Participation
ADR
Collaboration
Administrative Law Experts
Rulemaking
Access to Law
Open Government
Federalism
Transparency
Best Practices
Efficiency
Timeliness
Fairness
Cost-Savings
Education
Recommendations
Public-Private Partnership
Innovation

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Performance & Accountability Annual Report 2011

Streamlining Processes
Regulations

We make government work

better.

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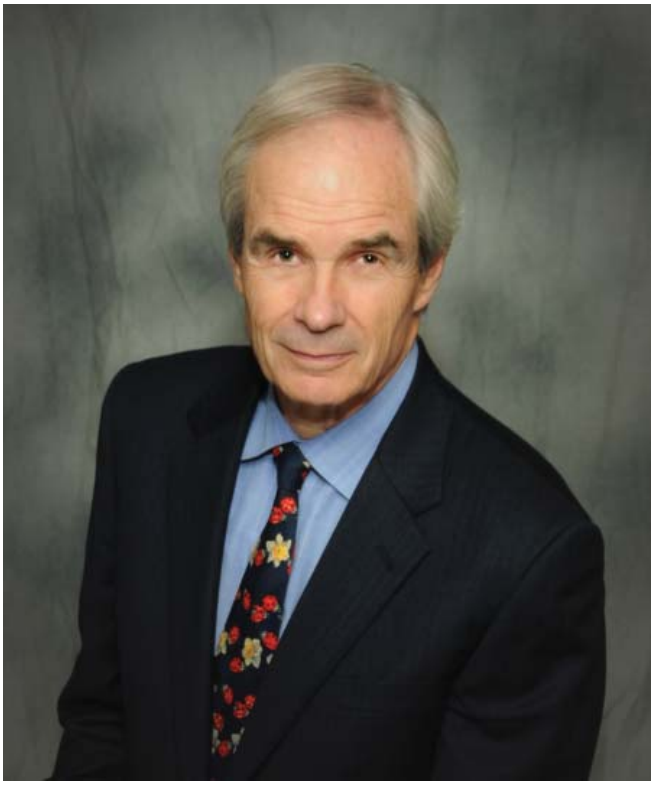
A Message From the Chairman



I am pleased to present the first full Annual Report of the Conference since it ceased operations in 1995. In the last annual report (1994-1995), my predecessor as Chair Thomasina V. Rogers (who is now appropriately the Vice Chair of the revived conference) gave an understandably somber view of the conference's work over its 27 prior years of service. My task in writing this report, as might be expected, is a much more celebratory one: ACUS is back and fully engaged in the creation of an extensive array of programs and recommendations.

Since we began operations in FY 2010 much has happened, as the ensuing pages show in detail. But what I am proudest of is the positive way our revival has been received by Congress, the White House, the agencies and the public (including the various professional organizations and institutions that sponsored our revival). We are that rare public institution capable of generating loyalty and support from those who work with us and whom we serve. As of the submission of this report we are about to embark on our third plenary session since the revival (and 55th overall). The assembly has four recommendations to consider and we have over 20 projects in the pipeline. A full plate indeed.

Based on the Independent Auditor's unqualified opinion on the Administrative Conference's consolidated financial statements, and the lack of any material internal control weaknesses, the agency can provide reasonable assurance that the objectives of the Federal Manager's Financial Integrity Act (FMFIA) have been achieved. The agency can also provide reasonable assurance that its financial systems conform to government-wide standards. The data contained in this report are reliable and complete.

Faithfully Yours,

Paul R. Verkuil
Chairman

ACUS 2.0

The Administrative Conference of the United States is a newly reauthorized independent agency that studies federal agency procedures and processes to recommend improvements to Congress and agencies. ACUS is a public-private partnership that brings together senior government officials and private citizens with diverse views and backgrounds to provide nonpartisan expert advice.

Following bipartisan endorsement of the work of two temporary Administrative Conferences during the Eisenhower and Kennedy Administrations, Congress enacted the Administrative Conference Act of 1964, which placed the work of ACUS on a more permanent footing. The Act codified the prior structure for these conferences, which emphasized collaboration among a wide array of federal agencies, as well as experts in administrative law and regulation from the private sector and academia, reflecting a wide diversity of views – all of whom serve without any additional compensation. This collaborative effort is designed to produce consensus on nonpartisan recommendations for improvements in federal administrative processes, which, more than ever, affect every sector of our national economy and the lives of American citizens.

Judge E. Barrett Prettyman, who had served as chairman of both temporary conferences, explained at ACUS' opening plenary session in 1968 that the members of the Conference "have the opportunity to make the administrative part of a democratic system of government work."

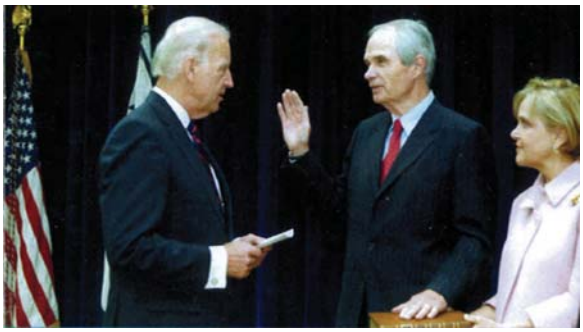
From its beginning in 1968 until its defunding in 1995, ACUS adopted approximately 200 such recommendations, based on careful study and the informed deliberations of its members in an open process that encouraged public input. Congress enacted a number of them into law, and agencies and courts have adopted or relied upon many others.

ACUS also played a leading role in developing and securing legislation to promote, and provide training in, "alternative dispute resolution" (ADR) techniques for eliminating excessive litigation costs and long delays in federal agency programs, as well as "negotiated rulemaking" processes for consensual resolution of disputes in rulemaking.

The work of ACUS has received consistent support from a wide range of outside sources. As the Congressional Research Service noted in 2007, ACUS provided "nonpartisan, nonbiased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices," based on "a meticulous vetting process, which gave its recommendations credence." Justice Scalia (a former Chairman of ACUS and current Senior Fellow) has viewed the agency as "a unique combination of talents from the academic world, from within the executive branch . . . and . . . from the private bar, especially lawyers particularly familiar with administrative law." Similarly, Justice Breyer (a former liaison representative to ACUS from the Judicial Conference and current Senior Fellow) has described the agency as "a unique organization, carrying out work that is important and beneficial to the average American, at low cost." In announcing his appointment of the members of the ACUS Council, President Obama emphasized the value of the "public-private partnership" reflected in the agency's enabling statute.

Today ACUS is exploring and promoting the most efficient means of sharing information and responsibility among the federal, state and local governments, businesses and citizens through both new and established techniques. The agency is also seeking new ideas that advance the core values of fairness, efficiency, and citizen satisfaction.



Swearing-In Ceremony
April 6, 2010

Vice President Joseph Biden
Paul R. Verkuil
Judith Rodin

Office of the Federal Register Anniversary
Oct 27, 2010

The Chairman provided comments at NARA regarding trends in Rulemaking on the 75th Anniversary of the Federal Register.

Watch the Video:
http://vimeo.com/17910275

Administrative Law Conference
Nov 4, 2010

ABA Administrative Law Conference - Chairman Verkuil was honored by being inducted as a Senior Fellow into the ABA Section of Administrative Law and Regulatory Practice.

ACUS 2.0
Nov 29, 2010

An event hosted by the ABA dedicated to celebrating the rejuvenation of ACUS.

Brookings + ACUS: Future of E-Rulemaking
Nov 30, 2010

On November 30, the Administrative Conference of the United States and the Center for Technology Innovation at Brookings hosted a public forum to explore how new technologies can promote more effective public participation and greater efficiency in the rulemaking process.

Chairman Paul Verkuil provided introductory remarks and Cass Sunstein, the senior White House official on regulatory review, explained the administration's commitment to e-rulemaking. Darrell West, vice president and director of Governance Studies at Brookings, moderated the discussion.

2010

53rd Plenary Session
Dec 9, 2010

At its Plenary Session on December 9-10, 2010, the Administrative Conference of the United States adopted Recommendation 2010-1, regarding agency procedures for determining whether to preempt state law.

Retrospective Review Workshop
Mar 10, 2011

ACUS brought together over 50 agency officials from 27 agencies to share ideas on the implementation on EO 13563, Improving Regulation and Regulatory Review.

US Chamber of Commerce Event: Regulatory Reform
April 28, 2011

ACUS and the US Chamber of Commerce cohosted an event that explored the international role, responsibility and coordination of regulatory agencies.

54th Plenary Session
June 16-17, 2011

The Administrative Conference of the United States hosted its 54th Plenary Session and adopted four recommendations to help make government work better.

Harvard Panel on Regulatory Issues
Mar 23, 2011

Shawne McGibbon, General Counsel, participated in a Regulatory Law Panel as part of the Law Practice/ Issue Area series at Harvard Law School.

ABA/ACUS Showcase
May 3, 2011

The Seventh Annual National Institute of the ABA Section of Administrative Law & Regulatory Practice ACUS Showcase: The First Recommendations to Emerge from the Reorganized Administrative Conference of the United States.

ACUS FACA Workshop
April 16, 2011

On Tuesday, August 16, 2011, the Conference hosted a workshop dealing with the Federal Advisory Committee Act. FACA is a statute that controls federal agencies' ability to obtain advice from groups of individuals outside of the government.

Science and Regulation Symposium
Apr 6, 2011

The Administrative Conference co-hosted a Science and Regulation Symposium with the Administrative Law Review.

OIRA 30th Anniversary
May 20, 2011

This conference, hosted by the GW Regulatory Studies Center, examined the key regulatory oversight issues, challenges, and developments over the last three decades, and draw lessons for regulatory oversight now and in the future.

ACUS+DOJ Limited English Proficiency Workshop
September 22, 2011

On September 22, 2011, the Conference and Department of Justice cohosted a workshop on promising agency practices to ensure limited English proficient (LEP) individuals have meaningful access to administrative hearings and proceedings pursuant to Executive Order 13166.

the assembly

Conference membership is composed of innovative senior federal officials and experts with diverse views and backgrounds from the private sector, including academia, the practicing bar, industry and public interest organizations.

The Conference membership, also known as the Assembly, includes the Chairman, the Council, members from 50 federal executive departments and agencies and independent regulatory boards and commissions, and 40 members of the public representing diverse views and backgrounds.

The Assembly includes Voting and Non-Voting Members. They are listed in this report alphabetically, by the following groups:

- Government Members
- Public Members
- Liaisons
- Senior Fellows
- Special Counsels[1]

The Conference is also supported by a small, full-time staff in the Office of the Chairman.

[1]Jeffrey S. Lubbers, Professor of the Practice in Administrative Law at American University's Washington College of Law, and Jonathan Siegel, Professor of Law at the George Washington University Law School, and a Jonathan and Barbara Kahan Research Professor in Administrative Law, serve as ACUS Special Counsels. Professor Siegel was recently appointed in December, 2011.

To view their complete biographies, please visit the ACUS website at www.acus.gov>About>Special-Counsels.

www.acus.gov/about/the-assembly

the chairman

Paul R. Verkuil, the tenth Chairman of the Administrative Conference of the United States, was sworn in by Vice President Biden on April 6, 2010. The Conference was revived by Congress in 2009 after a 15-year hiatus. President Obama named the 10 member Council on July 8, 2010, saying, “ACUS is a public-private partnership designed to make government work better.” The 50 government and 40 public members, along with the Council and Chairman, form the 101 member Conference. The Conference meets twice a year in June and December in Plenary sessions to make consensus driven recommendations to improve government processes and procedures.

