, (b) Congress could authorize both collection and obligation in appropriations legislation, or (c) in the fee-authorizing law, Congress could dispense with the rule that collected fees must be deposited in the U.S. Treasury and separately appropriated.²⁵³

Lawmakers will need to decide when the agency may use the collected fees. There are three choices: (1) authorization to use the fees expires, even if they have not been obligated, at the end of the fiscal year (in which case the agency has “one-year funds”); (2) the fees may be used for a specific multi-year period (“multi-year funds”), or (3) the fees may be used until expended (“no-year funds”).²⁵⁴ Providing no-year funds or even multi-year funds may mitigate an agency’s risk of revenue instability because the agency could create a reserve fund of unexpended fees to obligate as its workload ebbed and flowed. This flexibility might be viewed as important if the agency’s activity level depends on exogenous factors that lawmakers (and the agency) cannot control or predict, such as the pace of scientific innovation, geopolitical developments, or the broader economic climate. No-year funds and multi-year funds do, however, reduce congressional oversight. Another way to address revenue instability without losing this oversight would be to authorize placement of excess funds in a reserve fund but require appropriation for their use.²⁵⁵

Substantive controls on the uses to which fees may be put might appear in the fee-authorizing legislation, the appropriation, or both. Lawmakers

253. Some statutes that authorize agencies to administer programs include language purporting to authorize subsequent congressional appropriation of the necessary funds, but this language does not itself constitute an appropriation, and it is not binding on any subsequent legislative vote.

254. RICCARD, *supra* note 104, at 2.

255. *But see* GAO-13-820, *supra* note 112, at 16 (“If these amounts are made available in future years rather than in the year the fees were collected, the action will count or “score” as new budget authority against discretionary spending limits in place in a given future fiscal year, and will not offset against budget authority made available that year. The effect of this scoring may make the fee-funded activities appear more costly and can make granting access to previously collected amounts a less desirable option for Congressional fee designers. The outcome can lead to the buildup of unavailable and unobligated balances.”).

face a basic choice between stating specific activities the agency may support with fees, on the one hand, and broadly authorizing the use of the fees to support the agency's work, on the other hand. In the case of an agency that is fully fee-funded, the latter choice means the agency's organic statute effectively dictates how the fees may be spent. In turn, though, if that statute itself confers broad discretion to the agency, lawmakers have chosen to maximize agency discretion and minimize their own control. Between the two ends of the spectrum, a range of possibilities strike differing balances between legislative control and administrative flexibility.

FDA's user fee statutes offer two examples. In provisions authorizing medical device user fees, Congress lists activities that may be supported, including reviewing premarket submissions, issuing letters in response to these submissions, inspecting manufacturing establishments in connection with review of submissions, monitoring research conducted in connection with these submissions, handling requests to perform clinical research in anticipation of premarket submissions, developing related guidance and policy documents, providing technical assistance to manufacturers, classifying and reclassifying medical devices, and evaluating post-market studies required of companies.²⁵⁶ The agency's tobacco user fees provide a contrast; unlike its centers regulating drugs and devices, the agency's Center for Tobacco Products is fully fee-funded.²⁵⁷ The fee-authorizing language states that fees, once appropriated, should be used for costs "related to the regulation of tobacco products,"²⁵⁸ and the substantive tobacco provisions in its statute (which are detailed) provide the necessary controls.²⁵⁹

Legislatively prescribing activities an agency may support with fees (i.e., these but not those) may complicate the agency's accounting obligations and perhaps add to its operating costs.²⁶⁰ Prescriptive rules about activities the agency may support with fees could also make it hard for the agency to respond (for instance, curtailing programs or making adjustments) when

256. 21 U.S.C. § 379j(h) (stating that the fees may be spent only "to defray the costs of the resources allocated for the process for the review of device applications"); § 379i (defining "the process for the review of device applications").

257. See U.S. FOOD & DRUG ADMIN., REPORT TO THE HOUSE AND SENATE COMMITTEES ON APPROPRIATIONS: TOBACCO PRODUCT USER FEES 2 (2021), <https://www.fda.gov/media/155617/download>.

258. 21 U.S.C. § 387s(c)(2). Fees are available (after appropriation) to pay the costs of agency activities "related to the regulation of tobacco products" under this statute and the Family Smoking Prevention and Tobacco Control Act.

259. 21 U.S.C. §§ 387–387v.

260. GAO-13-820, *supra* note 112, at 14 ("For example, the narrower the subset of activities for which collections can be used, the more detailed and potentially expensive the required cost accounting.").

circumstances change unexpectedly.²⁶¹ In contrast, a broad grant of authority to use fees without caveats, combined with a plan for the agency to be fully fee-funded, relinquishes legislative control and may be concerning when combined with broadly-worded agency authority in the first instance.²⁶²

D. *Reviewing User Fees and Fee Programs*

The final set of design questions relate to updating user fees and reviewing fee programs.

1. *Reviewing and Adjusting Fees*

Decisionmakers will need to decide how often and how user fees will be reviewed and revised.²⁶³ If user fees are meant to recover costs, regular review and adjustment will help ensure their accuracy.²⁶⁴ Review allows the fee setter to consider new information, such as changes in demand for the agency's services and changes in the agency's costs stemming from other factors.²⁶⁵ Without regular fee adjustments, collections might become inadequate to cover the activities they are meant to cover. And failing to update regularly can eventually mean that a significant increase is required. This, in turn, can face implementation challenges. For instance, in 2007, USCIS conducted its first user fee review in nine years and increased fees by an average of 86%. Predictably, the agency had a massive influx of filings in the final month before the fee increase took effect.²⁶⁶ Another agency might not experience a surge of this sort, though.

Although reviews and adjustments are important, doing them frequently imposes costs on the agency and possibly others, and these costs may increase

261. *Id.* at 14 (“[S]tatutes that too narrowly limit how fees can be used reduces both Congress’s flexibility to make resource decisions and an agency’s flexibility to reallocate resources. This can make it more difficult to pursue public policy goals or respond to changing program needs, such as when the activities intended to achieve fee-funded purposes change.”).

262. Concern was voiced during the interviews for this project that an adverse ruling in the pending *Loper* case, *see supra* note 7, could jeopardize the ability of some fully fee-funded agencies to maintain existing programs.

263. The Chief Financial Officer of any agency subject to the Chief Financial Officers (CFO) Act of 1990, 31 U.S.C. §§ 901–03, must, on a biennial basis, review fees imposed by the agency for services it provides and recommend changes as needed. § 902(a)(8). For a list of agencies subject to the CFO Act, *see* 31 U.S.C. § 901(b).

264. GAO-13-820, *supra* note 112, at 11 (“We have found over the years that fees set through the regulatory process may be updated more frequently than fees set in statute: therefore, they may more consistently align collections with costs.”).

265. GAO-15-718, *supra* note 13, at 23 n.39, 24, 27 (listing benefits of user fee reviews).

266. GAO-13-820, *supra* note 112, at 10.

if the process is involved. If an agency uses notice-and-comment rulemaking, and especially if it includes other steps such as public hearings or meetings with an advisory committee, for example, frequent adjustments will impose a burden on agency resources.²⁶⁷ If the fee statute gives the agency very little discretion when setting fees, there might be little reason to incur this cost. Although the SEC sets its registration fees and transaction fees annually and adjusts its transaction fees midyear if actual transactions do not align with forecasts, for instance, the statutory formula leaves little discretion for the agency.²⁶⁸ It does not follow notice-and-comment procedures.²⁶⁹ In contrast, EPA uses more elaborate procedures for its electronic manifest user fee; among other things, it consults a federal advisory committee in addition to using notice-and-comment. Citing (in part) the administrative burden of this process, it chose to update this fee every two years.²⁷⁰

For some agencies, the timing and duration of the fee-setting process means that new fee rates are somewhat retroactive, which creates some accounting complications. The NRC experience illustrates. Staff begin preparing fee policy papers in the summer before each fiscal year begins, followed by a Commission vote and then preparation of a notice of proposed rulemaking, which is typically not published until January (of the fiscal year to which the fees pertain). The final rule is not published until June and does not take effect until August. As a result, for each fiscal year (October 1 to September 31), the fees do not take effect until August, at which point only

267. If the agency uses notice-and-comment rulemaking, other analyses or steps may be required. These could include preparation of a regulatory flexibility analysis, 5 U.S.C. §§ 601–12, for instance, and compliance with the Paperwork Reduction Act, 44 U.S.C. §§ 3501–20. Various executive orders may also apply.

