

**APPENDIX 2 - ELECTRONIC PUBLIC ACCESS
PROGRAM**

GENERAL STATEMENT AND INFORMATION

The Electronic Public Access (EPA) program provides electronic public access to court information in accordance with federal statutes, judiciary policies, and user needs. The internet-based Public Access to Court Electronic Records (PACER) service provides courts, litigants, and the public with access to court dockets, case reports, and the more than one billion documents filed with the courts through the Case Management/Electronic Case Files (CM/ECF) system. PACER is a portal to CM/ECF, making both integral to effective public access. In fiscal year (FY) 2020 alone, PACER processed nearly 523 million requests for case information.

Currently, there are more than 3.4 million PACER user accounts; approximately 20 percent of all user accounts are active in a given year. Besides court staff, users include members of the bar; city, state, and federal employees; and the general public. Nine of the ten biggest users are major commercial enterprises or financial institutions, with the Department of Justice being the only non-commercial user in the top ten. In fact, approximately 87 percent of PACER revenue is attributed to less than two percent of active users. During FY 2020, the judiciary's PACER Service Center established 321,471 new PACER accounts and responded to more than 323,000 telephone and email requests.

Pursuant to statute, the EPA program is funded through user fees set by the Judicial Conference of the United States. Fees are deposited in a special account in the U.S. Treasury and are then used exclusively to fund the cost of the judiciary's entire EPA program. The components of this program are listed on page Appendix 2.5 and include activities such as operations of the PACER Service Center; electronic bankruptcy noticing; and the telecommunications, replication, archiving, development, and maintenance costs associated with CM/ECF.

The judiciary continues to improve electronic public access to its records, with new initiatives to broaden public access, including:

- *Increasing Free Access to Court Records.* To make court documents free for more users, the Judicial Conference approved an increase in the quarterly waiver from \$15.00 to \$30.00, effective January 1, 2020. No fee is owed for electronic access to court data or audio files via PACER until an account holder accrues charges of more than \$30.00 in a quarterly billing cycle. From July 1, 2019 through June 30, 2020, approximately 76 percent of active PACER users accessed court records for free

as a result of the fee waiver.¹

- *Enhancing Public Outreach.* PACER.uscourts.gov is the public presence of the PACER service where users register an account, manage their account, and get information on the various ways of accessing court information. As part of the judiciary's effort to enhance its public outreach, the PACER.uscourts.gov website has been redesigned. The new website improves the user experience, provides mobile compatibility, and incorporates plain language. The new website was launched in June 2020. Additional guidance for pro se litigants was developed and a webpage was included on the new PACER website.
- *Establishing an Electronic Public Access User Group.* An EPA Public User Group was formed to collect advice and provide feedback on ways to improve PACER and other public access related services in the future. The group has 12 non-judiciary members who represent the legal sector, media, academia, government agencies, and other entities that use PACER. The EPA Public User Group had its first in-person meeting in February 2020 and has conducted two subsequent teleconferences. The Group has made several recommendations for improving public access services, and the Administrative Office (AO) is analyzing each recommendation to determine appropriate actions consistent with Judicial Conference policy and technical, legal, and financial feasibility and to determine best approaches for implementation.

SIGNIFICANT ISSUES FOR FISCAL YEAR 2022

Case Management/Electronic Case Files

CM/ECF, first introduced in early 2001, revolutionized the way federal courts and the bar managed cases and documents. Far more than just a repository of documents, CM/ECF is the program that manages the operations of the entire federal court system, handling millions of transactions each day. It manages documents, deadlines, hearing schedules, and trials. It does the docketing for every federal court, and it processes transactions at every step along the way in the progression of a case, from collecting filing fees, to determining deadlines for motions, to sharing vital information among litigants, judges, and court staff.

^{1/} Because the new \$30 fee waiver did not become effective until January 1, 2020, two quarters are based on the prior \$15 quarterly fee waiver, and two quarters are based on the new \$30 fee waiver. In the first two quarters, approximately 70 percent of active PACER users accessed court records for free based on the \$15 quarterly waiver. In the remaining two quarters, approximately 81 percent of active PACER users accessed court records for free, an increase of 11 percent due to the increased \$30 fee waiver.