Mr. Verkuil is a well-known administrative law teacher and scholar who has coauthored a leading treatise, Administrative Law and Process, now in its fifth edition, several other books (most recently, *Outsourcing Sovereignty,* Cambridge Press 2007), and over 65 articles on the general topic of public law and regulation. A *Festschrift* held in his honor in October 2010 was recently published at 32 Cardozo Law Review 2159 (2011). Starting in 1972 when Antonin Scalia was Chairman, Verkuil published six consultant studies for the Conference.

He is President Emeritus of the College of William & Mary, has been Dean of the Tulane and Cardozo Law Schools, and a faculty member at the University of North Carolina Law School. He is a graduate of William & Mary and the University of Virginia Law School and holds a JSD from New York University Law School. Among his career highlights is serving as Special Master in New Jersey v. New York, an original jurisdiction case in the Supreme Court, which determined sovereignty to Ellis Island. He is a Life Member of the American Law Institute and the Fellows of the American Bar Foundation.

the council

The ten Council members, in addition to the Chairman, are appointed by the President for three-year terms and include both government officials and private citizens. Among the Council's functions are to call plenary sessions of the Conference, propose by-laws and regulations for adoption by the Assembly, review budgetary proposals, and approve the appointment of public members and the conduct of research studies.

Federal officials named to the Council may constitute no more than one-half of the total Council membership. Members of the Conference representing the private sector are appointed by the Chairman, with the approval of the Council, for two-year terms.

Government Members

Thomasina V. Rogers[1]	Occupational Safety and Health Review Commission | Chairman
Preeta Bansal[2]	Office of Management and Budget | General Counsel & Senior Policy Advisor
Boris Bershteyn[3]	Office of Management and Budget | General Counsel
Michael Fitzpatrick[4]	Office of Management and Budget | Associate Administrator, OIRA
Julius Genachowski	Federal Communications Commission | Chairman
Thomas E. Perez	U.S. Department of Justice Civil Rights Division | Assistant Attorney General

Public Members

Ronald A. Cass	Cass & Associates, PC | President
Mariano-Florentino Cuéllar	Stanford Law School | Professor and Deane F. John Faculty Scholar
Theodore B. Olson	Gibson Dunn | Partner
Jane C. Sherburne	BNY Mellon | Senior Executive Vice President and General Counsel
Patricia McGowan Wald	US Court of Appeals for the DC Circuit (Ret.), Wald Open Society Justice Initiative | Board Member

[1] Appointed ACUS Vice Chair on November 8, 2011

[2] ACUS Vice Chair until November 7, 2011. Appointed as Public Council Member on December 7, 2011.

[3] Appointed on December 7, 2011.

[4] Departed government service in November, 2011.

http://www.acus.gov/about/the-council

Thomasina Rogers is the Chairman of the Occupational Safety and Health Review Commission. She was first appointed to the Review Commission by President Clinton in 1998 and served as Chairman from 1999 to 2002; she was then reappointed to the Review Commission in 2003 and 2009. Ms. Rogers previously served as Chairman of the Administrative Conference of the United States from 1994 to 1995. Rogers also served for seven years in the Federal Government's Senior Executive Service (SES). During her time in the SES, she served as Legal Counsel to the Equal Employment Opportunity Commission where she had primary responsibility for managing the development of the Americans With Disabilities Act employment regulations. She is a member of the American Bar Association and the National Bar Association. Ms. Rogers is a graduate of the Northwestern University School of Journalism and the Columbia University School of Law.

Preeta Bansal was General Counsel and Senior Policy Advisor for the Office of Management and Budget. Prior to joining the Obama Administration, Bansal was a Partner and Head of the Appellate Litigation Practice at Skadden, Arps, Slate, Meagher and Flom LLP in New York City. She also served as the Solicitor General of the State of New York from 1999-2001, where she helped supervise 600 attorneys in the New York Attorney General's office. While in private practice from 2003-2009, Bansal served as a Commissioner of the bipartisan United States Commission on International Religious Freedom, serving as Chair in 2004-2005. Raised in Lincoln, Nebraska, Bansal was a Visiting Professor of constitutional law and federalism at the University of Nebraska College of Law in 2002-2003. Earlier in her career, Bansal was a law clerk to Justice John Paul Stevens of the United States Supreme Court, counselor in the United States Department of Justice, and a Special Counsel in the Office of the White House Counsel. Bansal received a J.D., magna cum laude, from Harvard Law School, where she was Supervising Editor of the Harvard Law Review, and an A.B., magna cum laude and Phi Beta Kappa, from Harvard-Radcliffe College.

Ronald A. Cass has been the President of Cass & Associates since 2004. He is also Dean Emeritus of Boston University School of Law where he served as Dean from 1990-2004. Cass was a law professor at the University of Virginia School of Law from 1976-1981 and at Boston University from 1981-2004. He has also served as Vice Chairman of the U.S. International Trade Commission (1988-1990), U.S. Representative to the World Bank Panel of Conciliators (2009-Present), advisor to the American Law Institute, Chairman of the Federalist Society Practice Group on Administrative Law, Past Chair of the American Bar Association Administrative Law Section, and President of the American Law Deans Association. Cass received his B.A. with high distinction from the University of Virginia and J.D. with honors from the University of Chicago Law School in 1973.

Boris Bershteyn has served as the General Counsel of the Office of Management and Budget (OMB) since July 2011 and as the Deputy General Counsel of OMB from 2009 to 2010. Between his tours at OMB, he served as Special Assistant to the President and Associate White House Counsel, with responsibility for legal issues in regulatory, economic, health, and environmental policy. Before joining the Obama Administration, he was a litigator at Skadden, Arps, Slate, Meagher and Flom, LLP, and at Wachtell, Lipton, Rosen and Katz in New York. He also served as a law clerk to Justice David H. Souter of the U.S. Supreme Court and Judge José A. Cabranes of the U.S. Court of Appeals for the Second Circuit. He holds a B.A. in Economics and Political Science from Stanford University and a J.D. from Yale Law School.

Mariano-Florentino (Tino) Cuéllar is Professor of Law and the Deane F. Johnson Faculty Scholar at Stanford Law School. His teaching and research focus on how organizations manage complex regulatory, criminal justice and international security problems. From 2009 to 2010, he was on leave from Stanford to serve as Special Assistant to the President for Justice and Regulatory Policy at the White House Domestic Policy Council, with responsibility for public health and safety, regulatory reform, and civil rights. Before joining the Stanford faculty in 2001, he served for several years as Senior Advisor to the U.S. Treasury Department's Under Secretary for Enforcement, and clerked for Chief Judge Mary M. Schroeder of the U.S. Court of Appeals for the Ninth Circuit. While at Treasury, he worked on countering financial crime, improving border coordination, and enhancing anti-corruption measures. He has served on the Executive Committee of the Stanford Center for International Security and Cooperation and the Silicon Valley Blue Ribbon Task Force on Aviation Security. A member of the American Law Institute, he received a Ph.D. in political science from Stanford University, a J.D. from Yale Law School, and an A.B. from Harvard University.

Michael Fitzpatrick was Associate Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs, where he helps to lead the development of regulatory policy and White House review of significant Executive Branch regulatory actions. He served as the Executive Branch liaison to the ABA's Administrative Law Section and has led several U.S. delegations abroad for meetings with the European Union and Canada. During the Presidential Transition, Mr. Fitzpatrick served as deputy lead of the Executive Office of the President and Government Operations Agency Review Teams. From 2001 to 2009, Mr. Fitzpatrick was in the Washington, DC office of Akin Gump Strauss Hauer & Feld LLP, where he was a partner in the Litigation Practice Group, specializing in white collar, complex civil, and regulatory matters. Before joining Akin Gump, Mr. Fitzpatrick served as an Assistant United States Attorney in Washington, DC and as a Senior Advisor to the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget. Mr. Fitzpatrick clerked for Judge William Norris on the U.S. Court of Appeals for the Ninth Circuit after graduating from Stanford Law School.

Julius Genachowski is the Chairman of the Federal Communications Commission. Chairman Genachowski has two decades of experience in the private sector and public service. Prior to his appointment, he spent more than 10 years working in the technology industry as an executive and entrepreneur. He co-founded LaunchBox Digital and Rock Creek Ventures, where he served as Managing Director, and he was a Special Advisor at General Atlantic, a global private equity firm based in New York. Mr. Genachowski was a law clerk at the U.S. Supreme Court for Justice David Souter and Justice William J. Brennan, Jr., and at the U.S. Court of Appeals for the D.C. Circuit for Chief Judge Abner Mikva. Chairman Genachowski also worked in Congress for then-U.S. Representative (now Senator) Charles E. Schumer (D-N.Y.), and on the staff of the House select committee investigating the Iran-Contra Affair. He received a J.D, magna cum laude, from Harvard Law School, where he was co-Notes Editor of the Harvard Law Review, and his B.A., magna cum laude, from Columbia College.

Theodore B. Olson is a partner in Gibson, Dunn & Crutcher's Washington, D.C. office and a member of the firm's Executive Committee, Co-Chair of the Appellate and Constitutional Law Group and the firm's Crisis Management Team. Previously, he served as the 42nd Solicitor General of the United States from 2001-2004. Mr. Olson also served as Assistant Attorney General for the Office of Legal Counsel from 1981 to 1984. Except for those two intervals, he has been a lawyer with Gibson, Dunn & Crutcher in Los Angeles and Washington, D.C. since 1965. Throughout his career, Mr. Olson has argued numerous cases before the Supreme Court of the United States. Mr. Olson is a Fellow of both the American College of Trial Lawyers and the American Academy of Appellate Lawyers. He received his bachelor's degree cum laude from the University of the Pacific in Stockton, California, where he received awards as the outstanding graduating student in both journalism and forensics, and his law degree from the University of California at Berkeley (Boalt Hall), where he was a member of the California Law Review and Order of the Coif.

Thomas Perez is currently the Assistant Attorney General for Civil Rights at the U.S. Department of Justice. He previously served as the Secretary of Maryland's Department of Labor, Licensing and Regulation. From 2002 until 2006, Perez was a member of the Montgomery County Council. He was the first Latino ever elected to the Council, and served as Council President in 2005. Earlier in his career, Perez spent 12 years in federal public service. As a federal prosecutor for the Civil Rights Division of the Department of Justice, he prosecuted and supervised the prosecution of some of the Department's most high profile civil rights cases. Perez later served as Deputy Assistant Attorney General for Civil Rights under Attorney General Janet Reno. Perez also previously served as Special Counsel to Senator Edward Kennedy, and was Senator Kennedy's principal adviser on civil rights, criminal justice and constitutional issues. For the final two years of the Clinton administration, Perez served as the Director of the Office for Civil Rights at the United States Department of Health and Human Services. Perez was a law professor for six years at University of Maryland School of Law and later as a part-time professor at the George Washington School of Public Health. He is a graduate of Brown University, Harvard Law School and the John F. Kennedy School of Government.

Jane C. Sherburne is Senior Executive Vice President and General Counsel of BNY Mellon. She was formerly principal in her own law firm, and prior to that, Senior Executive Vice President and General Counsel Of Wachovia Corporation. Before Joining Wachovia in mid-2008, she served as Deputy General Counsel and Senior Deputy General Counsel of Citigroup, and General Counsel of Citigroup's Global Consumer Group. Sherburne was previously a Partner at Wilmer, Cutler & Pickering, where she practiced litigation, representing clients in matters requiring crisis management, including matters involving Congressional investigations, internal government and corporate investigations, and complex civil litigation. She has also served as Special Counsel to the President during the Clinton Administration, Chief of Staff and Executive Assistant to the Commissioner of Social Security in the Carter Administration, and as a Legislative Assistant to Congressman Donald Fraser (D-MN). Sherburne is a trustee of the Lawyers' Committee for Civil Rights Under Law and the National Women's Law Center. She is also an executive committee member of the New York City Bar. She received her B.A. and M.S.W. from the University of Minnesota in 1974 and 1976, respectively, and her J.D. from Georgetown University Law Center in 1983.