268. The statute provides the method for calculating annual adjustments. *See, e.g.*, Order Making Fiscal Year 2023 Annual Adjustments to Registration Fee Rates, 87 Fed. Reg. 53,030 (Aug. 30, 2022) (registration fees for FY 2023); Order Making Fiscal Year 2023 Annual Adjustments to Transaction Fee Rates, 88 Fed. Reg. 5,051 (Jan. 26, 2023) (transaction fees for FY 2023).

269. Interview with Caryn Kauffman, Elizabeth McFadden, Allen Blume & Michael Barnes, *supra* note 175.

270. Hazardous Waste Management System; User Fees for the Electronic Hazardous Waste Manifest System and Amendments to Manifest Regulations 83 Fed. Reg. 420, 432–33 (Jan. 3, 2018) (“While the Agency appreciates that an annual fee revision process would be even more responsive to program cost and manifest number changes than the final rule’s two-year cycle, the Agency is persuaded that any such advantage is overwhelmed by the additional administrative burden to EPA in conducting a nearly constant, annual fee refresh process. Also, we believe there are advantages to users in having access to a stable fee schedule of two years’ duration, rather than having to anticipate and react to a more frequent fee revision process.”).

two months remain. This means that from October to August of each year, the NRC operates under the prior fiscal year's fee rule. During the final two months, when the new fees are finally in effect, the NRC must adjust the fees so that actual collections for the year reconcile with the fee rates for the year.²⁷¹ So, too, at the SEC, even though its annual process is streamlined. It sets its transaction fee rate promptly after the President signs the fiscal year's appropriations law.²⁷² Even still, this can occur well into the fiscal year, and until that point, the SEC collects fees under the prior year's rates. The rate for the balance of the year is designed to ensure that aggregate collections, including already collected fees, align with the appropriation for the year.²⁷³

Providing adequate notice of fee changes will be important so that fee payers may make informed decisions about use of the agency's services and, in some cases, appropriate adjustments. For example, the airline industry collects customs fees and immigration inspection fees from passengers, and the companies may need time to adjust their electronic systems to reflect changes made by CBP to the fee structure and rates.

2. *Reviewing the Fee Program*

When Congress amends an agency's governing statute, decisionmakers may need to consider whether the agency's user fee authority (if any) should be changed or additional user fee authority provided. Periodic review of the user fee program—to determine whether it continues to align with the agency's responsibilities—itself may also be prudent. Third-party interest in the impact of the user fee program—for instance, stakeholder concerns or scholarly research suggesting that the program has had unintended collateral consequences—may be an important signal that the design should be reexamined. Doing so transparently and with the participation of interested parties may promote acceptance of the conclusions from this review.

One option is to force review through a sunset provision, i.e., providing that the agency's authority to assess user fees expires on a fixed date. Negotiation of reauthorizing legislation provides an opportunity to modify the design of the user fee program. For example, Congress reauthorizes most of FDA's user fee authorities every five years, and the structure of these fees has evolved. For instance, for decades, the agency collected drug application

271. Interview with Brian Harris & Anthony Rossi, *supra* note 216.

272. Order Making Fiscal Year 2023 Annual Adjustments to Transaction Fee Rates, 88 Fed. Reg. at 50,51 (setting transaction fees for FY 2023 and noting the statute directs it to publish notice of new fee rates “not later than 30 days after the date on which an Act making a regular appropriation for the applicable fiscal year is enacted”).

273. Interview with Caryn Kauffman, Elizabeth McFadden, Allen Blume & Michael Barnes, *supra* note 175.

fees, drug product fees, and drug facility registration fees, but now it simply collects application fees and “program” fees.²⁷⁴

IV. RECOMMENDATIONS

On the basis of the research that informed the preceding Parts of this Article²⁷⁵ and the interviews performed to support the underlying report to the Administrative Conference, this Part presents four sets of recommendations for decisionmakers considering whether to establish a user fee program and how to design that program.

A. Involve Stakeholders and Ensure Transparency

The research and interviews for this project suggested that the most significant issue for user fee program designers may be ensuring that stakeholders have a seat at the table during program design and fee setting, whether these steps occur at the legislative level or the agency level. Stakeholders include users (prospective payers) and organizations that represent their interests, but also those to whom the fees will be passed and any who might be affected by the fee or the fee program design. For example, if a fee will be passed from hazardous waste receiving facilities to hazardous waste generators, the latter have an interest in the fee program. If a fee will be passed from regulated companies to their customers, the latter have an interest. If a fee program is meant to encourage or discourage private behaviors, stakeholders include constituencies who would be affected by that behavior. For example, if a fee is designed to reduce congestion at airports during peak hours, taxi drivers may have an interest. The stakeholders probably include anyone interested in the work funded by the fees—patients who will use medical devices approved by FDA, for example—if insufficient collections would jeopardize the agency’s ability to perform that work.

The benefits of stakeholder participation during program design will vary with the agency and fee. In the case of a user fee collected from a regulated industry and used to support regulation, for instance, involving public interest representatives during program design may help to address concerns about capture. Involving payers in design decisions will allow program designers to consider relevant industry business practices and technological capabilities. If program designers envision firms tracking their own use of a particular agency service, it might be important to understand whether those

274. Compare 21 U.S.C. § 379h(a)(2) (2018) (“prescription drug program fee”), with 21 U.S.C. § 379h(a)(2) (2006) (“prescription drug establishment fee”), and *id.* § (a)(3)(2006) (“prescription drug product fee”).

275. See *supra* Parts I to III.

firms will need to make substantial changes to their technology and how quickly those changes could be made. If designers envision collecting substantial fees on a regular basis from firms, it might be important to understand whether the business cycle of the industry makes certain times of year better and whether firms would prefer regular but smaller fee adjustments or larger, less frequent adjustments.

Lawmakers creating new statutory user fee programs should, as a general rule, make significant design decisions themselves, with input from these differing stakeholder groups. If lawmakers instead give an agency discretion to make significant user fee design decisions, they should require the agency to use notice-and-comment procedures during the design process. In some situations—for instance, if the agency has broad discretion to decide which services and goods will be funded with fees, if the fees will have substantial budgetary implications for payers, or if equity considerations may prompt calls for waivers—additional procedures may be warranted. These could include public meetings, dockets opened to solicit suggestions, advisory committee meetings, and distribution of working papers for comment.

The benefits of stakeholder participation during fee adjustment will also vary. If the agency forecasts the use of its services to set fees, it might reach a more accurate number with input from likely users. An example might be an agency (such as the NRC) that receives a small number of applications each year, each requiring substantial resources to review. In other cases, it may be preferable to base forecasts on historical data, i.e., to use a time series forecast (as the SEC does). If an agency revises its fees frequently, involving payers will avoid surprises and may improve acceptance of the new fees. But if Congress has provided detailed instructions and the agency's fee revision process is mechanical, elaborate participation procedures may impose costs while yielding little benefit. For agencies whose fees reflect their budget proposals—because their budget proposals form the basis for their appropriations, which they must then collect in fees—it may be appropriate to involve stakeholders during the budget formulation process. Important decisions affecting fee payers might occur at the outset, in other words, when the agency prepares a budget proposal for the year.

In addition to involving stakeholders during fee design and fee setting, agencies should be transparent about the results. And changes should be announced well before their effective date, using methods of communication appropriate to the payers and, in the case of individual payers, taking accessibility into account.