The transition to a Next Generation of CM/ECF (NextGen CM/ECF) is well underway. The requirements gathering phase of the project concluded in March 2012, as groups of judges, chambers staff, clerks of court, court staff, and AO staff identified and prioritized hundreds of functional requirements. The project also received input from the bar, academia, government agencies, and others through interviews, focus groups, and surveys of approximately 10,000 of the judiciary's stakeholders. The first NextGen CM/ECF release was implemented in the Second and Ninth Circuit Courts of Appeals in the fall of 2014. Since that time, an additional 104 courts have gone live on NextGen CM/ECF. Implementation of NextGen CM/ECF is done in quarterly waves, with approximately 15 courts in each wave. The last wave (Wave 12) begins in January 2021.

Legislation Impacting PACER and the Case Management/Electronic Case Files (CM/ECF) System

Several bills were introduced in the 116th Congress aimed at significantly restricting or eliminating entirely PACER fees and revamping the judiciary's CM/ECF system. The bills were H.R. 8235, the "Open Courts Act"; H.R. 6017, the "Twenty-First Century Courts Act"; and H.R. 1164 and S. 2064, the "Electronic Court Records Reform Act." These bills had some common elements, including mandating court documents be made available to the public through the PACER service free of charge, directing the AO to consolidate CM/ECF into one undefined, nationwide system, and requiring all documents in PACER to be text-searchable and machine-readable. The Open Courts Act was the only bill that received a floor vote in either body, passing the House of Representatives on December 8, 2020. There was no Senate vote on the bill.

The Judicial Conference of the United States expressed its opposition to the House-passed Open Courts Act on the grounds that it would have devastating budgetary and operational impacts on the judiciary and its ability to serve the public by imposing radical and costly changes on the Third Branch's electronic case management system without adequate funding.

The Open Courts Act would require a complete overhaul of the judiciary's backbone case management and electronic filing system within a four-to-five-year period. It would eliminate the current single, per-page flat fee for PACER, which is the public access portal to the CM/ECF, and replace it with a complex and novel fee structure that is untested and possibly unreliable. It would be virtually impossible to estimate accurately the revenue generated by those fees in advance and to ensure that it would be sufficient to build the new system, keep court operations running while it is being built, and sustain the new system in the future.

Cost estimates done outside the judiciary for the new consolidated case management system failed to consider the full scope of the project as it is described in the House-passed bill. Those estimates tend to account only for the costs of replacing PACER, which is a small piece of what the entire CM/ECF does (described further on page 2.2 above).

Because the cost estimates do not capture the complexity of the required changes to CM/ECF and the revenue sources provided are uncertain and unlikely to cover those costs in full, the judiciary is extremely concerned that implementation of the Open Courts Act would create a substantial budget shortfall for the branch. Although the bill includes a “safety valve” provision intended to address such a shortfall, it would effectively force the judiciary to choose between (1) forcibly absorbing the shortfall for this project by slashing staff or other core operations, or (2) changing or pausing the consolidated records system in mid-development, with potentially catastrophic impacts on the continuous availability of electronic case filing and management capabilities.

The judiciary has other major concerns with the bill as well, including issues of technological feasibility, security, and governance, but the threat of devastating budget consequences for the Third Branch simply cannot be overemphasized. The judiciary shares Congress’ bipartisan interest in a modern, effective, fair and successfully funded system and is committed to working collaboratively with the 117th Congress to improve its systems for filing, storing, managing, and making available to the public all relevant court records.

Obligation of Funds from Electronic Public Access Receipts

EPA receipts (i.e., PACER fees) fund operations, maintenance, and improvements in EPA programs. Access to case information via PACER remains at \$0.10 per page and the cost to access a single document (regardless of length) is capped at \$3, the equivalent of 30 pages. As a result of the higher quarterly fee waiver that took effect January 1, 2020, PACER revenue is expected to decline slightly. Revenue is projected to total approximately \$142 million in both FY 2021 and FY 2022.

At this time, obligations are projected to total \$186 million in FY 2021 and \$175 million in FY 2022. The FY 2021 revenue is supplemented by \$136.5 million in carryforward funding from FY 2020, which includes \$120.5 million in unencumbered carryforward and \$16 million in encumbered carryforward funding.

