



Administrative Conference Recommendation 2012-5

Improving Coordination of Related Agency Responsibilities

Adopted June 15, 2012

Many areas of government agency activities are characterized by fragmented and overlapping delegations of power to administrative agencies. Congress often assigns more than one agency the same or similar functions or divides responsibilities among multiple agencies, giving each responsibility for part of a larger whole. Instances of overlap and fragmentation are common. They can be found throughout the administrative state, in virtually every sphere of social and economic regulation, in contexts ranging from border security to food safety to financial regulation.¹ The following recommendation suggests some reforms aimed at improving coordination of agency policymaking, including joint rulemaking, interagency agreements, and agency consultation provisions.

The study underlying this recommendation² provides a comprehensive picture of overlapping and fragmented delegations, and makes some practical suggestions for addressing

¹ As the Comptroller General of the United States has noted, “[v]irtually all of the results that the federal government strives to achieve require the concerted and coordinated efforts of two or more agencies.” U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-00-95, *MANAGING FOR RESULTS: USING GPRA TO HELP CONGRESSIONAL DECISIONMAKING AND STRENGTHEN OVERSIGHT* 19 (2000), available at <http://www.gao.gov/assets/110/108330.pdf> (statement of David M. Walker, Comptroller General of the United States, before the Subcomm. on Rules & Org. of the H. Comm. on Rules). GAO is now required by statute to identify federal programs, agencies, offices, and initiatives, either within departments or government-wide, which have duplicative goals or activities, and to report annually (Pub. L. No. 111-139, § 21, 124 Stat. 29 (2010), 31 U.S.C. § 712 Note). See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-318SP, *OPPORTUNITIES TO REDUCE POTENTIAL DUPLICATION IN GOVERNMENT PROGRAMS, SAVE TAX DOLLARS, AND ENHANCE REVENUE* (2011), available at <http://www.gao.gov/new.items/d11318sp.pdf>

² Jody Freeman & Jim Rossi, *Improving Coordination of Related Agency Responsibilities* (May 30, 2012) (report to the Administrative Conference of the U.S.). See also Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).



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the coordination problems they create.³ Because characterizing such delegations as redundant might suggest literal duplication, the study adopts the more nuanced concept of “shared regulatory space.” This term includes not only literally duplicative or overlapping responsibilities, but also instances where cumulative statutory delegations create a situation in which agencies share closely related responsibilities for different aspects of a larger regulatory, programmatic, or management enterprise.

Such delegations may produce redundancy, inefficiency, and gaps, but they also create underappreciated coordination challenges. A key advantage to such delegations may be the potential to harness the expertise and competencies of specialized agencies. But that potential can be wasted if the agencies work at cross-purposes or fail to capitalize on one another’s unique strengths and perspectives. By improving efficiency, effectiveness, and accountability, coordination can help to overcome potential dysfunctions created by shared regulatory space. Greater coordination can reduce costs for both the government and regulated entities not only by avoiding literal duplication of functions but also by increasing opportunities for agencies exercising related responsibilities to manage and reconcile differences in approach. Coordination that takes the form of interagency consultation can improve the overall quality of decisionmaking by introducing multiple perspectives and specialized knowledge, and structuring opportunities for agencies mutually to test their information and ideas. Coordination instruments can also equip and incentivize agencies to monitor each other constructively, which should help both the President and Congress to better manage agency policy choices and compliance with statutes. It is plausible too, that greater coordination will make it harder for interest groups to capture the administrative process or to play agencies against each other.

Much coordination occurs against the backdrop of day-to-day, informal interactions among agency staffs, including casual conversations, meetings, and working groups. However,

³ The underlying study and this recommendation focus on federal government agencies only, and do not address the coordination problems presented more generally by federalism due to dispersed responsibilities between federal and state governments.



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systematic efforts to institutionalize coordination (as opposed to relying exclusively on the ad hoc coordination that occurs as a matter of course among agencies) will tend to be more stable, visible, and durable than relying only on informal networks for promoting interagency interactions. This recommendation does not purport to address all agency interactions, but focuses on the processes and instruments agencies use to memorialize agency interactions and agreements. In such instances, this recommendation endorses documented coordination policies to help formalize ad hoc approaches and provide useful guidelines for agency staff. Coordination policies can be top-down, through the President's leadership, as well as bottom-up, beginning with agencies themselves.

Presidential leadership can be helpful in addressing the challenges posed by fragmented and overlapping delegations, especially in instances where there is conflict among agencies, inability of agency staffs to coordinate, or a reluctance of agency officials to work together. Components of the Executive Office of the President (EOP) with relevant policy expertise may be well positioned to promote coordination in their respective domains, and efforts in this regard could be bolstered. The EOP can play a crucial role in fostering coordination by establishing priorities, convening the relevant agencies, and managing a process that is conducive to producing agreement. For example, the White House Office of Energy and Climate Change Policy has been credited with facilitating the joint rulemaking effort of EPA and the Department of Transportation, which produced new fuel efficiency and greenhouse gas standards,⁴ and the EOP played a central role in convening and coordinating the nine-agency memorandum of understanding on siting of transmission lines on federal lands.⁵ The President recently established an interagency task force to coordinate federal regulation of natural gas

⁴ See Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343 (2011).