The Honorable Patricia Wald served for twenty years on the U.S. Court of Appeals for the District of Columbia Circuit, from 1979-1999, including five years as Chief Judge. Since that time she has served in various capacities including as a Judge on the International Criminal Tribunal for the former Yugoslavia and a Member on the President's Commission on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction. Prior to serving on the U.S. Court of Appeals for the D.C. Circuit, Judge Wald was the Assistant Attorney General for Legislative Affairs at the Department of Justice. She also previously served as an attorney with the Mental Health Law Project, an attorney with the Center for Law and Social Policy, co-director of the Ford Foundation Drug Abuse Research Project, an attorney with the Neighborhood Legal Services Program, and an attorney with the Office of Criminal Justice at the Department of Justice. She is a member of the American Law Institute. Judge Wald is also a member of the American Philosophical Society, and serves on the Open Society Institute's Justice Initiative Board, including two years as chair (2002-2004). Judge Wald clerked for the Honorable Jerome Frank on the U.S. Court of Appeals for the Second Circuit, and received her B.A. from the Connecticut College for Women and her J.D. from Yale Law School.

government members

The government members of the Conference are current, senior officials at other government agencies. The Conference's organic act designates certain agencies to have government members of the Conference, and it authorizes the President and the Council to designate other such agencies.

The government members are appointed by their agencies and serve no fixed term. They participate in Conference activities in addition to their full-time work at their own agencies. The following were government members at the end of FY2011:

Name	Agency	Role
Scott G. Alvarez	Federal Reserve Board	General Counsel
Michael Bardee	Federal Energy Regulatory Commission	General Counsel
Paul Bardos	International Trade Commission	Assistant General Counsel
Stephen Burns	Nuclear Regulatory Commission	General Counsel
Mark Cahn	U.S. Securities and Exchange Commission	General Counsel
Sandy Comenetz	Federal Housing Finance Agency	Executive Advisor to the Acting Director
Martin Conrey	U.S. Small Business Administration	Assistant General Counsel for Legislation and Appropriations
Elizabeth Dickinson	Food and Drug Administration	Acting General Counsel
Kris E. Durmer	General Services Administration	General Counsel
Daniel R. Elliott	Surface Transportation Board	Chairman
Cheryl A. Falvey	Consumer Product Safety Commission	General Counsel
Rebecca A. Fenneman	Federal Maritime Commission	General Counsel
Ivan K. Fong	Department of Homeland Security	General Counsel
Don Fox	Office of Government Ethics	Acting Director and General Counsel
Arthur E. Gary	Department of the Interior	Deputy Solicitor
Remington A. Gregg	Office of Science and Technology Policy	Advisor, Open Government
Susan Tsui Grundmann	Merit Systems Protection Board	Chairman
Will A. Gunn	Department of Veterans Affairs	General Counsel
Christopher Hughey	Federal Election Commission	Acting General Counsel
Elaine Kaplan	Office of Personnel Management	General Counsel
Cameron F. Kerry	Department of Commerce	General Counsel
Harold Hongju Koh	Department of State	Legal Advisor

Name	Agency	Role
Edward P. Lazarus	Federal Communications Commission	Chief of Staff
Robert Lesnick	Federal Mine Safety and Health Review Commission	Chief Administrative Law Judge
Sean Lev	Department of Energy	Acting General Counsel
George W. Madison	U.S. Department of the Treasury	General Counsel
Nadine Mancini	Occupational Safety and Health Review Commission	General Counsel
Elizabeth A. M. McFadden	Department of Education	Assistant General Counsel for Regulatory Services
David Morris Michaels, PhD, MPH	Occupational Safety and Health Administration	Assistant Secretary
Miriam M. Nisbet	National Archives and Records Administration	Director, Office of Government Information Services (OGIS)
Richard Osterman	Federal Deposit Insurance Corporation	Deputy General Counsel
Patrick Patterson	Equal Employment Opportunity Commission	Senior Counsel to the Chair
Mark Polston	Centers for Medicare and Medicaid Services	Deputy Associate General Counsel for Litigation
Michael J. Ravnitzky	Postal Regulatory Commission	Chief Counsel
Robert S. Rivkin	Department of Transportation	General Counsel
Robert Schiff	National Labor Relations Board	Chief of Staff to the Chairman
Christopher H. Schroeder	Department of Justice	Assistant Attorney General, Office of Legal Policy
William Schultz	Department of Health and Human Services	Acting General Counsel
Robert A. Shapiro	Department of Labor	Associate Solicitor
Carol Ann Siciliano	Environmental Protection Agency	Associate General Counsel
Steven C. Silverman	Department of Agriculture	Associate General Counsel
Kevin M. Simpson	Department of Housing and Urban Development	Principal Deputy General Counsel
Glenn E. Sklar	Social Security Administration	Deputy Commissioner for Disability Adjudication and Review
Lon Smith	Internal Revenue Service	National Counsel to the Chief Counsel for Special Projects
Megan Sperling	Commodity Futures Trading Commission	Counsel to the Chairman
Robert S. Taylor	Department of Defense	Principal Deputy General Counsel
Willard K. Tom	Federal Trade Commission	General Counsel
Daniel Werfel	Office of Management and Budget	Controller
Julie L. Williams	Office of the Comptroller of the Currency	First Senior Deputy Comptroller and Chief Counsel
Vacant	Consumer Financial Protection Bureau	

The following individuals were former members in the first year of ACUS operations:

- David Becker, Securities and Exchange Commission
- Robert Cusick, Office of Government Ethics
- Scott Blake Harris, Department of Energy
- David Horowitz, Health and Human Services
- Arlene Fine Klepper, National Labor Relations Board
- Ralph Tyler, Food and Drug Administration

public members

The public members of the Conference are typically leading authorities in administrative law, public administration, or other areas of interest to the Conference. Most public members are lawyers, but some are experts in other disciplines. The public members come primarily from academia, law firms, and public interest organizations.

Public members are appointed by the Chairman with the approval of the Council. They serve two-year terms (except that, of the initial public members, half were randomly selected to serve an initial one-year term, so that the terms can be staggered). Public members may be reappointed and may serve a total of three consecutive two-year terms. The following were public members at the end of FY2011:

Name	Agency	Role
Fred W. Alvarez	Wilson Sonsini Goodrich & Rosati	Partner
Jodie Z. Bernstein	The Kelley Drye & Warren Advertising Law Practice Group	Of Counsel
Lisa S. Bressman	Vanderbilt Law School	Associate Dean for Academic Affairs; Professor of Law
James Ming Chen	University of Louisville Louis D. Brandeis School of Law	Dean and Professor of Law
John F. Cooney	Venable LLP	Partner
Walter Dellinger	O'Melveny & Myers LLP, Washington, DC	Partner
Susan E. Dudley	Trachtenberg School of Public Policy and Public Administration, The George Washington University	Research Professor
Cynthia R. Farina	Cornell Law School	Professor of Law
David C. Frederick	Kellogg, Huber, Hansen, Todd, Evans & Figel	Partner
Jody Freeman	Harvard Law School	Archibald Cox Professor of Law
H. Russell Frisby, Jr	Stinson Morrison Hecker LLP	Partner
Patti Goldman	Earthjustice	Vice President for Litigation
John Graham	Indiana University	Professor
Philip J.Harter	Vermont Law School	Adjunct Professor
Michael E. Herz	Benjamin N. Cardozo School of Law	Professor of Law and Director, Floersheimer Center for Constitutional Democracy; Current Vice Chair, ABA Section on Administrative Law and Regulatory Practice
Philip Howard	Covington and Burling	Partner
James E. Johnson	Debevoise & Plimpton	Partner

www.acus.gov/about/the-assembly/public-members

Name	Agency	Role
John M. Kamensky	IBM Center for the Business of Government	Senior Fellow
Peter D. Keisler	Sidley Austin LLP	Partner
Simon Lazarus	National Senior Citizens Law Center	Public Policy Counsel
Ronald Levin	Washington University School of Law	Henry Hitchcock Professor of Law
Carl Malamud	PublicResource.Org	President and Founder
Jerry L. Mashaw	Yale Law School	Sterling Professor of Law
Randolph J. May	Free State Foundation	President
Doris Meissner	Migration Policy Institute	Senior Fellow and Director, U.S. Immigration Policy Program
Nina Mendelson	University of Michigan Law School	Professor of Law
Gillian E. Metzger	Columbia Law School	Professor of Law
Beth Noveck	New York Law School	Professor of Law
David W. Ogden	Wilmer Cutler Pickering Hale and Dorr	Partner
John A. Payton	NAACP Legal Defense and Educational Fund, Inc.	President and Director-Counsel
Richard J. Pierce, Jr.	The George Washington University Law School	Lyle T. Alverson Professor of Law
Richard L. Revesz	New York University School of Law	Dean and Lawrence King Professor of Law
Alasdair S. Roberts	Suffolk University Law School	Rappaport Professor of Law and Public Policy
Teresa Wynn Roseborough	Metropolitan Life Insurance Company	Deputy General Counsel
Max Stier	Partnership for Public Service	President and CEO
Larry D. Thompson	PepsiCo, Inc	Senior Vice President and General Counsel
James J. Tozzi	Center for Regulatory Effectiveness	Member, Board of Directors
John Vittone	Department of Labor (retired)	Chief Administrative Law Judge
Helgi C. Walker	Wiley Rein, LLC	Partner
Allison M. Zieve	Public Citizen Litigation Group	Director

The following individuals were former members in the first year of ACUS operations:

- Christopher Edley, UC Berkeley Law School
- Michael K. Powell, Providence Equity Partners
- Sikrishna Prakash, UVA, School of Law

www.acus.gov/about/the-assembly/public-members

liaison members

The Chairman, with the approval of the Council, may designate federal agencies or other organizations that do not have voting members of the Conference to have a liaison representative. Agencies or organizations so designated appoint their liaison representative. Liaison representatives serve no fixed term.

Name	Agency	Role
Allison Beck	Federal Mediation and Conciliation Service	Deputy Director for National and International Programs
Amy P. Bunk	Office of the Federal Register	Director of Legal Affairs and Policy
Judge Charles Center	Federal Labor Relations Authority	Chief Administrative Law Judge
Tobias Dorsey	U.S. Sentencing Commission	Special Counsel
Judge D. Randall Frye	The Association of Administrative Law Judges	President
Lynn Gibson	Government Accountability Office	Acting General Counsel
Judge Brett M. Kavanaugh	US Court of Appeals for the DC Circuit	Circuit Judge
Edward Kelly	Executive Office for Immigration Review	Chief of Staff, Office of the Chief Immigration Judge
Dan Levinson	Council of Inspectors General on Integrity and Efficiency	Inspector General, HHS
William V. Luneburg	ABA Section of Administrative Law and Regulatory Practice	Professor of Law
Rebecca MacPherson	Federal Aviation Administration	Assistant Chief Counsel for Regulation
Mary C. McQueen	National Center for State Courts	President
Jeffrey P. Minear	Judicial Conference of the United States	Counselor to the Chief Justice
Katie L. Nash	Office of the Director of National Intelligence	Associate General Counsel
Nina Olson	Office of the National Taxpayer Advocate, Internal Revenue Service	National Taxpayer Advocate
Timothy Reif	Office of the US Trade Representative	General Counsel
Jill Sayenga	Administrative Office of the U.S. Courts	Deputy Director
Lois J. Schiffer	National Oceanic and Atmospheric Administration	General Counsel
Esa L. Sferra-Bonistalli	United States Coast Guard	Senior Attorney / Team Leader, Office of Regulations and Administrative Law
Thomas W. Snook	ABA National Conference of the Administrative Law Judiciary	Immediate Past Chairman
Daniel Solomon	Federal Administrative Law Judges Conference	President
Alan Swendiman	Immigration and Customs Enforcement	Chief of Staff
Stephen Wood	National Highway Traffic Safety Administration	Assistant Chief Counsel for Vehicle Rulemaking and Harmonization

The following individual was a former member in the first year of ACUS operations:

- Mary Lucille Jordan, Federal Mine Safety and Health Review Commission

acus.gov/about/the-assembly/liaison-representatives

senior fellows

Senior fellows have previously served as Chairman of the Conference or have served for six or more years as government or public members of, or liaison representatives to, the Conference. The senior fellows are appointed by the Chairman with the approval of the Council. Senior fellows serve for 2-year terms and may be reappointed.