The research for this project uncovered a broader transparency issue. There is no authoritative public list of federal agency user fees. OMB declined to provide one, and although the Budget Appendix of the United States Government indicates which agencies have offsetting collections (and

how much) it does not identify individual user fees. As a general rule, agencies do not provide this information clearly to the public. A few maintain pages on their websites listing user fees and providing hyperlinks to relevant regulations and Federal Register notices. The vast majority do not. The Appendix presents a list compiled from public sources, but it is not exhaustive and may include fees that are no longer assessed because the services are no longer offered.²⁷⁶ Federal agencies collected more than half a trillion dollars in user fees in FY 2022,²⁷⁷ and the public should have easy access to a straightforward explanation from every agency collecting user fees of this significant non-tax source of its operating funds. If an agency does not place its fee schedule in the Code of Federal Regulations, it should publish the schedule in the Federal Register. In addition, it should maintain a page on its website devoted to user fees, identifying and explaining the fees in language that the general public can understand, with links to supporting materials.

B. Address Risk of Distorting Agency Decisions and Private Behavior

The research and interviews for this project also indicated concern that user fee programs may have unintended consequences—specifically, that they may skew agency decisionmaking or private behavior in ways that are unintended and undesirable. The most significant issue identified is the risk, or at least the perception, that user fees paid by regulated companies create a conflict of interest within the regulating agency. The notion is that an agency dependent on user fees may favor its own interests (choosing outcomes that ensure a continuing flow of fees) or favor the interests of fee payers over other considerations. But there are other concerns as well, including concern that fees (or waivers and other modifications) skew private behaviors in ways that were not intended.

Undesirable unanticipated consequences, by their nature, arise after user fee implementation. Lawmakers and agency decisionmakers should be mindful of the risk when designing fee programs in the first instance. Novel user fee structures should be assessed carefully. A robust public design process may help identify potential spillover effects. The possibility that an existing user fee program has affected outcomes—regulatory decisionmaking or private behaviors—should be examined empirically if serious questions have been raised. Robust peer-reviewed empirical studies performed in the private sector may be sufficient, but in their absence, lawmakers may need to request a study by GAO or (if warranted) the relevant inspector general. When spillover effects are identified and can be attributed to a feature of the

276. See *infra* Appendix: Key User Fee Programs.

277. See *supra* note 2 and accompanying text.

user fee program, the agency—or lawmakers, if appropriate—should engage in a transparent public process assessing the costs and benefits of the feature and of taking a different approach. Even in the absence of empirical evidence, widespread belief that an agency is laboring under a conflict of interest may undermine its effectiveness in engaging with the public on important matters. Steps to address this concern may be important even in the absence of empirical evidence of harm.

In some cases, lawmakers may need to consider measures to ensure greater oversight of the agency's decisionmaking. Measures could include placing the fees in the U.S. Treasury and requiring an annual appropriation before the agency may obligate the funds (i.e., giving the agency offsetting receipt authority rather than offsetting collection authority), limiting the purposes for which the collected fees may be used, making changes to the agency's authorizing statute to further cabin its discretion, and providing for expiry of the agency's user fee authority to force regular scrutiny of the program.

C. Consider Risk of Revenue Instability

Some agencies may face a risk of revenue instability, which happens when fee collections are insufficient to cover the costs that they are intended to cover because collections fall below expected levels, because costs exceed expected levels, or both.

Various aspects of user fee program design can increase or decrease the risk of either happening and perhaps the impact of its occurring. For example, frequent fee adjustments may reduce the risk of costs and collections becoming misaligned. This process can be resource intensive for an agency, however, requiring funds and diverting agency personnel from other tasks. If the resulting changes to the fee schedule will be modest, the reduction in risk of revenue instability may be small, and the cost of the frequent adjustment process may not be justified. The risk of collections falling short or costs exceeding expectations may also depend on factors unrelated to the user fee program that are difficult or impossible to predict. Market conditions could affect demand for the services or goods offered by the agency. Unanticipated scientific and technological developments could increase, decrease, or change the activities of the companies it regulates, shifting demand from one type of service to another.

If an agency's program costs will not drop when its collections drop, or if its revenue instability would have a significant negative social welfare impact, lawmakers should consider ways to mitigate the risk. Among other things, they might consider authorizing or requiring the agency to adjust fee rates more often, allowing the agency to use appropriated taxpayer funds to cover shortfalls in exigent circumstances, authorizing the agency to use its funds for

a wide range of program purposes, allowing the agency to retain its fee collections until expended, structuring the program so that fees reimburse expenses already borne by appropriations, or creating a reserve fund. Lawmakers will need to weigh the benefits of providing an agency with these additional flexibilities against the reduction in congressional oversight of spending and prioritization that would result.

D. Consider Values Other than Efficiency

When collected in connection with goods or services provided to identifiable recipients, user fees may encourage more rational consumption of those goods and services than would otherwise be the case. Economic efficiency was the initial justification for user fees in the middle of the 20th century. Some may view it as a compelling basis for their imposition today, and some may view it as the only permissible basis for their imposition. When collected from regulated entities to support regulatory activities, user fees may put more resources at an agency's disposal than would be available if these same activities had to be funded exclusively through appropriations from general revenue. Even when they do not put more resources at the agency's disposal, user fees may alleviate pressure on the federal budget. The prospect of additional resources for government programs without an increase in taxes provides, for many, another compelling basis for user fee programs.

Lawmakers should be cautious about authorizing regulatory user fees simply to increase the funds available to the Executive Branch, however, and especially cautious before arranging for an agency to be entirely self-sustaining. Although the prospect of additional funding outside the appropriations process may be appealing, these arrangements create a risk that important decisions about the agency's programming and priorities will be made without legislative oversight and without the involvement of others who may be affected. And there are questions about the constitutionality of statutes allowing executive branch entities to raise their operating funds directly from private parties, especially if the money is available for an unlimited amount of time without subsequent congressional involvement and if the entities have broad discretion to design their own substantive programs.

The research and interviews for this project indicated that, in addition to considering efficiency and perhaps resource needs, decisionmakers may want to consider other values, goals, and priorities when deciding whether to impose user fees and when structuring fee programs. There may be social policy reasons to impose or not impose user fees in the first instance or to implement rate reductions, waivers, or exemptions. An example would be the decision that the U.S. Coast Guard should not collect user fees in connection with search and rescue. Another would be the lifetime national

parks pass for Gold Star Families. Another might be the decision that the incentives to develop drugs for rare diseases should include an exemption from the user fee that other companies pay with their drug applications. Similarly, there may be public policy reasons to take a particular approach to the fee structure. An example might be USPTO's decision to shift most of its patent fee collection to post-issuance fees, which makes it easier for inventors to start the patent prosecution process and allows them to make informed decisions over time about continuing investment in their patent rights. If program designers consider waivers and exemptions, though, they should consider the likely impact of these modifications on demand for the agency's services and (if the agency is fully fee funded) the fairness of expecting other fee payers to subsidize both the exceptions and (if the exceptions are assessed case by case) their administration.

Although lawmakers in Congress may wish to consider these other values, goals, and priorities when designing a user fee program, program designers at the agency level should be wary of effecting substantive policy goals through user fee design without clear congressional authorization to do so and without following a transparent public process. Agency decisionmakers should consider additional steps beyond notice-and-comment—such as consulting a public advisory committee or convening a public hearing—if the policy choices may be controversial.

APPENDIX: KEY USER FEE PROGRAMS²⁷⁸

Agency	Fee
Department of Agriculture	
Agricultural Marketing Service (AMS)	<i>Fees for Certain Voluntary Services.</i> AMS charges fees for voluntary grading, inspection, certification, auditing, and laboratory services for agricultural commodities such as meat, poultry, fruits, vegetables, eggs, dairy products, rice, cotton, and tobacco. Agricultural Marketing Act of 1946, 7 U.S.C. § 1622(h); Cotton Statistics and Estimates Act, 7 U.S.C. §§ 473a, 473d; Cotton Standards Act, 7 U.S.C. § 55; Cotton Futures Act, 7 U.S.C. § 15b; Tobacco Inspection

278. This table does not identify every agency that assesses a user fee or every user fee assessed by the agencies listed. Further, it omits many filing fees associated with proceedings within the agency (such as filing fees associated with appeals), many fees for services such as providing transcripts and copies of documents, and fees for responding to requests under the Freedom of Information Act. It also omits exceptions and similar nuances. Finally, although it generally cites the statutory provisions on which these agencies have based these user fees (for instance, as reported in a Federal Register notice), it takes no position on whether the statutes in fact authorize the fees assessed by the agency or whether the statutes comport with the U.S. Constitution.