The obligation of EPA program receipts has been impacted in recent fiscal years by a ruling of the District Court for the District of Columbia in *NVLSP, et al. v. U.S.* In its ruling, the court upheld the judiciary’s use of EPA program funds for the vast majority of its public access programs but determined that several other services, including courtroom technology, eJuror, and the Crime Victims

Notification System, were impermissible because they lacked a sufficient nexus to information available to the public on the federal court's CM/ECF docketing system. The judiciary filed an appeal with the Court of Appeals for the Federal Circuit, which affirmed the District Court's ruling in August 2020.

After the D.C. District Court's ruling, the judiciary shifted the funding source for the three disallowed categories from the EPA program to the Salaries and Expenses (S&E) appropriation, beginning in FY 2018, at a cost of approximately \$30 million to the S&E account.² Final appropriations for the S&E account in both FYs 2018 and 2019 were sufficient to cover the full cost of both the judiciary's standard S&E requirements as well as these resources shifted from the EPA program, but this dynamic could change going forward. If the annual S&E appropriation is below the requested level, the judiciary could be forced to make trade-offs between continuing to support these disallowed categories at full funding versus funding them at a reduced level in order to provide additional funds for court support staffing (including probation and pretrial services offices, as well as appellate, bankruptcy and district court clerks offices) to handle increasing workload. For FY 2020, the judiciary fully funded the disallowed categories, but the tradeoff between standard S&E program requirements and the disallowed EPA expenditures will continue to challenge the judiciary in any fiscal year in which enacted appropriations constrain the judiciary from fully funding its entire request.

Consistent with longstanding practice, the judiciary will continue to use Electronic Public Access funds for the CM/ECF system and electronic bankruptcy noticing among other appropriate expenses. Litigation is ongoing, and the judiciary will keep the Committees updated on the progress of this litigation and any resulting decisions about the use of Electronic Public Access program funding.

The current FY 2021 EPA program requirements are shown in Table A-2.1 on page 2.6. The judiciary continues to carefully examine all EPA program requirements for optimal utilization of available resources to improve public access to court information. In FY 2020 and FY 2021, requirements for CM/ECF increased significantly. In FY 2022, requirements decrease to a midpoint level between FY 2020 and FY 2021 requirements. The higher costs are due to several factors, including: the incorporation of necessary security findings, tools, and protocols; the ongoing resolution of "technical debt" (e.g., upgrading third party libraries, downstream application upgrades (PACER, pay.gov), re-writing of web services to improve performance;) and other changes associated with the system's infrastructure.

² The removal of these activities from the EPA program contributed, in part, to the accumulation of the unusually high unobligated EPA balances referenced on page 2.4. The judiciary will continue to monitor the balance of revenue and requirements in the EPA program and will keep the Committees apprised of any necessary changes in policy or practice.

The table below provides obligation data by program and financing for FYs 2020, 2021, and 2022.

Table A-2.1 Utilization and Financing of Electronic Public Access Receipts & Prior Year Recoveries (\$000)¹

Program Category	FY 2020 Actual	FY 2021 Plan	FY 2022 Request
Public Access Services	19,445	24,106	23,425
CM/ECF Development, Operations, and Maintenance	56,022	69,743	68,976
Communications Infrastructure, Services, and Security	56,855	60,997	65,209
Electronic Bankruptcy Noticing	6,105	6,243	6,368
Allotments to the Courts	5,167	25,191	11,144
TOTAL	143,594	186,280	175,122
Unobligated Balance, Start of Year	(123,278)	(136,512)	(94,732)
Estimated Receipts	(155,480)	(142,000)	(142,000)
Prior Year Recoveries and Exchanges (Projected FY20 & FY21)	(1,348)	(2,500)	(2,500)
Unobligated Balance, End of Year ²	136,512	94,732	64,110

^{1/} Electronic Public Access revenues are deposited into the Judiciary Information Technology Fund (JITF). See chapter 11 for more information on the JITF.

^{2/} The unobligated balance at the end of FY 2020 includes \$120.5 million in unencumbered carryforward and \$16 million in encumbered carryforward. This \$16 million in encumbered carryforward (or project slippage) includes \$12 million for allotments to the courts for the implementation of NextGen of CM/ECF; \$2.1 million for CM/ECF development, operations, and maintenance; \$0.9 million for communications infrastructure, services, and security; and \$0.9 million for public access services.