William H. Allen
Retired Partner, Covington and Burling LLP
Public Member (1972-82), Senior Fellow (1982-95)

Warren Belmar
Chairman of the Board, Clean Economy Network Education Fund
Public Member (1986-95), Senior Fellow (1995)

Marshall J. Breger
Professor of Law, Catholic University Columbus School of Law
Chairman (1985-91), Senior Fellow (1991-95)

The Honorable Stephen Breyer
Associate Justice, United States Supreme Court
Liaison Representative (1981-95)

Betty Jo Christian
Partner, Steptoe & Johnson LLP
Government Member (1977-79), Public Member (1980-89), Senior Fellow (1989-95)

Neil R. Eisner
Assistant General Counsel, United States Department of Transportation
Government Member (1982-95)

E. Donald Elliott
Partner, Willkie Farr & Gallagher LLP
Professor (adj) of Law, Yale Law School
Government Member (1990-91, Public Member 1991-94)

Fred F. Fielding
Partner, Morgan Lewis & Bockius
Special Counsel (1981-86), Public Member (1986-94)

Brian C. Griffin
Chairman of the Board, Clean Energy Systems Inc.
Chairman (1992-93), Senior Fellow (1993-95)

Paul D. Kamenar
Washington Legal Foundation
Public Member 1982-1990)
Senior Fellow (1990-95)

Sally Katzen
Consultant and Visiting Professor, New York University School of Law
Public Member (1988-93), Council (Vice Chairman 1993-95), Acting Chairman (1993-94)

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Richard J. Leighton
Partner, Keller and Heckman LLP
Public Member (1983-91), Senior Fellow (1991-95)

Alan B. Morrison
Lerner Family Associate Dean for Public Interest and Public Service Law, The George Washington University Law School
Public Member (1983-91), Senior Fellow (1989-95)

Sallyanne Payton
William W. Cook Professor of Law, University of Michigan Law School. Public Member (1980-88), Senior Fellow (1988-95)

Judge S. Jay Plager
United States Court of Appeals for the Federal Circuit.
Government Member (1988-89), Special Counsel (1989-91), Liaison Representative (1991-95)

Jonathan Rose
Willard H. Pedrick Distinguished Research Scholar, Professor of Law, Arizona State University, Sandra Day O'Connor College of Law. Public Member (1989-95)

The Honorable Antonin Scalia
Associate Justice, United States Supreme Court
Chairman (1972-74), Public Member (1978-82), Senior Fellow (1982-95)

The Honorable Loren A. Smith
Senior Judge, United States Court of Federal Claims
Chairman (1981-85), Senior Fellow (1985-95)

Peter L. Strauss
Betts Professor of Law, Columbia Law School. Government Member (1975-77), Public Member (1982-91), Senior Fellow (1991-95)

David Vladeck
Director, Bureau of Consumer Protection, Federal Trade Commission. Public Member (1990-95)Edward L. Weidenfeld
Founder , The Weidenfeld Law Firm, P.C. Council (1981-91), Senior Fellow (1992-95)

Richard E. Wiley
Partner, Wiley Rein LLP. Council (1973-77),
Senior Fellow (1984-95)

In Memoriam

Malcolm Mason ((Government Member (1976-79), Senior Fellow, 1984-95, 2010-2011)) who died at the age of 101 on November 1, 2011.

Robert A. Anthony George Mason University Foundation Professor Emeritus, George Mason University School of Law. Chairman (1974-79), Senior Fellow (1982-95) who died at the age of 79 on November 17, 2011.

acus staff

The Administrative Conference staff is composed of a dynamic and interdisciplinary group of individuals dedicated to public service.

Reestablishing a federal agency is a historic undertaking, which requires a nimble group of innovators who understand that sometimes the best ideas come from outside the agency.

They are a team of attorneys, statisticians, technologists, writers, graphic designers, and more.

We are collaborating to

make government work better.



Michael T. McCarthy
Executive Director

Shawne C. McGibbon
General Counsel

Jonathan R. Siegel
Director of Research and Policy

Emily Schleicher Bremer
Attorney Advisor

Reeve T. Bull
Attorney Advisor

Gabrielle Guy
Paralegal






Charles Kersey
IT Specialist

Kathy Kyle
Communications Director

Sherland Peterson
Executive Assistant

David M. Pritzker
Deputy General Counsel

Funmi E. Olorunnipa
Attorney Advisor

Scott J. Rafferty
Deputy Director of Research and Policy

Harry Seidman
Administrative Director



www.acus.gov/about/the-staff

mission statement

ACUS MANDATE

Arrange for federal agencies, assisted by outside experts, cooperatively [to] study mutual problems, exchange information, and develop recommendations for actions [so that] private rights may be fully protected and federal responsibilities may be carried out expeditiously in the public interest (1964).

Added in 2004

- Promote public participation and efficiency in rulemaking and with regard to rulemaking, adjudication, licensing, and investigations.
- Reduce unnecessary litigation.
- Improve the use of science.
- Improve the effectiveness of applicable laws.

5 USC § 591

strategic plan

During the first year of operations, the Chairman and staff have worked to develop a strategic direction for the Administrative Conference that would fulfill its statutory mission of improving administrative procedure and meet the expectations of Congress. Of particular importance in developing these strategic goals is the Report of the Administrative Law, Process, and Procedure Project for the 21st Century, published by the House Committee on the Judiciary in December 2006, which guided Congress' decision to reauthorize and fund the Administrative Conference.

In setting direction, the Chairman and staff met with a wide variety of government agencies, bar association members, and private sector and non-profit groups to identify areas of needed reform of federal rulemaking, adjudication, and other administrative processes.

Based on this information, the Chairman and staff developed proposed goals and priorities for the Administrative Conference, which were presented to the full membership at the December 2010 plenary session. Members provided feedback and suggested additional goals, and the Chairman has identified the following mission and strategic goals to guide the Administrative Conference based on these discussions.

The Administrative Conference of the United States is a public-private partnership whose membership develops formal recommendations and innovative solutions that make our government work better.

vision & values

The Administrative Conference is given the power to "study the efficiency, adequacy, and fairness of administrative procedure…" 5 USC § 594.

The work of the Conference is guided by these procedural values, which reflect legal and social science measures of performance.

The fairness value derives from law and employs principles in the Administrative Procedure Act and the due process clause of the Constitution.

The efficiency value derives from economics and looks at how procedures employed by the agency achieve the public purposes the regulations are intended to serve. The question is whether the agency procedures and management techniques reflect optimum resource allocations.

The adequacy value borrows from the disciplines of psychology and political science and looks at the effectiveness of regulatory techniques from the public's perspective, including such factors as trust, transparency, and participation.

In many situations, these values must be balanced by the Conference in crafting recommendations, but in no case will they be ignored.

On Regulation

"As long as there is a need for regulatory reform, there is a need for something like the Administrative Conference."

C. Boyden Gray, former White House Counsel

Performance Goals

In accordance with OMB guidance, ACUS identified results-oriented performance goals for FY 2011 and FY 2012 that are based on the agency's strategic goals. Due to the agency's startup status in FY 2011, the goals were designed to initiate progress in FY 2011 and be fully achieved in FY 2012.

strategic goals

PARTICIPATION

ACUS will expand citizen participation in the regulatory process through increased use of interactive communications technology and creative means of outreach, in order to provide essential information to government officials and to inform the public.

COLLABORATION

ACUS will study and promote the most responsive and efficient means of sharing authority and responsibility among the federal government, state and local governments, contractors, grantees, and citizens. This will include exploration of new models of collaborative governance as well as a more effective division of responsibility between government and the private sector.

INNOVATION

ACUS will seek new ideas that advance the core values of fairness and efficiency, and will study existing government programs to identify what works, what doesn't, and what's promising. Research will address the use of science, ensuring data quality, and performance evaluation.

EDUCATION

ACUS will bring together senior federal officials and outside experts to identify best practices and will advise agencies on revising their rulemaking and hearing processes, technology, and management systems to deliver better results. The Conference will be a central resource for agencies by compiling and publishing data and guidance on solving mutual problems.

strategic goal: PARTICIPATION

Expand public participation and increase transparency.

The Administrative Conference will expand citizen participation in the regulatory process through increased use of interactive communications technology, as well as by alternative means of outreach, in order to provide essential information to government officials and inform the public. The Administrative Conference will improve openness and transparency in government by promoting common standards and formats for information sharing and proposing updates to laws and rules written before the Internet era.

Performance Goal	Results Measure	FY 2011 Results
1) Participation ACUS will identify and encourage more widespread adoption of new methods for public input into the rulemaking process.	Adoption by ACUS of formal recommendations to expand participation and provide training and technical assistance to agencies to implement such recommendations.	In FY 2011, ACUS commissioned research reports and adopted two formal recommendations addressing the rulemaking comment process and legal issues in e-rulemaking. In FY 2012, ACUS staff will work with federal agencies on implementation of these recommendations.
2) Transparency Pilot virtual online meetings of federal advisory committees, using technology to provide public access and transparency, and recommend proposed regulatory and legislative changes to update the Federal Advisory Committee Act for the Internet era.	Complete pilot project on online FACA meetings, evaluate whether practice improves transparency and participation, and assist other advisory committees in adopting best practices identified.	In FY 2011, ACUS commissioned research into the Federal Advisory Committee Act and proposed recommendations to reform the Act. These recommendations are currently under review in committee and are expected to be considered in December 2011. ACUS has also launched a pilot program to hold certain of its federal advisory committee meetings online using web forum technology.
3) Access to law Foster placing primary legal materials on the Web, promote common standards and formats for federal agencies to post searchable, accessible, and complete records of adjudications.	Place all past ACUS recommendations and supporting materials on ACUS Website and increase visits to website. Evaluate agency practices in making administrative materials accessible and provide training and technical assistance to add documents to agency websites.	In FY 2011, ACUS launched a website at http://www.acus.gov. This website incorporates current information about Conference activities as well as historical materials. The Website was recognized as one of the top 35 public sector websites in the world and traffic to the website has increased since the launch. Historical recommendations dating from 1988 to 2011 have been posted; recommendations from 1968 through 1988 will be posted later this year.

strategic goal: COLLABORATION

Promote collaborative governance.