	Act, 7 U.S.C. §§ 511–511s.
Animal and Plant Health Inspection Service (APHIS)	<p><i>Agriculture Quarantine Inspection (AQI) Fees.</i> APHIS charges fees for inspection services in connection with arrivals at air, sea, and land ports of entry under 21 U.S.C. § 136a. 7 C.F.R. § 354.3. Both APHIS and the U.S. Department of Homeland Security’s Bureau of Customs and Border Protection (CBP) provide the services. The U.S. Treasury maintains an AQI user fee account containing all user fees collected for AQI program services, and APHIS distributes the funds to APHIS and CBP.</p> <p><i>Export Certification Fees.</i> APHIS assesses a fee for issuance of a phytosanitary certificate to export plants and plant products under 21 U.S.C. § 136a. 7 C.F.R. § 354.3.</p> <p><i>Veterinary Services Import/Export User Fees, and Veterinary Diagnostic User Fees.</i> APHIS imposes user fees under 21 U.S.C. § 136a in connection with animals that are imported or exported, including fees for use of space at animal import centers, fees for inspection of live animals at land borders, and fees for endorsing export certificates. 9 C.F.R. pt. 130.</p>
Federal Grain Inspection Service (FGIS, part of AMS)	<p><i>Grain Inspection Service Fees.</i> The FGIS collects fees to cover the costs of performing official inspection and weighing services under the United States Grain Standards Act. 7 U.S.C. §§ 79a, 87e, 87h; 7 C.F.R. §§ 800.71, 800.72, 800.73; FGIS Directive 9180.74 (Oct. 1, 2023).</p>
Food Safety and Inspection Service (FSIS)	<p><i>Fees for Inspection Services and Laboratory Accreditation.</i> The Federal Meat Inspection Act, 21 U.S.C. §§ 601–683, and the Poultry Products Inspection Act, 21 U.S.C. ch. 10, require inspection of livestock and poultry slaughtered at official establishments and of meat and poultry processed at official establishments. The Egg Products Inspection Act, 21 U.S.C. ch. 15, requires inspection of egg products processed at official plants. FSIS bears the cost of the inspections, except it assesses user fees for inspection services performed on holidays or on an overtime basis. The Agricultural Marketing Act (AMA), 7 U.S.C. ch. 38, authorizes FSIS to collect fees to recover the cost of providing voluntary inspection, certification, and identification services that assist in the orderly marketing of various animal products and byproducts. It also authorizes FSIS to collect fees to recover the costs of providing voluntary laboratory services. <i>See</i> 9 C.F.R. pt. 391.</p>
Rural Housing Service (RHS)	<p><i>Guaranteed Loan Technology Fee.</i> Under the Housing Opportunity Through Modernization Act of 2016, 42 U.S.C. § 1472(i), RHS collects a guarantee underwriting user fee from lenders for their use of RHS’s automated guaranteed loan systems. The fee supports information technology enhancements to improve program delivery and</p>

	<p>reduce burden to the public.</p> <p><i>Initial and Annual Guarantee Fees.</i> As part of the Guaranteed Rural Rental Housing Program, under the Housing Act of 1949, 42 U.S.C. § 1490p-2, RHS guarantees loans for the development of housing and related facilities in rural areas. Subsection (g) authorizes RHS to charge fees to lenders for loan guarantees, which are used to cover the costs of loan guarantees. 42 U.S.C. § 1490p-2(g).</p>
U.S. Forest Service (Forest Service)	<p><i>Recreation User Fees.</i> Under the Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6802, the Forest Service charges fees for use of standard amenities (picnic areas, developed trailheads, and the like) as well as expanded amenities (such as campgrounds). It also assesses fees for special use permits.</p> <p><i>Grazing Fees.</i> Under the 1978 Public Rangelands Improvement Act, the Forest Service assesses a grazing fee for use of certain public lands in sixteen western states by domestic livestock.</p>
Department of Commerce	
International Trade Administration (ITA)	<p><i>Export and Investment Promotion Information and Service Fees.</i> The United States Commercial Service (USCS) within the ITA offers “standard” and “customized” trade promotion services to U.S. businesses, for which it collects fees. For instance, through the “Gold Key Service,” it arranges meetings in foreign markets to match U.S. exporters with prospective sales agents or distributors, manufacturers, licensees, franchisees, or strategic partners. 31 U.S.C. § 9701; see 82 Fed. Reg. 31,752 (July 10, 2017) (most recent notice of implementation of user fees).</p>
National Oceanic and Atmospheric Administration (NOAA)	<p><i>Environmental Data Fees.</i> The National Environmental Satellite, Data, and Information Service (NESDIS), within NOAA, charges fees for special access to environmental data and information that it collects and maintains. Most data are provided at no fee, but NESDIS makes special data products available as well. 15 U.S.C. § 1534; 15 C.F.R. pt. 950.</p> <p><i>Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) Fees.</i> This statute authorizes NOAA Fisheries—also known as the National Marine Fisheries Service (NMFS)—to regulate commercial and recreational fisheries in U.S. waters. NOAA Fisheries establishes catch limits as well as limited access programs and requires various types of permits. And it collects fees, typically from vessels and vessel operators, but also from fish processors that receive fish subject to a fishery management plan. To give an example, it collects fees for foreign fishing vessel permits and—when applicable—poundage fees and observer fees. 16 U.S.C. § 1824; 50 C.F.R. § 600.518. To give another example, it collects a fee for issuance of an exempt fishing</p>

	<p>permit, which authorizes for “limited testing, public display, data collection, exploratory fishing, compensation fishing, conservation engineering, health and safety surveys, environmental cleanup, and/or hazard removal purposes, the target or incidental harvest of species under [a fishery management plan] or fishery regulations that would otherwise be prohibited.” 50 C.F.R. § 600.745; <i>see also</i> 16 U.S.C. § 1853(b). To give a final example, Alaska processors and registered buyers of groundfish and halibut pay an ex-vessel value-based fee to support the funding and deployment of observers on vessels and in plants. 16 U.S.C. § 1862; 50 C.F.R. § 679.55.</p> <p><i>Seafood Inspection Program Fees.</i> NOAA Fisheries collects fees for contract and non-contract services performed by its Seafood Inspection Program, which provides inspection and auditing services to domestic seafood processors and distributors. 7 U.S.C. § 1622; 50 C.F.R. pts. 260 & 261.</p>
<p>United States Patent and Trademark Office (USPTO)</p>	<p><i>Patent Fees.</i> USPTO collects filing fees in connection with patent filings (e.g., a basic filing fee for a utility patent, as well as an additional filing fee for each independent claim in excess of three). It assesses patent search fees, patent examination fees, patent issue and publication fees, patent extension of time fees, other miscellaneous fees, and—after patent issuance—patent maintenance fees and other post-issuance fees. It assesses fees associated with the Patent Trial and Appeal Board, petition fees, service fees, and fees in connection with registering to practice before the agency. There are also fees associated with submissions and other activities under the Patent Cooperation Treaty. 35 U.S.C. § 41, plus uncodified language in § 10 of the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284, 3166–318. The regulations are scattered through Title 37 of the Code of Federal Regulations, but can also be identified through the Fee Schedule on USPTO’s website. <i>See USPTO Fee Schedule</i>, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule (Mar. 6, 2024).</p> <p><i>Trademark Fees.</i> USPTO assesses fees in connection with trademark applications (e.g., a basic fee for a paper trademark application), petitions, and letters of protest. There are also post-registration fees (e.g., registration renewal application fees), fees associated with Trademark Trial and Appeal Board, fees in connection with the Madrid Protocol, trademark service fees, and the Fastener Quality Act. 15 U.S.C. § 1113, plus uncodified language in § 10 of the Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284, 316–318; 37 C.F.R. §§ 2.6, 2.7, 7.6; <i>see also USPTO Fee Schedule</i>, U.S.</p>