⁵ See Press Release, Advisory Council on Historic Preservation, Nine Federal Agencies Enter into a Memorandum of Understanding Regarding Transmission Siting on Federal Lands (Oct. 28, 2009), *available at* <http://www.achp.gov/docs/pressrelease10282009.pdf>.



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production.⁶ There are many other examples from prior administrations, involving policy initiatives large and small.

The President could seek to promote coordination through a comprehensive management strategy that puts coordination at its core, which might be done via a new executive order tasking one or more EOP offices with an oversight role. Promoting consistency in agency rulemaking is already explicitly within the mandate of the Office of Information and Regulatory Affairs under Executive Order 12,866 and was reiterated by President Obama in Executive Order 13,563.⁷ While this is compatible with the larger goal of promoting greater interagency coordination where agencies exercise overlapping and closely related responsibilities, still more could be done. For example, the Office of Management and Budget (OMB) could consider ways to achieve coordination as part of its implementation of the Government Performance and Results Modernization Act (GPRMA),⁸ and propose cross-cutting budget allocations (sometimes referred to as “portfolio budgeting”) to help incentivize the agencies to work together on a variety of projects, some of which might involve rulemakings. The White House might explore ways to strengthen existing interagency task forces or encourage similar interagency efforts where their potential benefits have been overlooked.⁹

⁶ Exec. Order No. 13,605, Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources, 77 Fed. Reg. 23,107 (Apr. 17, 2012).

⁷ See also OIRA’s March 20, 2012 memorandum to agencies on cumulative regulations, which seeks to promote harmonization and streamline agency regulations in an effort to reduce the cost of agency rules. Memorandum from Cass R. Sunstein, Admin., Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Agencies, Cumulative Effects of Regulations (Mar. 20, 2012), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/cumulative-effects-guidance.pdf>.

⁸ Pub. L. No. 111-352, 124 Stat. 3866 (2011). GPRMA amends the Government Performance and Results Act of 1993 (GPRA), Pub. L. No. 103-62, 107 Stat. 285 (1993).

⁹ The Conference recognizes the special concerns about presidential authority with respect to independent regulatory agencies. However, various presidential actions have sought to extend administration policies to the independent agencies. For example, sec. 4 of Executive Order 12,866 “Regulatory Planning and Review,” includes independent regulatory agencies in its requirements for the semiannual Unified Regulatory Agenda and the annual Regulatory Plan, “to the extent permitted by law.” Similarly, Executive Order 13,579, “Regulation and Independent Regulatory Agencies,” and the further guidance contained in the OIRA Administrator’s Memorandum for the Heads



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Beyond OMB, other councils and offices within the EOP may also play important roles facilitating coordination.

However, centralized supervision is not the only means of improving agency coordination. Congress could prescribe specific reforms via statute. Yet even absent direction from the President or Congress, agencies could voluntarily adopt certain targeted reforms. This recommendation suggests some initial and relatively modest measures that agencies could adopt to help conduct, track and evaluate existing coordination initiatives, subject, of course, to budget constraints. These include development of agency policies on coordination, sharing of best practices, adopting protocols for joint rulemaking and memoranda of understanding, ex post evaluation of at least a subset of coordination processes, tracking of outcomes and costs, and making coordination tools more transparent. These measures are not intended to impose substantial additional burdens on agencies, but to the extent they do, the recommendation urges OMB to recognize the need to devote sufficient resources to allow agencies to participate effectively in interagency processes.

Nor, of course, does this recommendation seek to preclude other measures that might promote interagency collaboration, consultation and coordination, either at the federal level, or between federal and state and local agencies. It is not meant to displace or preclude any additional effort, whether under the GPRA amendments or otherwise, to develop national strategies. In addition, in many instances, informal agency consultation and negotiation work effectively to resolve inconsistencies and conflict. This recommendation is meant to augment rather than displace such efforts.

of Independent Regulatory Agencies, M-11-28, ask independent regulatory agencies to comply with directives to Executive Branch agencies with respect to public participation, regulatory analyses, and retrospective review of existing regulations. Memorandum from Cass R. Sunstein, Admin., Office of Info. & Regulatory Affairs, to the Heads of Independent Regulatory Agencies, Executive Order 13579, "Regulation and Independent Regulatory Agencies" (July 22, 2011), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf>.