The Administrative Conference will study and promote the most responsive and efficient means of sharing authority and responsibility among the federal government, state and local governments, contractors, grantees, and citizens. This will include exploration of new models of collaborative governance as well as the most efficient division of responsibility between government and the private sector

Performance Goal	Results Measure	FY 2011 Results
1) Public-private partnerships Develop guidance for agencies to ensure accountability when reliant on non-government personnel to fulfill their mission.	Publish a report and/or recommendation on management of public-private joint ventures, such as procurement practices and use of third-party certification. Provide training and assistance to agencies adopting best practices that produce cost savings and increased efficiency.	In FY 2011, ACUS published a recommendation on ethics rules for government contractor employees and commenced a research project on uses of third-party certification. In FY 2012, ACUS will follow up on the ethics recommendation by tracking its implementation and providing advice and training. The project on third-party certification is expected to produce a report and/or recommendation in 2012.
2) Federalism Reform agency procedures to promote better collaboration between federal and state and local officials in the regulatory process.	Publish guidance and/or recommendation on agency federalism procedures. Provide training and assistance to agencies adopting best practices that produce cost savings and increased efficiency.	ACUS published a recommendation on agency procedures when considering regulations that may preempt state law, including consultation with state attorneys general and other interested state agencies. Adoption of this recommendation is expected to reduce unnecessary litigation over preemption issues. In 2012, ACUS will continue to assess the implementation of the recommendation and provide training and assistance as needed.
3) Alternative Dispute Resolution (ADR) Review alternative dispute resolution programs, identify potential improvements, and develop and advocate ADR legislative and regulatory reforms.	Convene a conference leading to recommendations for legislative and regulatory reforms. Estimate potential cost savings and improved efficiency for such reforms. Advocate for adoption of reforms that are identified.	In FY 2011, ACUS convened a forum for agencies with high-volume caseloads to learn about automated dispute resolution systems used by eBay and PayPal. ACUS also held preliminary meetings with a range of government participants in the ADR process to plan a government-wide ADR conference. In FY 2012, ACUS will build on this work to convene a conference and develop concrete recommendations for reform.

strategic goal: INNOVATION

Identify innovations to make government procedures more efficient, fair, timely, and data-driven.

The Administrative Conference will seek new ideas that advance the core values of fairness and efficiency, and will study existing government programs to identify what works, what doesn't, and what's promising. Because government action should be based on sound data, the Administrative Conference will improve the use of science, empirical data, and performance evaluation in regulations and administrative law, and the Conference's own activities will be measured to demonstrate the value that they provide.

Performance Goal	Results Measure	FY 2011 Results
1) Efficiency The Administrative Conference will work to modernize the administrative process by exploring innovations like audited self-regulation which increases the government's capacity without increasing costs.	Publish at least three reports and/or recommendations on best practices that increase the capacity of the government to undertake activities without increasing costs. Provide training and technical assistance to agencies adopting these models and measure the increases in efficiency.	In FY 2011, ACUS adopted a recommendation that video hearings be adopted more widely across the government. Based on research on the use of video hearings at the Social Security Administration, ACUS expects that video hearings can reduce costs by eliminating travel time and expenses and more efficiently allocating administrative law judge caseloads, without affecting the outcomes of cases. ACUS is currently advising agencies on how they might adopt video hearings. ACUS is currently considering projects on international regulatory cooperation and immigration adjudication that have similar potential to expand agency capacity without increasing costs. These and other projects are scheduled for consideration in FY 2012.
2) Timeliness Because justice delayed can be justice denied, the Administrative Conference will work across federal agencies to reduce backlogs and unnecessary delays in case and rule processing through better use of technology such as video conferencing.	Publish a report and/or recommendation on best practices that reduce delays in the administrative process. Provide training and technical assistance to agencies adopting these models and measure reductions in backlogs and delays.	In FY 2011, ACUS convened a workshop for agencies with high-volume caseloads and adopted a recommendation on the use of video hearings. ACUS also began a major study of immigration adjudication with a goal of reducing backlogs. In FY 2012, ACUS will continue developing the report and recommendation on immigration adjudication and help agencies implement video hearings.

Performance goal, results measure and results continue on the next page.

strategic goal: INNOVATION

Performance Goal	Results Measure	FY 2011 Results
3) Fairness The Administrative Conference will identify obstacles that prevent access to the government's regulatory and adjudicatory activities, including procedural legal barriers and reduced access to technology, and seek to eliminate these barriers.	Publish a report and/or recommendation on best practices to eliminate barriers to access. Provide training and technical assistance to agencies adopting these models and measure the effect of their implementation.	In FY 2011, ACUS and the Department of Justice convened a forum on access to administrative and regulatory materials for persons with limited English proficiency. Making materials available in languages other than English was also addressed in an ACUS report on innovations in rulemaking and an ACUS study on immigration adjudication is addressing legal and practical barriers to accessing proceedings. In FY 2012, ACUS will continue work on these projects with a goal of adopting and implementing ACUS recommendations.
4) Data-Driven The Administrative Conference will study best practices for agencies to use in considering scientific and empirical data during the rulemaking process, and will recommend to agencies best practices for scientific integrity.	Publish a report and/or recommendation on best practices for considering scientific and empirical data and scientific integrity. Conduct evaluations of all ACUS projects to measure their impact and effectiveness.	In FY 2011, ACUS launched a research project on best practices for use of science in the regulatory process. A report and recommendation is expected to be completed in FY 2012. ACUS has also begun reviews of the recommendations adopted in FY 2011 to measure their implementation.
5) Agency Management As a new agency not constrained by outdated infrastructure and processes, the Administrative Conference will be an innovative test lab for experiments in agency management and government performance, focusing on flexible and transparent information technology, minimal overhead and administrative costs, and utilizing top talent through innovative personnel policies and partnerships.	Implement new models of technology that can serve as a guide to other agencies. Share expertise and develop ACUS staff skills through temporary assignments, longer-term details, and use of fellowship programs.	ACUS has launched a modern Website that incorporates social media to provide information about the administrative process. The Website includes a site for the Model Agency project, where government agencies can share best practices for administrative reform. The ACUS Website was recognized by Tripwire magazine as a top 35 government Website that excels in aesthetics and user interface. ACUS has also taken advantage of details and the Intergovernmental Personnel Act to bring top talent to the agency.

strategic goal: EDUCATION

Convene leaders to share information, solve common problems, and encourage adoption of promising innovations government-wide.

The Administrative Conference will bring together senior federal officials and outside experts to identify best practices and will advise agencies on revising their rulemaking and hearing processes, technology, and management systems to deliver better results. The Conference will be a central resource for agencies by compiling and publishing data and guidance on solving mutual problems.

Performance Goal	Results Measure	FY 2011 Results
1) Reconvene Council of Independent Regulatory Agencies Independent regulatory agencies, because subject to limited OMB oversight, have limited mechanisms for sharing information and solving common administrative problems. ACUS will reconstitute a council for leaders in these agencies to meet on a bi-monthly basis.	Convene four to six meetings per year of the Council of Independent Regulatory Agencies. Provide research and guidance documents to Council on issues that the Council identifies.	In FY 2011, the ACUS Chairman reestablished the Council of Independent Regulatory Agencies and convened five meetings, to discuss common issues such as the effects of recent court decisions, the Sunshine Act, and the Congressional Review Act.
2) Workshops ACUS will convene a series of workshops for agency general counsels to share experiences with discrete legal and regulatory problems, with a goal of identifying the most efficient solutions for replication government-wide.	Convene four to six workshops per year, each attended by multiple government agencies, and provide follow-up summaries, best practices or training on topics covered.	In FY 2011, ACUS convened six workshops for federal agencies to share information on a range of current topics, including management of high-volume caseloads, retrospective review of regulations, international regulatory cooperation, the Federal Advisory Committee Act, and access to proceedings for persons with limited English proficiency. The workshops were rated as useful by participants.
3) Publications Create a modern website with collaborative tools to provide ready access to historical and current data on administrative law and regulatory policy. Create written and electronic guidance on best practices and procedural improvements, including the introduction of a model agency project that highlights and honors outstanding agency practices in this regard.	Create Website that is compliant with federal requirements, incorporates innovative tools such as social media, and is useful, as measured by increasing number and duration of Web visits and user surveys.	In FY 2011, ACUS launched a modern Website that incorporates social media to provide information about the administrative process. The Website includes a site for the Model Agency project, where government agencies can share best practices for administrative reform. The ACUS Website was recognized by Tripwire magazine as a top 35 government Website that excels in aesthetics and user interface.

the recommendation process

What is unique about this process?

...ACUS provides "non-partisan, non-biased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices,"... based on "a meticulous vetting process, which gave its recommendations credence."

Congressional Research Service, 2007

The Conference's research and the resulting recommendations are conducted through the Administrative Conference Project Process.

The process includes gathering and selecting ideas for a project, obtaining Council approval, and selecting the researcher. The Conference's six Committees will then consider the researcher's report. The Committee then collaborates on the project in public meetings (that are also broadcast on the internet). Once the Committee formulates a recommendation, the draft recommendation is then considered by the Council and then the full Conference membership.

Upon approval by the full Conference, ACUS follows up to see that official Conference recommendations are implemented.

The graphic shown below illustrates and describes the steps involved in preparing a recommendation.

/research/the-administrative-conference-project-process/

the plenary sessions

At the first plenary session in 15 years, the Conference was just getting restarted. The Conference adopted one recommendation and engaged in a productive discussion about the future priorities and agency goals. Six months later, ACUS' six committees are meeting regularly and more than a dozen other projects are in the pipeline. The agency is currently operating at the level achieved before ACUS was shut down, and with a smaller staff.

During its plenary sessions and committee meetings, members exchange views and work together to reach consensus solutions to complex problems during their two to three-hour committee meetings. This process at the committee level produces the recommendations the Conference considers at plenary sessions. All sessions are broadcast live over the internet and may be viewed online.

53rd Plenary Session: December 8-9, 2010

The first day of the 53rd Plenary Session opened with the swearing-in the membership by Justice Scalia, followed by Conference business and debate and adoption of the recommendation regarding Federal preemption of state law. The second day was devoted to conducting focus groups and mapping the future of the Conference agenda.

54th Plenary Session: June 16-17, 2011

On the first day of the session, the Conference debated and passed the recommendations regarding Rulemaking Comments and e-Rulemaking. On the second day, the recommendations regarding Video Hearings Best Practices and Compliance Standards for Government Contractor Employees were considered and adopted. Dan Gordon, Administrator of OMB's Office of Federal Procurement Policy, attended the event and welcomed ACUS' "shining a light on this sensitive area." Justice Breyer, a Conference Senior Fellow, provided the closing keynote address.

To form a more perfect union...

ACUS is... "a unique organization, carrying out work that is important and beneficial to the average American, at low cost," and that "can make it easier for citizens to understand what government agencies are doing to prevent arbitrary government actions that could cause harm."

Justice Stephen Breyer
Senior Fellow

www.acus.gov/events/plenary-session/

"The concept of an Administrative Conference of the United States promises more to the improvement of administrative procedures and practices and to the systemization of the federal regulatory agencies than anything presently on the horizon."

James Landis
Former Dean of Harvard Law School
and SEC Commissioner

adopted recommendations

Making formal recommendations is one of the primary activities of the Administrative Conference. Conference recommendations result from the Administrative Conference Project Process.

As a part of this process, recommendations are adopted by the voting members of the Conference at semi-annual plenary sessions.

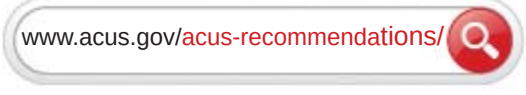
Recommendation 2010-1:
Agency Procedures for Considering Preemption of State Law.

Recommendation 2011-1:
Legal Considerations in e-Rulemaking

Recommendation 2011-2:
Rulemaking Comments

Recommendation 2011-3:
Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information

Recommendation 2011-4:
Agency Use of Video Hearings: Best Practices And Possibilities For Expansion



Recommendation 2010-1
Agency Procedures for Considering Preemption of State Law

Background
Executive Order 13132 requires agencies to consult with State and local governments and consider State and local interests when considering rules that may preempt State and local law. There appears to be consensus that the requirements of the preemption provisions of Executive Order 13132 are sound, but compliance has been inconsistent across administrations of both political parties. On May 20, 2009, President Barack Obama issued a Presidential Memorandum announcing the Administration's policy on regulatory preemption and directing agencies to conduct a retrospective review of preemptive rules.