	PAT. & TRADEMARK OFF. (Mar. 6, 2024), https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule .
Department of Defense	
Department of Defense (DoD)	<i>Fees for Assistance Provided to Entertainment-Oriented Media Productions.</i> Department of Defense (DoD) policy states that “DoD assistance may be provided to an entertainment media production, to include fictional portrayals, when cooperation of the producers with the Department of Defense benefits the Department of Defense, or when such cooperation would be in the best interest of the Nation.” 32 C.F.R. § 238.4. Production companies must reimburse the government for expenses incurred as a result of DoD assistance. 10 U.S.C. § 2264; 31 U.S.C. § 9701; 32 C.F.R. § 238.6.
United States Army Corps of Engineers (USACE)	<i>Recreation Use Fees.</i> The USACE operates more than 2000 recreation areas, at which it charges fees for the use of boat launch ramps and swimming beaches, as well as fees for camping and camping-related services, and fees for specialized facilities (such as group picnic shelters) and events. These are assessed under § 210 of the Flood Control Act of 1968, 16 U.S.C. § 460d-3, and § 1047 of the Water Resources Reform and Development Act of 2014, 33 U.S.C. § 2328a.
Department of Energy	
Federal Energy Regulatory Commission (FERC)	<i>Filing Fees.</i> FERC assesses filing fees in connection with various submissions: a pipeline certificate authorization application, a petition for issuance of a declaratory order, a request for review of a remedial order, a request for review of a denial of adjustment, a request for written legal interpretation from the Office of General Counsel, a request for review of a jurisdictional agency determination, a petition for rate approval, and a request for certification of qualifying status as a small power production facility or cogeneration facility. 31 U.S.C. § 9701 (IOAA); 18 C.F.R. §§ 381.207, 381.302, 381.303, 381.304, 381.305, 381.401, 381.403, 381.505.
Power Marketing Administrations (PMAs)	<i>Rate Payments.</i> The four Power Marketing Administrations (PMAs)—Bonneville Power Administration (BPA), Western Area Power Administration (WAPA), Southeastern Power Administration (SEPA), and Southwestern Power Administration (SWPA)—operate electric systems and sell the electrical output of federally owned and operated hydroelectric dams. Flood Control Act of 1944, 16 U.S.C. § 825s; Reclamation Project Act of 1939, 43 U.S.C. § 485h(c).
Department of Health and Human Services	
Centers for Disease Control	<i>Vessel Sanitation Program.</i> The CDC assesses user fees for vessel sanitation, construction, and renovation inspections. Every passenger

and Prevention (CDC)	<p>cruise vessel that has a foreign itinerary involving a U.S. port and carries 13 or more passengers is subject to biannual unannounced operational sanitation inspections and, when necessary, reinspection. Cruise vessel design and equipment must meet the program’s sanitary design criteria standards and routine operational inspection requirements. Cruise vessel owners and shipyards that build or renovate cruise vessels can request construction or renovation inspections of new or renovated vessels before their first or next operational inspection, and the associated fee depends on the size of the vessel. <i>E.g.</i>, 88 Fed. Reg. 55,048 (Aug. 14, 2023) (notice of fee schedule for FY 2024); <i>see also</i> 52 Fed. Reg. 45,019 (Nov. 24, 1987) (first publication of fee schedule).</p> <p><i>Respiratory Certification Program.</i> The CDC, through the National Institute for Occupational Safety and Health (NIOSH), charges fees for services provided to applicants for conformity assessment activities conducted by NIOSH for respiratory protective devices. Fees are charged for (1) respirator certification application processing, (2) initial review and approval of manufacturing facilities, (3) quality site audits, and (4) product audits to verify the performance of approved respirators. 42 C.F.R. pt. 84; 30 U.S.C. § 7; 31 U.S.C. § 9701.</p>
Centers for Medicare and Medicaid Services (CMS)	<p><i>Clinical Laboratory Improvement Amendments of 1988 (CLIA) User Fees.</i> CMS collects fees for issuance and renewal of clinical laboratory certifications. It also collects fees for inspection of nonaccredited laboratories and for evaluating accredited laboratories to determine if an accreditation organization’s standards and inspection process are equivalent to the CLIA program. 42 U.S.C. § 263a(m).</p> <p><i>Federally-Facilitated Exchange User Fees and State-Based Exchange on the Federal Platform User Fees.</i> CMS collects user fees from health insurance issuers who offer qualified health plans through federally facilitated exchanges as well as those who offer plans through state-based exchanges on the federal platform. 31 U.S.C. § 9701; 45 C.F.R. § 156.50; 87 Fed. Reg. 78,206, 78,213 (Dec. 21, 2022) (rates for the 2024 benefit year).</p>
Food and Drug Administration (FDA)	<p><i>Accredited Third-Party Certification Program User Fees.</i> FDA recognizes “accreditation bodies” that accredit third-party “certification bodies.” The certification bodies in turn conduct food safety audits and issue certifications of foreign food facilities. FDA also directly accredits certification bodies to perform those audits. The program assess application fees (for accreditation bodies seeking recognition, and for certification bodies seeking accreditation directly from FDA) as well as annual fees (for recognized accreditation bodies and for accredited</p>

	<p>certification bodies). 21 U.S.C. § 384d; 21 C.F.R. §§ 1.700–1.725.</p> <p><i>Animal Drug User Fees.</i> FDA collects fees with the submission of certain animal drug applications and supplemental applications, as well as annual fees from each sponsor of an application, each product marketed, and each establishment (manufacturing location). 21 U.S.C. § 379j-12.</p> <p><i>Animal Generic Drug User Fees.</i> FDA collects fees with the submission of certain abbreviated applications for generic animal drugs, as well as annual fees from each sponsor of an application and each marketed product. 21 U.S.C. § 379j-21.</p> <p><i>Biosimilar User Fees.</i> FDA collects fees for products in the agency’s “biosimilar biological product development program”—an initial fee to enter the program, an annual fee while the product remains in the program, and a reactivation fee if the sponsor wants to resume participation after leaving the program. The agency also assesses a user fee for each biosimilar biological product application, as well as an annual program fee for each approved product (up to five products per application). 21 U.S.C. §§ 379j-51, 379j-52, 379j-53.</p> <p><i>Color Additive User Fees.</i> FDA collects fees for listing and certification of color additives. 21 U.S.C. § 379e.</p> <p><i>Export Certificate Fees.</i> FDA will, on request, prepare a certificate about the regulatory or marketing status of a product being exported from the United States. The agency collects fees for export certificates prepared for human drugs, animal drugs, and devices. 21 U.S.C. § 381(e)(4)(B).</p> <p><i>Generic Drug User Fees.</i> FDA collects an annual program fee from every generic drug company; annual facility fees from active pharmaceutical ingredient manufacturers, finished dosage from manufacturers, and contract manufacturers identified in approved generic applications; a one-time fee for holders of drug master files (referenced by generic applicants); and a filing fee for each generic drug application. 21 U.S.C. §§ 379j-41, 379j-42.</p> <p><i>Human Drug Compounding Outsourcing Facility Fees.</i> An entity registers with FDA as a drug compounding outsourcing facility must pay an annual establishment fee. Also if FDA must visit the facility for a reinspection because of noncompliance identified during a prior inspection, the entity must pay a reinspection fee. 21 U.S.C. § 379j-62.</p> <p><i>Mammography Facility Fees.</i> FDA collects fees from persons who own or lease mammography facilities to cover the costs of inspections conducted by the agency, states designated as “States as Certifier” (SAC) states, and state or local agencies acting on behalf of FDA. 42 U.S.C. § 263b(r).</p>
--	---