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RECOMMENDATION

1. *Developing Agency Coordination Policies.*

(a) Federal agencies should identify any areas of shared, overlapping or closely related jurisdiction or operation that might require, or benefit from, interagency coordination.¹⁰

Federal agencies that share overlapping or closely related responsibilities should adopt policies or procedures, as appropriate, to document ongoing coordination efforts, and to facilitate additional coordination with other agencies.¹¹

(b) Concurrently, the Executive Office of the President (EOP) should work with the agencies to develop a policy to promote coordination where agencies share overlapping or closely related responsibilities. The policy, while maintaining the need for flexibility,¹² should require agencies to address, among other things, how they will:

(i) resolve disagreements over jurisdiction;

(ii) share or divide information-production responsibilities;

(iii) solicit and address potentially conflicting views on executing shared responsibilities;

¹⁰ A recent GAO report on the implementation of the Dodd-Frank Act faulted the financial regulatory agencies for not pursuing coordination more systematically and noted that the majority of agencies reviewed had not developed internal policies on coordination. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-151, DODD FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM BETTER ANALYSIS AND COORDINATION 25 (2011) (noting that seven of nine regulators reviewed "did not have written policies and procedures to facilitate coordination on rulemaking").

¹¹ 31 U.S.C. § 1115(b)(5)(D) of GPRA, as amended by sec. 3 of GPRMA, *supra* note 8, requires each agency to have an annual performance plan providing a description of how its performance goals are to be achieved, including how the agency is working with other agencies to achieve those goals.

¹² See Exec. Order No. 13,609, Promoting International Regulatory Cooperation, 77 Fed. Reg. 26,413 (May 4, 2012), for an approach that combines a government-wide policy with individual agency responsibilities, coordinated by the Regulatory Working Group. See *infra* note 14.



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- (iv) minimize duplication of effort;
- (v) identify and resolve differences over the application of analytic requirements imposed by statute or executive order;¹³ and
- (vi) formalize agreements allocating respective responsibilities or develop standards or policies jointly, where appropriate.

In addition, the policy should establish a mechanism by which agencies can share best practices and evaluate their coordination initiatives ex post, and assist them in doing so effectively and efficiently.

(c) The EOP should effectively utilize the Regulatory Working Group, established by Executive Order 12,866, or establish or utilize other comparable bodies to assist agencies in identifying opportunities for coordination.¹⁴

2. *Improving Joint Rulemaking*

The coordination policies and procedures adopted by the EOP and the agencies should include best practices for joint rulemaking and recommend when agencies should consider using it even when not statutorily required to do so. Best practices might include establishing joint technical teams for developing the rule and requiring early consultation, where appropriate, (a) with the Office of Information and Regulatory Affairs (OIRA) regarding joint production of cost-benefit analyses and other analyses required by statute or executive

¹³ See generally Curtis W. Copeland, *Regulatory Analysis Requirements, A Review and Recommendations for Reform* (2012) (report to the Administrative Conference of the U.S.), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/04/COR-Final-Reg-Analysis-Report-for-5-3-12-Mtg.pdf>; and Administrative Conference Recommendation 2012-1, Regulatory Analysis Requirements.

¹⁴ Exec. Order No. 12,866, § 4(d) (announcing the establishment of a Regulatory Working Group as “a forum to assist agencies in identifying and analyzing important regulatory issues”).



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order, and (b) among agency legal staff and lawyers at the Department of Justice who may need ultimately to defend the rule in litigation.

3. *Improving Interagency Agreements*

(a) The coordination policies and procedures adopted by the EOP and the agencies should include best practices for agency agreements such as memoranda of understanding (MOUs). Such best practices might include specification of progress metrics that will enable agencies to assess the effectiveness of their agreement and sunset provisions that would require signatory agencies to review MOUs regularly to determine whether they continue to be of value.¹⁵

(b) Agencies should make available to the public, in an accessible manner, interagency agreements that have broad policy implications or that may affect the rights and interests of the general public unless the agency finds good cause not to do so.

4. *Supporting and Funding Interagency Consultation.*

(a) The EOP should encourage agencies to conduct interagency consultations early in a decisionmaking process, before initial positions are locked in, and to conduct such consultations in a continuing and integrated, rather than periodic and reactive, way. To this end, when appropriate, the EOP should encourage coordinating agencies to establish an interagency team to produce and analyze data together over the course of the decisionmaking process, and ensure such teams have adequate funding and support.

(b) The Office of Management and Budget and agencies involved in coordinated interagency activities should take into account, in the budgetary process, the need for sufficient resources to participate effectively in interagency processes, and the need to provide

¹⁵ In several of the examples reviewed in the Freeman/Rossi report, *supra* note 2, the agencies were negotiating new MOUs to replace outdated ones (often negotiated by previous administrations)—a clear sign that ineffective MOUs can be left to languish for too long.



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specifically for such cross-cutting activities. Further, an action agency, on which a duty to consult with other agencies falls, should contribute a share of its resources, as appropriate, to the extent it possesses the discretion to do so, to support joint technical and analytic teams, even if those resources will be consumed in part by other agencies.

5. Tracking Total Resources.

To better evaluate the effectiveness of coordination initiatives, an appropriate office or offices of the federal government should assess the costs and benefits, both quantitative and qualitative, of interagency consultations, MOUs, joint rules, and other similar instruments. Such offices might include the Government Accountability Office or the Congressional Research Service, perhaps with the assistance of the Administrative Conference of the United States. To minimize the burden on the agencies of such evaluation, at the outset, this effort might be limited to high-priority, high-visibility interagency coordination efforts, such as important joint rulemakings, or equivalent initiatives.