Research Methodology
Professor Catherine M. Sharkey of New York University School of Law undertook a study of agency compliance with Executive Order 13132 and responses to President Obama's preemption memorandum. Professor Sharkey interviewed a number of agencies regarding preemption issues in rulemaking and also conducted a thorough examination of relevant law and scholarship.

Recommendation
At its December 2010 Plenary Session, the Conference adopted Recommendation 2010-1, Agency Procedures for Considering Preemption of State Law, which addresses agency procedures for fulfilling Federal requirements regarding consultation with State and local governments and for considering State interests in rulemakings that may result in the preemption of State law.

Agency responses to the Conference's implementation efforts have been generally positive and cooperative and suggest that a number of agencies have undertaken serious efforts to incorporate the recommendations into their rulemaking procedures and policies. The Conference has also implanted the recommendation by providing on its website a contact list that agencies can use to reach out to appropriate representatives of state interests when considering potentially preemptive rules.

Contact
Emily Schleicher Bremer
ebremer@acus.gov

Administrative Conference Recommendation 2010-1

Agency Procedures for Considering Preemption of State Law

Adopted December 9, 2010

Presidents Reagan and Clinton both issued executive orders mandating executive branch agencies,[1] and urging independent agencies,[2] to take certain measures to ensure proper respect for principles of federalism. Executive Order 13132, "Federalism," issued by President Clinton on August 4, 1999 (the "Order"),[3] is still in effect today, and is an amended version of President Reagan's Executive Order on Federalism, Executive Order 12612.[4] The Order identifies federalism principles that bear consideration in policymaking and specifies procedures for intergovernmental consultation, emphasizing consultations with State and local governments and enhanced sensitivity to their concerns. The Order requires agencies to have "an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications."[5] The Order requires agencies to "provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings" whenever an agency proposes to preempt State law through adjudication or rulemaking.[6] It establishes specific procedures for "any regulation that has federalism implications and that preempts state law,"[7] requiring agencies to consult

[1] Exec. Order No. 13,132, § 1(c).

[2] *Id.* at § 9.

[3] Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 3 U.S.C. § 301 (2006).

[4] President Reagan's Executive Order on Federalism adopted, nearly verbatim, ACUS recommendations. *Compare* Exec. Order No. 12,612, 3 C.F.R. 252, §§ 4(d) & (e) (1988), *reprinted in* 5 U.S.C. § 601 (1994), *with* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION NO. 84-5, ¶¶ 4, 5, PREEMPTION OF STATE REGULATION BY FEDERAL AGENCIES (1984).

[5] Exec. Order No. 13,132, § 6(a). The consultation process must involve "elected officials of State and local governments or their representative national organizations." *Id.* at §§ 1(d), 6(a).

[6] *Id*. at § 4(e).

[7] *Id.* at § 6(c).

with state and local officials "early in the process of developing the proposed regulation,"[8] and to prepare a federalism impact statement ("FIS").[9]

Individual agencies are responsible for implementing Executive Order 13132, and the Office of Information and Regulatory Affairs ("OIRA"), located within the Office of Management and Budget ("OMB"), has issued procedural guidelines on "what agencies should do to comply with the Order and how they should document that compliance to OMB."[10] These Federalism Guidelines provide that each agency and department should designate a federalism official charged with: (1) ensuring that the agency considers federalism principles in its development of regulatory and legislative policies with federalism implications; (2) ensuring that the agency has an accountable process for meaningful and timely intergovernmental consultation in the development of regulatory policies that have federalism implications; and (3) providing certification of compliance to OMB. The federalism official must submit to OMB "a description of the agency's consultation process,"[11] that "indicate[s] how the agency identifies those policies with federalism implications and the procedures the agency will use to ensure meaningful and timely consultation with affected State and local officials."[12] For any draft final regulation with federalism implications submitted for OIRA review under Executive Order 12866, the federalism official must certify that the requirements of Executive Order 13132 concerning both the evaluation of federalism policies and consultation have been met in a meaningful and timely manner.[13]

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[8] *Id.* at § 6(c)(1).

[9] *Id.* at § 6(c)(2) (requiring a FIS for any regulation "that has federalism implications and that preempts State law"); *id.* at § 1(a) (defining "federalism implications").

[10] Memorandum from Jacob J. Lew, Director, Office of Mgmt. & Budget, to the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, Guidance for Implementing E.O. 13132, "Federalism" (Oct. 28, 1999), at 2, *available* at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/m00-02.pdf (last visited October 29, 2010) ("Federalism Guidelines").

[11] Exec. Order No. 13,132, § 6(a); Federalism Guidelines 2.

[12] Federalism Guidelines 4-5.

[13] Exec. Order No. 13,132, § 8(a).

President Obama's official policy on preemption, articulated in a May 20, 2009 presidential "Memorandum for Heads of Executive Departments and Agencies" ("Preemption Memorandum"), provides that "[p]reemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption."[14] It specifically admonishes department and agency heads to cease the practice of including preemption statements in the preamble to a regulation without including it in the codified regulation. And it further directs agencies to include preemption provisions in codified regulations only to the extent "justified under legal principles governing preemption, including the principles outlined in Executive Order 13132." Finally, the Preemption Memorandum requests that agencies conduct a 10-year retrospective review of regulations including preemption statements, whether in the preamble or the codified regulation, "in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption."

An empirical evaluation of agency practices reveals that compliance with the preemption provisions of Executive Order 13132 has been inconsistent, although President Obama's Preemption Memorandum has effectuated a meaningful shift in preemption policies within a number of agencies. This evaluation was based on statistical analysis of agency rulemaking practices, on particular examples of agency rulemakings, on recent interviews with officials at the National Highway Traffic Safety Administration ("NHTSA"), Food and Drug Administration ("FDA"), Office of the Comptroller of the Currency ("OCC"), Consumer Product Safety Commission ("CPSC"), Federal Trade Commission ("FTC"), and Environmental Protection Agency ("EPA"), and on consideration of legislative changes to statutes relevant to agency preemption and an independent review of the agencies' respective rulemaking dockets and intervention in litigation.

[14] Memorandum for the Heads of Executive Departments and agencies (May 20, 2009), 74 Fed. Reg. 24,693, 24,693-94 (May 22, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-05-22/pdf/E9-12250.pdf#page=1 (last visited October 29, 2010).

There appears to be consensus that the requirements of the preemption provisions of Executive Order 13132—including consultation with the states and the requirement for "federalism impact statements"—are sound. But compliance with these provisions has been inconsistent, and difficulties have persisted across administrations of both political parties. A 1999 GAO Report identified only five rules—out of a total of 11,000 issued from April 1996 to December 1998[15]—that included a federalism impact assessment.[16] Case studies of particular rulemaking proceedings have revealed failures to comply with Executive Order 13132.[17] In August 2010, reflecting continued concern with agency practices in this area, the ABA House of Delegates adopted a recommendation developed by the ABA Task Force on Federal Preemption of State Tort Laws, aimed at improving compliance with the preemption provisions of Executive Order 13132.[18]

This Administrative Conference Recommendation is intended to improve agency procedures for implementing the preemption provisions of Executive Order 13132 and to

[15] Executive Order 12612 was in effect during this time period.

[16] U.S. GENERAL ACCOUNTING OFFICE, GAO/T-GGD-99-93, IMPLEMENTATION OF EXECUTIVE ORDER 12612 IN THE RULEMAKING PROCESS 1 (1999). The exact number of federalism impact assessments during this period is in some doubt but appears to be quite small. *See* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 784 n.192 (2004) (reporting identification of 9 federalism impact assessments from the fourth quarter of 1998); *see also id* at 783-84 (demonstrating that federalism impact statements are relatively rare and of "poor quality"). Of course, many rules do not require a federalism impact assessment. The number of rules that *should* have included one is unknown, but the very small number that did suggests that agencies were "not implementing the order as vigorously as they could." GAO report, *supra*, at 13.

[17] *See* Catherine M. Sharkey, *Federalism Accountability: "Agency Forcing" Measures*, 58 DUKE L.J. 2125, 2131-439 (2009) (analyzing several rulemaking proceedings in which an agency's notice of proposed rulemaking stated that a rule would have no federalism impact, but in which the agency stated that the final rule had preemptive effect, in some cases without preparing a federalism impact statement or consulting with state officials); *see also* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. L. REV. 695, 719 (2008) (reporting results from a further, 2006 study of preemptive rules, which disclosed that, out of six preemptive rulemakings studied, only three contained federalism impact analysis, and only one of the analyses "went beyond stating either that the agency concluded that it possessed statutory authority to preempt or that the document had been made available for comment, including to state officials").

[18] American Bar Association House of Delegates, Resolution 117, *available at* http://www.abanow.org/2010/07/am-2010-117/ (last visited Nov. 2, 2010).

increase transparency regarding internal agency policies and external enforcement mechanisms designed to ensure compliance with those provisions. The goal is not to favor or disfavor preemption, but to improve agency procedures in potentially preemptive rulemakings. The Recommendation is also intended to facilitate federal agency consultation with state representatives, such as the "Big Seven," a group of nonpartisan, non-profit organizations composed of state and local government officials,[19] and, conversely, to facilitate state officials' awareness of and responsiveness to, opportunities to consult with federal officials and to comment in regulatory proceedings that may have preemptive effect. Improved communication on preemption issues would result if state and local government officials or their representative organizations availed themselves of opportunities to become aware of whether federal agencies are engaging in potentially preemptive rulemaking proceedings, for example, by monitoring the Federal Register or using relevant Internet dashboards, such as are available at www.reginfo.gov. Agencies can ensure that these tools are optimally useful to state representatives by clearly posting relevant information on their individual websites and providing appropriate information for inclusion in the semiannual Unified Agenda. Finally, this Recommendation is aimed at both executive branch and independent agencies that engage in preemptive rulemaking, with the recognition that the executive directives described above bind the former and urge voluntarily compliance by the latter.

The Conference recognizes the danger of encumbering the rulemaking process with too many formal requirements. Therefore, in crafting this Recommendation, the Conference has remained mindful of the continuing validity of its previous Recommendation aimed at reducing "ossification" of the regulatory process.[20] The Conference recognizes, however, that certain principles, including those embodied in the preemption provisions of Executive Order 13132, are sufficiently important to warrant systematic consideration by agencies engaging in

[19] The Big Seven include the Council of State Governments, the National Governors Association, the National Conference of State Legislatures, the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and the International City/County Management Association.

[20] *Improving the Environment for Agency Rulemaking*, Recommendation No. 93-4, 1 C.F.R. §§ 305.93-4(II)(A) & (C) (ACUS 1993).

rulemaking. The following Recommendation has accordingly been structured both to encourage compliance with existing executive directives and increase the efficiency of internal agency processes designed to ensure such compliance.

RECOMMENDATION

1. The Conference reiterates its previous, related recommendation that "Congress should address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct."[21]

Internal Procedures for Compliance with the Preemption Provisions of Executive Order 13132

2. Agencies that engage in rulemaking proceedings that may have preemptive effect on state law should have internal written guidance to ensure compliance with the preemption provisions of Executive Order 13132, which should describe:

(a) How the agency determines the need for any preemption;

(b) How the agency consults with state and local officials concerning preemption; and

(c) How the agency otherwise ensures compliance with the preemption provisions of Executive Order 13132.