	<p><i>Medical Device User Fees.</i> Every company that distributes medical devices intended for use in the United States must register with FDA and pay an annual registration fee. In addition, there are filing fees associated with premarket submissions (such as premarket notifications, premarket approval applications, and de novo classification requests) as well as certain other submissions (such as a request for the agency’s views on the classification of and requirements applicable to a device). 21 U.S.C. § 379j.</p> <p><i>Over-the-Counter (OTC) Monograph Drug User Fees.</i> FDA collects an annual facility fee from every qualifying person who owns a facility engaged in manufacturing OTC monograph drugs, as well as a fee from each person that submits an OTC Monograph Order Request. 21 U.S.C. § 379j-72.</p> <p><i>Prescription Drug User Fees.</i> FDA collects a fee with each application for approval of a new drug under the FDCA or licensure of a biological application. It also assesses an annual program fee for products with approved applications. 21 U.S.C. §§ 379g, 379h.</p> <p><i>Tobacco User Fees.</i> FDA collects user fees from manufacturers and importers of cigarettes, snuff, chewing tobacco, roll-your-own tobacco, cigars, and pipe tobacco. The total amount of fees for each year is specified by statute, and FDA assess one fourth of the amount each quarter, allocating the assessment among the different classes of products (based on the class’s volume of products in commerce) and within each class based on the company’s market share. 21 U.S.C. § 387s.</p> <p><i>Voluntary Qualified Importer Program User Fees.</i> FDA collects a fee from each importer participating in the Voluntary Qualified Importer Program (QVIP), which provides for (voluntary) expedited review and import entry of human and animal food. 21 U.S.C. § 379j-31.</p>
Department of Homeland Security	
<p>Federal Emergency Management Agency (FEMA)</p>	<p><i>Flood Map Related Fees.</i> FEMA charges fees for processing certain map change requests to National Flood Insurance Program flood map products, requests for Letter of Determination Review (for a property owner to appeal a lender’s flood zone determination), and requests for Flood Insurance Study backup data. 44 C.F.R. § 65.17; 44 C.F.R. pt. 72; 80 Fed. Reg. 2,955 (Jan. 21, 2015) (current fees, also on agency’s website).</p> <p><i>Radiological Emergency Preparedness Program.</i> FEMA collects user fees from Nuclear Regulatory Commission (NRC) licensees of commercial nuclear power plants, to fund offsite radiological emergency planning, preparedness, and response. 42 U.S.C. § 5196e; 44 C.F.R. pt. 354.</p>

U.S. Citizenship and Immigration Services (USCIS)	<i>User Fees Charged for Immigration or Naturalization Benefits.</i> USCIS collects fees with applications to replace permanent resident cards, applications for travel documents, applications for permission to reapply for admission after deportation, immigrant petitions from standalone investors, applications for employment authorization, and other submissions. 8 U.S.C. §§ 1254a, 1254b, 1304, 1356; 8 C.F.R. pt. 106.
United States Coast Guard (USCG)	<i>Merchant Mariner Credentialing Fees.</i> The USCG collects fees with applications for merchant mariner credentials. 46 U.S.C. § 2110; 31 U.S.C. § 9701; 46 C.F.R. § 10.219. <i>Vessel Inspection Fees.</i> The USCG collects inspection and examination fees from vessel owners and operators requesting certification, vessels required to have a Certificate of Inspection, and those required to have a Certificate of Compliance. 46 U.S.C. § 2110; 31 U.S.C. § 9701; 46 C.F.R. pt. 2.10.
U.S. Customs and Border Protection (CBP)	<i>Customs Fees.</i> CBP collects customs user fees, for instance, upon the arrival of a commercial vessel (watercraft), commercial truck, passenger or commercial freight railroad car, private vessel or private aircraft, dutiable mail, or passenger aboard a commercial vessel or commercial aircraft. It also collects annual fees from customs brokers. 19 U.S.C. § 58c; 19 C.F.R. § 24.22. <i>Immigration Inspection User Fee.</i> CBP collects a user fee for immigration inspection of passengers on commercial aircraft or vessels. 8 U.S.C. § 1356; 8 C.F.R. pt. 286. <i>Agricultural Quarantine Inspection (AQI) User Fee.</i> See above discussion, under APHIS. 21 U.S.C. § 136a; 7 C.F.R. § 354.3
Department of Housing and Urban Development	
Office of Manufactured Housing Programs (OMHP)	<i>Technical Suitability of Products (TSP) User Fee.</i> The TSP program provides a mechanism for acceptance of new materials and products to be used in buildings financed with the United States Department of Housing and Urban Development (HUD)-insured mortgages. HUD collects user fees for issuance of structural engineering bulletins (SEBs), mechanical engineering bulletins (MEBs), materials releases (MRs), and use of materials bulletins (UMs). The fees apply to initial issuance, revision, or renewal (every three years). 42 U.S.C. § 3535(j); 24 C.F.R. § 200.934.
Department of the Interior	
Bureau of Land Management (BLM)	<i>Grazing Fees.</i> The BLM assesses a federal grazing fee for use of certain public lands in sixteen western states by cows, horses, sheep, and goats. 43 U.S.C. § 1905; 43 C.F.R. § 4130.8-1. <i>Recreation Fees.</i> The BLM collects recreation fees on lands it manages, for (1) special recreation permits (commercial use, competitive events,

	<p>group activities, recreation events, and providing vending services or supplies associated with recreation events); (2) recreation use permits, including standard amenity fees (e.g., for day use areas and visitor centers) and expanded amenity fees charged by campgrounds; and (3) individual special recreation permits, which are issued when special measures need to be taken. 16 U.S.C. § 6802.</p> <p><i>Minerals Management Fees.</i> The BLM charges roughly four dozen different fees for processing applications and other documents related to its minerals program (management of locatable, saleable, and leasable minerals on federal land). For instance, it collects a fee for a license to mine coal, a fee for a geophysical exploration permit in Alaska, and a fee for recording a mining claim or site location. 43 U.S.C. § 1734; 43 C.F.R. § 3000.12.</p>
Bureau of Ocean Energy Management (BOEM)	<p><i>Fees for Certain Services.</i> BOEM assesses fees for services relating to its management of offshore U.S. energy and mineral resources. For instance, it grants leases for mineral exploration and development of the Outer Continental Shelf, and an exploration plan must be submitted for approval before an operator (the company assigned by the lessee) may begin exploratory drilling on a lease. It charges a fee for processing the exploration plan. 31 U.S.C. § 9701; 30 C.F.R. §§ 550.125 (2015), 556.106 (2021).</p>
Bureau of Reclamation (Reclamation)	<p><i>Application and Use Fees.</i> In connection with applications for authorization to use Reclamation land, facilities, and waterbodies, the agency collects an application fee and fees to cover its review and continued processing of the application. The agency also charges a fee for actual use of Reclamation land, based on a valuation or on competitive bidding. 31 U.S.C. § 9701; 43 C.F.R. pt. 429 Subpart D (2022).</p>
National Park Service (Park Service)	<p><i>Recreation Fees.</i> The Park Service collects recreation fees, including entrance fees and amenity fees for certain equipment and services, such as campgrounds. 16 U.S.C. § 6802. It also collects fees from concessioners that operate businesses in park units. 54 U.S.C. §§ 101917, 101925(b)(2)(A). <i>See also</i> 54 U.S.C. § 103104 (authorizing recovery of costs associated with special use permits).</p>
U.S. Fish and Wildlife Service (USFWS)	<p><i>Recreation Fees.</i> The USFWS collects an entrance fee at national wildlife refuges and national fish hatcheries, as well as hunting and fishing permit fees, special permit fees, and commercial operation fees. 16 U.S.C. § 6802; 54 U.S.C. § 103104.</p> <p><i>Import and Export License Application Fees; Inspection Fees.</i> Importing or exporting wildlife for commercial purposes requires a license from the USFWS, which collects both an application fee and inspection fees. 31 U.S.C. § 9701; 50 C.F.R. pt. 14 (2022).</p>