3. Agencies should post their internal guidance for compliance with the preemption provisions of Executive Order 13132 on the Internet or otherwise make publicly available the information contained therein.

[21] *Preemption of State Regulation by Federal Agencies*, Recommendation No. 84-5, 1 C.F.R. s 305.84-5 (ACUS 1984).

4. Agencies should have an oversight procedure to improve agency procedures for implementing the preemption provisions of Executive Order 13132. This procedure should include an internal process for evaluating the authority and basis asserted in support of a preemptive rulemaking. The agency should provide a reasoned basis, with such evidence as may be appropriate, that supports its preemption conclusion.

Updated Policies to Ensure Timely Consultation with State and Local Interests Concerning Preemption

5. Agencies should have a consultation process that contains elements such as the following:

(a) Agencies should use an updated contact list for representatives of state interests, including but not limited to the "Big Seven." The Administrative Conference will maintain such a list for use by agencies.

(b) Agencies should maintain some form of regularized personal contact in order to build relationships with representatives of state interests.

(c) Agencies should disclose to the public when they meet with the representatives of state interests in the course of rulemaking proceedings that may preempt state law. The disclosure should include the identity of the organization(s) or institution(s) that participate and the subject matter of the discussion.

(d) Agencies should reach out to appropriate state and local officials early in the process when they are considering preemptive rules. Such outreach should, to the extent practicable, precede issuance of the notice of proposed rulemaking.

6. Agencies should establish contact with organizations and state and local regulatory bodies and officials that have relevant substantive expertise or jurisdiction.

7. Agencies should adopt, as one component of their notice practice, a procedure for notifying state attorneys general when they are considering rules that may have preemptive effect. This may be achieved via direct communication with state attorneys general and by contacting an appropriate representative organization such as, for example, the National Association of Attorneys General.

Actions by OIRA/OMB to Improve the Process

8. OIRA/OMB should request agencies to post on their open government websites a summary of the agencies' responses to the directive contained in the Preemption Memorandum to conduct a 10-year retrospective review of preemptive rulemaking.

9. OIRA/OMB should update its Federalism Guidelines with respect to preemption.

10. OIRA should include reference to Executive Order 13132 in Circular A-4.[22]

[22] OFFICE OF INFO. & REGULATORY AFFAIRS, CIRCULAR A-4 ON REGULATORY ANALYSIS (2003), *available at* www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf (last visited October 15, 2010).

Recommendation 2011-1
Legal Considerations in e-Rulemaking

Background

The federal government is increasingly using electronic rather than paper means to conduct rulemaking activities. The Conference conducted a study to address legal issues associated with e-Rulemaking. Such issues include whether agencies can require comments to be submitted electronically, how e-comments (including attachments and links) must be archived, how agencies should deal with copyright and privacy concerns, what rules govern the solicitation of comments through social media, and whether any APA amendments are needed to account for electronic rulemaking. The study recommends answers and best practices on these issues.

Research Methodology

In-house researcher Bridget C.E. Dooling (on detail from the Office of Information and Regulatory Affairs in OMB) examined the legal issues agencies face in e-Rulemaking, and suggested how agencies can best approach those issues. Her research was partly empirical, drawing data from agency personnel who routinely encounter and address legal issues in e-rulemaking. Her study included an informal survey and workshop of approximately a dozen such agency employees. Ms. Dooling's research was also documentary, including consideration of relevant statutes, agency decisions, judicial opinions, and scholarship.

Recommendation

At its June 2011 Plenary Session, the Conference adopted Recommendation 2011-1, Legal Considerations in e-Rulemaking. The recommendation provides guidance to agencies for addressing legal and related policy issues when considering comments, assessing privacy concerns, maintaining rulemaking dockets in electronic form, providing rulemaking records to courts for judicial review, and complying with recordkeeping requirements in e-rulemaking. The recommendation includes potential cost-saving measures, including the suggestions that agencies may lawfully and should consider using technological tools to review rulemaking comments.

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Administrative Conference Recommendation 2011-1

Legal Considerations in e-Rulemaking

Adopted June 16, 2011

Agencies are increasingly turning to e-Rulemaking to conduct and improve regulatory proceedings. "E-Rulemaking" has been defined as "the use of digital technologies in the development and implementation of regulations"[1] before or during the informal rulemaking process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA). It may include many types of activities, such as posting notices of proposed and final rulemakings, sharing supporting materials, accepting public comments, managing the rulemaking record in electronic dockets, and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.

A system that brings several of these activities together is operated by the eRulemaking program management office (PMO), which is housed at the Environmental Protection Agency and funded by contributions from partner Federal agencies. This program contains two components: Regulations.gov, which is a public website where members of the public can view and comment on regulatory proposals, and the Federal Docket Management System (FDMS), which includes FDMS.gov, a restricted-access website agency staff can use to manage their internal files and the publicly accessible content on Regulations.gov. According to the Office of Management and Budget, FDMS "provides . . . better internal docket management functionality and the ability to publicly post all relevant documents on regulations.gov (e.g., Federal Register

[1] Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process at 2 (2004) (working paper), http://lsr.nellco.org/upenn_wps/108.

documents, proposed rules, notices, supporting analyses, and public comments)."[2] Electronic docketing also provides significant costs savings to the Federal government, while enabling agencies to make proposed and final regulations, supplemental materials, and public comments widely available to the public. These incentives and the statutory prompt of the E-Government Act of 2002, which required agencies to post rules online, accept electronic comments on rules, and keep electronic rulemaking dockets,[3] have helped ensure that over 90% of agencies post regulatory material on Regulations.gov.[4]

Federal regulators, looking to embrace the benefits of e-Rulemaking, face uncertainty about how established legal requirements apply to the web. This uncertainty arises because the APA, enacted in 1946, still provides the basic framework for notice-and-comment rulemaking. While this framework has gone largely unchanged, the technological landscape has evolved dramatically.

The Conference has therefore examined some of the legal issues agencies face in e-Rulemaking and this recommendation provides guidance on these issues. The Conference has examined the following issues:

- *Processing large numbers of similar or identical comments.* The Conference has considered whether agencies have a legal obligation to ensure that a person

[2] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FY 2009 REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE E-GOVERNMENT ACT OF 2002, at 10 (2009), http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/2009_egov_report.pdf.

[3] *See* Pub. L. 107-347 § 206.

[4] Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies, p. D-1 (Nov. 30, 2010), http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf. Some agencies rely on their own electronic docketing systems, such as the Federal Trade Commission (which uses a system called CommentWorks) and the Federal Communications Commission, which has its own electronic comment filing system (http://fjallfoss.fcc.gov/ecfs/).

reads every individual comment received, even when comment-processing software reports that multiple comments are identical or nearly identical.

- *Preventing the publication of inappropriate or protected information.* The Conference has considered whether agencies have a legal obligation to prevent the publication of certain types of information that may be included in comments submitted in e-Rulemaking.
- *Efficiently compiling and maintaining a complete rulemaking docket.* The Conference has considered issues related to the maintenance of rulemaking dockets in electronic form, including whether an agency is obliged to retain paper copies of comments once they are scanned to electronic format and how an agency that maintains its comments files electronically should handle comments that cannot easily be reduced to electronic form, such as physical objects.
- *Preparing an electronic administrative record for judicial review.* The Conference has considered issues regarding the record on review in e-Rulemaking proceedings.

This recommendation seeks to provide all agencies, including those that do not participate in Regulations.gov, with guidance to navigate some of the issues they may face in e-Rulemaking.[5] With respect to the issues addressed in this recommendation, the APA contains sufficient flexibility to support e-Rulemaking and does not need to be amended for these purposes at the present time. Although the primary goal of this recommendation is to dispel some of the legal uncertainty agencies face in e-Rulemaking, where the Conference finds that a practice is not only legally defensible, but also sound policy, it recommends that agencies use it.

[5] This report follows up on previous work of the Administrative Conference. On October 19, 1995, Professor Henry H. Perritt, Jr. delivered a report entitled "Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication." Although never published, the Perritt Report continues to be a helpful resource and is available at: http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm.

It bears noting, however, that agencies may face other legal issues in e-Rulemaking, particularly when using wikis, blogs, or similar technological approaches to solicit public views, that are not addressed in this recommendation. Such issues, and other broad issues not addressed herein, are beyond the scope of this recommendation, but warrant further study.[6]

RECOMMENDATION

Considering Comments

1. Given the APA's flexibility, agencies should:

(a) Consider whether, in light of their comment volume, they could save substantial time and effort by using reliable comment analysis software to organize and review public comments.

(1) While 5 U.S.C. § 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.

(2) Agencies should also work together and with the eRulemaking program management office (PMO), to share experiences and best practices with regard to the use of such software.

[6] The Conference has a concurrent recommendation which focuses on issues relating to the comments phase of the notice-and-comment process independent of the innovations introduced by e-Rulemaking. *See* Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments.*

(b) Work with the eRulemaking PMO and its interagency counterparts to explore providing a method, including for members of public, for flagging inappropriate or protected content, and for taking appropriate action thereon.

(c) Work with the eRulemaking PMO and its interagency counterparts to explore mechanisms to allow a commenter to indicate prior to or upon submittal that a comment filed on Regulations.gov contains confidential or trade secret information.

(d) Confirm they have procedures in place to review comments identified as containing confidential or trade secret information. Agencies should determine how such information should be handled, in accordance with applicable law.

Assessing Privacy Concerns

2. Agencies should assess whether the Federal Docket Management System (FDMS) System of Records Notice provides sufficient Privacy Act compliance for their uses of Regulations.gov. This could include working with the eRulemaking PMO to consider whether changes to the FDMS System of Records Notice are warranted.

Maintaining Rulemaking Dockets in Electronic Form

3. The APA provides agencies flexibility to use electronic records in lieu of paper records. Additionally, the National Archives and Records Administration has determined that agencies are not otherwise legally required, at least under certain circumstances, to retain paper copies of comments properly scanned and included in an approved electronic recordkeeping system. The circumstances under which such destruction is permitted are governed by each agency's

records schedules. Agencies should examine their record schedules and maintain electronic records in lieu of paper records as appropriate.

4. To facilitate the comment process, agencies should include in a publicly available electronic docket of a rulemaking proposal all studies and reports on which the proposal for rulemaking draws, as soon as practicable, except to the extent that they would be protected from disclosure in response to an appropriate Freedom of Information Act request.[7]

5. Agencies should include in the electronic docket a descriptive entry or photograph for all physical objects received during the comment period.

Providing Rulemaking Records to Courts for Judicial Review

6. In judicial actions involving review of agency regulations, agencies should work with parties and courts early in litigation to provide electronic copies of the rulemaking record in lieu of paper copies, particularly where the record is of substantial size. Courts should continue their efforts to embrace electronic filing and minimize requirements to file paper copies of rulemaking records. The Judicial Conference should consider steps to facilitate these efforts.

Complying With Recordkeeping Requirements in e-Rulemaking

7. In implementing their responsibilities under the Federal Records Act, agencies should ensure their records schedules include records generated during e-Rulemaking.

[7] *See also* Exec. Order No. 13,563, § 2(b), 76 Fed. Reg. 3,821 (Jan. 18, 2011) (requiring agencies to provide timely online access to "relevant scientific and technical findings" in the rulemaking docket on regulations.gov).

Recommendation 2011-2
Rulemaking Comments

Background

Agencies conduct most rulemaking proceedings via the process of "notice and comment." Under this process, an agency publishes notice of a proposed rule in the Federal Register, gives the public a period of time in which to comment, and then issues a final rule after considering the comments received. See 5 U.S.C. § 553. The Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century, which was issued in December 2006 by the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary of the U.S. House of Representatives, identified a number of questions for the reconstituted Administrative Conference to address, and this project sought to examine several of the questions associated with rulemaking comments raised in that Report.