Department of Justice	
Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)	<p><i>Federal Firearms License Fees.</i> ATF charges a fee for firearms licenses and ammunition licenses, which are required for manufacturers, importers, and dealers. 18 U.S.C. § 923; 27 C.F.R. § 478.42 (2022).</p> <p><i>Explosives Permits User Fees.</i> ATF charges a fee for every license to engage in business as an importer or manufacturer of, or a dealer in, explosive materials, and it charges a fee for permits to use explosive materials. 18 U.S.C. § 843; 27 C.F.R. §§ 555.41–555.43.</p>
Drug Enforcement Administration (DEA)	<p><i>Annual Registration Fees.</i> The DEA charges annual fees for applications to register to engage in the manufacture, distribution, dispensing, import, and export of controlled substances and listed chemicals. 21 U.S.C. §§ 821, 958(f); 21 C.F.R. pt. 1309 (2022).</p>
Federal Bureau of Investigation (FBI)	<p><i>Criminal Justice Information Services Division User Fees.</i> The FBI collects fees from authorized entities (federal, state, and other authorized entities) requesting noncriminal justice, fingerprint-based and name-based criminal history record information checks. It performs these checks for noncriminal justice, nonlaw enforcement employment, and licensing purposes, and for certain employees of private sector contractors with classified government contracts. 34 U.S.C. § 41104; 28 C.F.R. § 20.31 (2022).</p>
Department of Labor	
Mine Safety and Health Administration (MSHA)	<p><i>Approval and Certification Fees.</i> MSHA collects fees for the approval and certification of equipment, materials, and explosives for use in mines. 30 U.S.C. § 966; 30 C.F.R. pt. 5 (2022).</p>
Occupational Safety and Health Administration (OSHA)	<p><i>Application Processing and Audit Fees.</i> Many OSHA safety standards require testing and certification of equipment or products used in the workplace. This testing and certification is done by organizations that apply to OSHA for recognition as “nationally recognized testing laboratories” (NRTLs). OSHA charges fees for services rendered to each NRTL, including application processing and on site reviews. 31 U.S.C. § 9701; 29 C.F.R. § 1910.7(f) (2021).</p>
Department of State	
Bureau of Consular Affairs	<p><i>Passport Fee.</i> The State Department charges fees for the execution and issuance of passports. 22 U.S.C. § 214; 22 C.F.R. pt. 51 Subpart D.</p>
Department of Transportation	
Federal Aviation Administration (FAA)	<p><i>Registration, Certification, and Related Fees.</i> The FAA charges registration and certification fees; for instance, it charges a fee for registering an aircraft and issuing a dealer’s aircraft registration certificate. 49 U.S.C. §§ 45302, 45305; 14 C.F.R. § 47.17 (2022).</p>

	<p><i>Fees for Certification Services and Production-Certification Services Provided Outside the United States.</i> The FAA collects fees for certification services provided to persons outside the United States, including airman certificate services and aircraft certificate services, as well as production certificate services (services relating to approval to manufacture products pursuant to an FAA-approved type design). 31 U.S.C. § 9701; 14 C.F.R. pt. 187 app. C (2022); 14 C.F.R. § 61.13 (2022).</p> <p><i>Overflight Fees.</i> The FAA collects an “overflight fee” from every person who conducts an overflight through either “enroute” or “oceanic” airspace. (An overflight through “enroute” airspace goes through U.S.-controlled airspace where primarily radar-based air traffic services are provided, and an overflight through “oceanic” airspace goes through U.S.-controlled airspace where primarily procedural air traffic services are provided.) 31 U.S.C. § 9701; 49 U.S.C. § 45301; 14 C.F.R. pt. 187 (2022).</p>
Federal Motor Carrier Safety Administration (FMCSA)	<p><i>Unified Carrier Registration System Fees.</i> The FMCSA collects fees for registration of brokers, freight forwarders, motor carriers, and motor private carriers. 49 U.S.C. § 13908; 31 U.S.C. § 9701; 49 C.F.R. pt. 360 (2022).</p>
National Highway Traffic Safety Administration (NHTSA)	<p><i>Registration Fees.</i> Motor vehicles not manufactured to conform to federal motor vehicle safety standards may be imported on a permanent basis only by an importer that has registered with NHTSA (or by someone under contract with a registered importer). NHTSA collects fees to administer the registered importer program, including an annual fee from registered importers, a fee for filing a petition for a determination whether a vehicle is eligible for importation, and a fee for importing a vehicle pursuant to a determination. 49 U.S.C. § 30141; 49 C.F.R. pt. 594 (2022).</p>
Pipeline and Hazardous Material Safety Administration (PHMSA)	<p><i>Natural Gas and Hazardous Liquids Pipeline Fees.</i> PHMSA collects annual fees from persons operating gas pipeline transmission facilities, liquefied natural gas pipeline facilities, and hazardous liquid pipeline facilities, generally based on the number of miles of pipeline each operator has in service. 49 U.S.C. § 60301.</p> <p><i>Underground Natural Gas Storage Fees.</i> PHMSA collects an annual fee from every entity that operates an underground natural gas storage facility. 49 U.S.C. § 60302.</p>
Department of Treasury	
Bureau of the Fiscal Service (Fiscal Service)	<p><i>User Fees.</i> The Fiscal Service collects fees to cover services performed in qualifying companies to become authorized sureties, reinsurers on federal bonds, or both. 31 U.S.C. § 9701; 31 C.F.R. § 223.22 (2022).</p>
Internal Revenue Service (IRS)	<p><i>Historic Easements User Fee.</i> The IRS collects a user fee from any person claiming a deduction for a historical conservation easement</p>

	<p>donation. 26 U.S.C. § 170(f)(13).</p> <p><i>Disclosure of Returns and Return Information.</i> The IRS collects fees for reproducing individual and business tax returns, for its income verification express service, and for U.S. residency certifications. 26 U.S.C. § 6103.</p> <p><i>User Fees for Letter Rulings, Opinion Letters, Determination Letters, and Advisory Letters.</i> The IRS collects fees with requests for opinion, ruling and determination letters, and with other similar requests. 26 U.S.C. § 7528; see Rev. Proc. 2022-1 app. A.</p> <p><i>Other User Fees.</i> The IRS collects fees in connection with the following services: (1) entering into, restructuring, or reinstating an installment agreement, (2) processing an offer to compromise, (3) taking the examination to become an enrolled agent, (4) enrolling or renewing the enrollment of an enrolled agent, (5) enrolling or renewing the enrollment of an enrolled actuary, (6) renewing the enrollment of an enrolled retirement plan agent, (7) taking the exam to become a registered tax return preparer, (8) applying for a preparer tax identification number, and (9) requesting an estate tax closing letter. 31 U.S.C. § 9701; 26 C.F.R. § 300.0 (2022).</p>
Office of the Comptroller of the Currency (OCC)	<p><i>Assessment Fees.</i> Every national bank and federal savings association pays a semiannual assessment fee to the OCC. Also, every independent credit card national bank and independent credit card federal savings association pays an assessment based on receivables attributable to the credit card accounts it owns. 12 U.S.C. § 16; 12 C.F.R. § 8.2 (2022).</p> <p><i>Fees for Special Examinations and Investigations.</i> The OCC assesses a fee for various examinations and investigations. 12 U.S.C. § 16; 12 C.F.R. § 8.6 (2022).</p>
United States Mint	<p><i>Sale of Numismatic Coins and Other Items.</i> In addition to producing coins for circulation, the U.S. Mint prepares and distributes items for collectors such as: gold, silver, and platinum coins; proof sets; commemorative coins; uncirculated coins; medals; and even holiday ornaments. 31 U.S.C. § 5111. Its website explains that the prices “must be self-sufficient and cover all of the associated costs of our numismatic portfolio, plus enough margin to cushion against volatility” and that “excess funds are returned to the Treasury General Fund to reduce the annual budget deficit of the federal government.” <i>Frequently Asked Questions</i>, U.S. MINT, https://catalog.usmint.gov/faqs/products-and-coin-programs/ (last visited May 10, 2024) (select “How do you price your products?” under “Products and Coin Programs” menu).</p>
Environmental Protection Agency	

Environmental Protection Agency (EPA)	<p><i>Manifest Fees.</i> Recipients of hazardous waste pay a user fee to support EPA’s electronic hazardous waste manifest system. 42 U.S.C. § 6939g; 40 C.F.R. § 264.1312 (2022).</p> <p><i>Toxic Substances Control Act Fees.</i> EPA collects fees from chemical manufacturers and importers to defray a portion of the costs associated with implementation of the Toxic Substances Control Act (TSCA); the implementing rule requires payment of fees for eight categories of activities or triggering events. 15 U.S.C. § 2625(b); 40 C.F.R. pt. 700 (2022).</p> <p><i>Pesticide Registration Service Fees and Pesticide Maintenance Fees.</i> EPA assesses pesticide registration service fees, which depend on the type of application submitted and the action requested (out of several hundred identified in a series of tables). 7 U.S.C. § 136w-8 (Supp. II 2021). EPA also collects annual fees from pesticide registrants, generally based on the number of registrations held. 7 U.S.C. § 136a-1 (Supp. II 2021).</p> <p><i>Motor Vehicle and Engine Compliance Program Fees.</i> Manufacturers of regulated motor vehicles, motor vehicle engines, various nonroad engines and equipment, stationary internal combustion engines, and regulated portable fuel containers pay fees to support activities related to EPA’s vehicle and engine compliance programs. 42 U.S.C. § 7552.</p> <p><i>Title V Operating Permit Fees.</i> Title V of the Clean Air Act requires certain facilities that are sources of air pollutants to obtain operating permits. Most permits are issued by state or local agencies (“part 70” permits, referring to 40 C.F.R. pt. 70 (2022)), but some are issued by EPA (“part 71” permits, referring to 40 C.F.R. pt. 71 (2022)). Every part 71 source pays an initial fee to EPA and, thereafter, an annual fee. 42 U.S.C. § 7661a(b); 40 C.F.R. § 71.9 (2022).</p>
Other Agencies	
Commodity Futures Trading Commission (CFTC)	<p><i>Review Fees.</i> The CFTC charges fees to recover costs incurred in reviewing the rule enforcement programs of any registered futures associations (currently only the National Futures Association) as well as designated contract markets, each of which is a self-regulatory organization overseen by the CFTC. 7 U.S.C. § 16a; 17 C.F.R. pt. 1 app. B (2022).</p>
Farm Credit Administration (FCA)	<p><i>Annual Assessment.</i> FCA regulates the farm credit system. Its administrative expenses are funded mostly by annual assessments on the institutions—banks and associations, and also Federal Agricultural Mortgage Corporation (Farmer Mac)—that make up the system. 12 U.S.C. § 2250; 12 C.F.R. pt. 607 (2022).</p>
Federal	<p><i>Application Processing Fees.</i> The FCC charges processing fees for</p>

<p>Communications Commission (FCC)</p>	<p>licenses, equipment approvals, antenna registrations, tariff filings, formal complaints, and other authorizations and regulatory actions. 47 U.S.C. § 158; 47 C.F.R. §§ 1.1101–1.1109 (2022).</p> <p><i>Annual Regulatory Fees.</i> The FCC collects annual fees from regulated entities in the mass media, common carrier, wireless, international and cable television services. 47 U.S.C. § 159; 47 C.F.R. §§ 1.1152–1.1156 (2022).</p> <p><i>Auction Payments.</i> The FCC collects upfront payments, down payments, and subsequent payments for licenses that it auctions. 31 U.S.C. § 9701; 47 C.F.R. §§ 1.1181–1.1182 (2022).</p>
<p>Federal Maritime Commission (FMC)</p>	<p><i>Passenger Vessel Operator Performance and Casualty Certificate Fees.</i> The FMC charges application fees for various certificates obtained by passenger vessel operators, such as the Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation. 31 U.S.C. § 9701; 46 C.F.R. pt. 540 (2022).</p> <p><i>Ocean Transportation Intermediary License Application Fees.</i> The FMC charges a user fee for licensing ocean transportation intermediaries. 31 U.S.C. § 9701; 46 C.F.R. § 515.5 (2022).</p> <p><i>Other Filing Fees.</i> The FMC collects other filing fees, including fees for filings in adjudications before the agency (complaint fees, petition fees, and so forth), 46 C.F.R. pt. 502 (2022), and fees with submission of ocean common carrier and marine terminal operator agreements, <i>id.</i> pt. 535 (2022); 31 U.S.C. § 9701.</p>
<p>Federal Trade Commission (FTC)</p>	<p><i>Premerger Notification Program Fees.</i> The FTC collects fees with premerger notification and report forms filed under the Hart-Scott-Rodino Act. The latest fee amounts were dictated in the Merger Filing Fee Modernization Act, Division GG of the Consolidated Appropriations Act, Pub. L. No. 117-328, § 101, 136 Stat. 5967, 5967–68 (2022); 15 U.S.C. § 18a note.</p> <p><i>Telemarketer Fees.</i> The FTC collects a fee from telemarketers, which must download the numbers on the National Do Not Call Registry. 15 U.S.C. § 6152; 16 C.F.R. pt. 310 (2022).</p>
<p>National Aeronautics and Science Administration (NASA)</p>	<p><i>Various Fees.</i> NASA charges fees for use of various agency resources. For instance, aircraft that are not operated for the benefit of the U.S. government and that land at a NASA airfield facility without preapproval are usually assessed a user fee under 14 C.F.R. § 1204.1407 (2022). In addition, NASA's Airborne Science Program gives researchers access to NASA aircraft for science experiments on a fee-for-service basis. The user fees are based on the flight hour cost, mission specific costs, and any ancillary support costs. 31 U.S.C. § 9701.</p>
<p>National Credit</p>	<p><i>Operating Fees.</i> The NCUA charters, regulates, and insures deposits in</p>

Union Administration (NCUA)	federal credit unions and insures deposits in federally insured state-chartered credit unions. These activities are partially supported by an annual operating fee paid by the credit unions. 12 U.S.C. § 1755(a); <i>see</i> 88 Fed. Reg. 43,149 (July 6, 2023) (requesting comment on changes to the methodology used to apportion these fees).
Nuclear Regulatory Commission (NRC)	<i>Hourly Service Fees.</i> The NRC charges hourly fees for licensing services, inspection services, and special products. 31 U.S.C. § 9701; 10 C.F.R. pt. 170 (2022). <i>Annual Fees.</i> The NRC collects annual fees from persons who hold licenses, certificates of compliance, sealed source and device registrations, and quality assurance program approvals that it issues. 42 U.S.C. § 2215; 10 C.F.R. pt. 171 (2022).
United States Postal Service (USPS)	<i>Mailing and Shipping Fees.</i> The Postal Regulatory Commission (PRC) sets the fees that USPS charges for mailing and shipping services. 39 U.S.C. § 303; <i>see, e.g.</i> , PRC Docket No. R2023-2; 88 Fed. Reg. 23,113 (Apr. 14, 2023) (notice of planned rate adjustment for mailing services); PRC Docket No. CP2023-151; 88 Fed. Reg. 31,527 (May 17, 2023) (notice of planned rate adjustment for competitive shipping services).
Securities and Exchange Commission (SEC)	<i>Registration Fees.</i> The SEC collects fees from issuers on the registration of securities under section 6(b) of the Securities Act of 1933, 15 U.S.C. § 77f(b), on specified proxy repurchases of securities under § 13(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(2), and on specified solicitations and statements in corporate control transactions under § 14(g) of the Exchange Act, 15 U.S.C. § 78n(g). <i>Transaction Fees.</i> The SEC collects fees from the national securities exchanges based on the aggregate dollar amount of sales of certain securities transacted, and fees from each national securities association based on the aggregate dollar amount of covered sales transacted by or through any member of the association other than on an exchange, under § 31 of the Securities Exchange Act of 1934, 15 U.S.C. § 78ee.
Surface Transportation Board (STB)	<i>Application Fees.</i> The STB collects fees with various applications, such as an application for the pooling or division of traffic, an application involving the purchase of a motor carrier of passengers, an application for approval of a non-rail rate association agreement, an application for a certificate authorizing the extension of lines of railroad, an application of a class II or class III carrier to acquire an extended or additional rail line, an application for authority to abandon all or a portion of a line of railroad or discontinue operation thereof, an application for two or more carriers to consolidate or merge their properties or franchises into one corporation, and a carrier's

	<p>application to purchase the properties of another by purchase of stock. 31 U.S.C. § 9701; 49 C.F.R. § 1002.2 (2022).</p> <p><i>Other Filing Fees.</i> The STB collects fees with filings in formal proceedings before the board, including a formal complaint alleging unlawful rates or practices of carriers, a competitive access complaint, a petition for a declaratory order, an appeal of an STB decision, and a request for waiver of its regulations. It collects fees with filings in informal proceedings, such a filing of tariffs and the filing of water carrier annual certifications. 31 U.S.C. § 9701; 49 C.F.R. § 1002.2 (2022).</p> <p><i>Service Fees.</i> The STB collects service fees, such as fees for messenger delivery of its decisions to a railroad carrier's agent in Washington, DC, and an application fee for the STB practitioner's exam. 31 U.S.C. § 9701; 49 C.F.R. § 1002.2 (2022).</p>
--	---