Research Methodology

Steven J. Balla, Associate Professor of Political Science at George Washington University, conducted an empirical study in which he analyzed over one thousand separate notices seeking comments connected with proposed rulemakings and interviewed rulemaking experts both within and outside of the government. Professor Balla submitted a report analyzing his research and offering a number of recommendations related to "best practices" agencies might undertake to improve the rulemaking comment process.

Recommendation

Conference Recommendation 2011-2 identified a series of best practices agencies should undertake to improve the transparency of the rulemaking comment process and promote the submission of useful comments. The recommendation encourages agencies to develop policies explaining the characteristics of effective comments for use by public commenters. It recommends minimum comment periods for rulemakings. It encourages agencies to develop policies for posting all comments received to the Internet within a specified period after submission. It recommends that agencies develop policies on the acceptance of anonymous comments and late comments and publish those policies. Finally, it encourages agencies to use reply comment periods when additional input on submitted comments would be beneficial and supplemental notices of proposed rulemaking when a sufficient period of time has elapsed since the initiation of the comment period such that existing comments have become "stale."

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Administrative Conference Recommendation 2011-2

Rulemaking Comments

Adopted June 16, 2011

One of the primary innovations associated with the Administrative Procedure Act ("APA") was its implementation of a comment period in which agencies solicit the views of interested members of the public on proposed rules.[1] The procedure created by the APA has come to be called "notice-and-comment rulemaking," and comments have become an integral part of the overall rulemaking process.

In a December 2006 report titled "Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century," the Subcommittee on Commercial and Administrative Law of the United States House of Representatives' Committee on the Judiciary identified a number of questions related to rulemaking comments as areas of possible study by the Administrative Conference.[2] These questions include:

- Should there be a required, or at least recommended, minimum length for a comment period?
- Should agencies immediately make comments publicly available? Should they permit a "reply comment" period?

[1] 5 U.S.C. § 553; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (describing the "notice-and-comment procedures for rulemaking" under the APA as "probably the most significant innovation of the legislation").

[2] SUBCOMM. ON COMMERCIAL & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMIN. LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY at 3–5 (Comm. Print 2006).

- Must agencies reply to all comments, even if they take no further action on a rule for years? Do comments eventually become sufficiently "stale" that they could not support a final rule without further comment?
- Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?
- What effects do comments actually have on agency rules?

The Conference has studied these questions and other, related issues concerning the "comment" portion of the notice-and-comment rulemaking process. The Conference also has a concurrent recommendation that deals with separate matters, focusing specifically on legal issues implicated by the rise of e-rulemaking. *See* Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*.

The Conference believes that the comment process established by the APA is fundamentally sound. Nevertheless, certain innovations in the commenting process could allow that process to promote public participation and improve rulemaking outcomes more effectively. In this light, the Conference seeks to highlight a series of "best practices" designed to increase the opportunities for public participation and enhance the quality of information received in the commenting process. The Conference recognizes that different agencies have different approaches to rulemaking and therefore recommends that individual agencies decide whether and how to implement the best practices addressed.

In identifying these best practices, the Conference does not intend to suggest that it has exhausted the potential innovations in the commenting process. Individual agencies and the Conference itself should conduct further empirical analysis of notice-and-comment rulemaking, should study the effects of the proposed recommendations to the extent they are implemented, and should adjust and build upon the proposed processes as appropriate.

RECOMMENDATION

1. To promote optimal public participation and enhance the usefulness of public comments, the eRulemaking Project Management Office should consider publishing a document explaining what types of comments are most beneficial and listing best practices for parties submitting comments. Individual agencies may publish supplements to the common document describing the qualities of effective comments. Once developed, these documents should be made publicly available by posting on the agency website, Regulations.gov, and any other venue that will promote widespread availability of the information.

2. Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. As a general matter, for "[s]ignificant regulatory action[s]" as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.[3]

3. Agencies should adopt stated policies of posting public comments to the Internet within a specified period after submission. Agencies should post all electronically submitted comments on the Internet and should also scan and post all comments submitted in paper format.[4]

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[3] *See also* Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993) ("Congress should consider amending section 553 of the APA to . . . . [s]pecify a comment period of 'no fewer than 30 days.'"); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.").

[4] *See also* Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010) ("OMB expects

4. The eRulemaking Project Management Office and individual agencies should establish and publish policies regarding the submission of anonymous comments.

5. Agencies should adopt and publish policies on late comments and should apply those policies consistently within each rulemaking. Agencies should determine whether or not they will accept late submissions in a given rulemaking and should announce the policy both in publicly accessible forums (*e.g.*, the agency's website, Regulations.gov) and in individual Federal Register notices including requests for comments. The agency may make clear that late comments are disfavored and will only be considered to the extent practicable.[5]

6. Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.[6]

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agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.").

[5] *See, e.g.*, Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5,120, 5,121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking announcing that "[c]omments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable").

[6] *See also* Administrative Conference of the United States, Recommendation 76-3, *Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking* (1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto "present new and important issues or serious conflicts of data"); Administrative Conference of the United States, Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability* (1972) (recommending that agencies consider providing an "opportunity for parties to comment on each other's oral or written submissions); Office of Information & Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13,563, M-11-10, at 2 (Feb. 2, 2011) ("[Executive Order 13,563] seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.").

7. Although agencies should not automatically deem rulemaking comments to have become stale after any fixed period of time, agencies should closely monitor their rulemaking dockets, and, where an agency believes the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale, consider the use of available mechanisms such as supplemental notices of proposed rulemaking to refresh the rulemaking record.

Recommendation 2011-3

Compliance Standards for Government Contractor Employees - Personal Conflicts of Interest and Use of Certain Non-Public Information

Background

Federal employees and employees of federal government contractors are subject to widely disparate ethics regimes. Whereas government employees must comply with extensive rules covering things like personal conflicts of interest, receiving gifts, and post-employment restrictions, contractor employees are generally not subject to such specific regulations.

Government contracting has vastly expanded in recent years, and some have suggested that the ethics regime currently applicable to contractors is insufficient. At the same time, new regulations can create additional costs for contractors and agencies. In this light, the project sought to identify pressing shortfalls in the existing ethics regime and solutions designed to promote integrity without imposing large compliance burdens on contractors or monitoring costs on agencies.

Research Methodology

Professor Kathleen Clark of the Washington University in St. Louis School of Law conducted extensive research involving interviews with contracting agencies, government contractors, and experts from the procurement community. In addition to Professor Clark's work, the Administrative Conference staff surveyed procurement officials at agencies that rely heavily on government contractors, spoke with a number of officials at associations of government contractors (including the Defense Industry Initiative and Professional Services Council), and worked with other experts in government contracting in order to identify certain types of services that pose a particularly high risk of ethical misconduct.

Recommendation

The research suggested that two potential ethical abuses are especially salient in the government contracting context: (a) contractor employee conflicts of interest (generally referred to as "personal conflicts of interest") and (b) contractor employee misuse of non-public information. The research also identified certain types of services for which government agencies might contract that are particularly likely to implicate those two ethical risks.

Conference Recommendation 2011-3 urges the Federal Acquisition Regulatory Council to draft a set of model contract clauses that contracting agencies may use when entering into any contract for such "high-risk" services. The draft clauses would provide protection against contractor employee conflicts of interest and/or misuse of non-public information. Contracting agencies should modify such clauses as appropriate or forego the use of such clauses if the particular contract at issue is unlikely to involve ethical risks.

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Administrative Conference Recommendation 2011-3

Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information

Adopted June 17, 2011

The Conference believes that it is important to ensure that services provided by government contractors—particularly those services that are similar to those performed by government employees—are performed with integrity and that the public interest is protected. In that light, the Conference recommends that the Federal Acquisition Regulatory Council ("FAR Council") promulgate model language in the Federal Acquisition Regulation ("FAR")[1] for agency contracting officers to use when negotiating or administering contracts that pose particular risks of government contractor employee personal conflicts of interest or misuse of non-public information. In order to ensure that, in its effort to protect the public interest, this recommendation does not create excessive compliance burdens for contractors or unnecessary monitoring costs for agencies, the Conference is limiting its recommendation to those areas that it has identified as the top priorities—contractor employees who perform certain activities identified as posing a high risk of personal conflicts of interest or misuse of non-public information.

[1] The FAR is a set of uniform policies and procedures that all executive agencies must use in procurements from sources outside of the government. 48 C.F.R. § 1.101. All executive agencies must comply with the FAR when purchasing from contractors, though individual agencies can also adopt agency-specific supplements to the FAR by regulation or provide additional requirements in individual contracts. *See, e.g.*, 48 C.F.R. ch. 2 (Defense Federal Acquisition Regulation Supplement for the Department of Defense) The FAR Council consists of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services. *See* 41 U.S.C. §§ 1102, 1302.

Background

In recent years, the federal government has increasingly relied upon private contractors to perform services previously provided in-house by civil servants.[2] Despite this expansion in the use of government contractors, there continues to be a substantial disparity between the ethics rules regulating government employees and those applicable to government contractor employees. Whereas an array of statutes and regulations creates an extensive ethics regime for government employees, the rules currently applicable to contractor employees vary significantly by agency.

Government employees are subject to various statutes and regulations that create a comprehensive ethics regime governing, among other things, their financial interests, use of government resources, outside activities, and activities in which they may engage after leaving government.[3] By contrast, the compliance standards applicable to contractor employees are much less comprehensive and can vary significantly from contract to contract. A handful of statutes apply to contractor employees and prohibit their offering bribes or illegal gratuities,[4] serving as foreign agents,[5] disclosing procurement information,[6] or offering or receiving

[2] Specifically, federal spending on service contracts increased by 85% in inflation adjusted dollars between 1983 and 2007. Kathleen Clark, *Ethics for an Outsourced Government* Table 3 (forthcoming), *available at* http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics. Over the same period, the number of executive branch employees declined by 18%. *Id.* In this light, the relative significance of the contractor workforce vis-à-vis the federal employee workforce has increased substantially in the last few decades.

[3] *Id.* at 7.

[4] 18 U.S.C. §§ 201(b)–(c).

[5] *Id.* § 219.

[6] 41 U.S.C. § 2102.

kickbacks.[7] The FAR requires contracting officers to identify organizational conflicts of interest (in which the *contractor* has a corporate interest that may bias its judgment or the advice it provides to the government) and either address or waive such conflicts.[8] The FAR also requires that contracting firms that have entered into one or more government contracts valued in excess of $5 million and requiring 120 days or more to perform have in place "codes of business ethics and conduct."[9] A handful of agencies have adopted ethics regulations supplementing the FAR,[10] and still other agencies impose additional ethics requirements by contract.[11]

Finally, certain contracting firms, most notably some performing work for the Department of Defense, have voluntarily adopted internal ethics codes, some of which provide fairly detailed rules relating to such important ethical issues as personal conflicts of interest, confidentiality, gifts and gratuities, protection of government property, and other major ethical

[7] *Id.* §§ 8701–07 (prohibiting kickbacks to contractors, subcontractors, and their employees).

[8] 48 C.F.R. § 9.500 *et seq.* The FAR provision applies only to organizational conflicts of interest, wherein the *firm itself* possesses such business interests, and not to personal conflicts of interest, wherein one of the *firm's employees* has a business or financial interest that could influence his or her decisionmaking in performing a contract.

[9] *Id.* §§ 3.1000–04. These codes must ensure that the firm has adequate systems for detecting, preventing, and reporting illegal conduct and violations of the civil False Claims Act and that it "[o]therwise promote[s] an organizational culture that encourages ethical conduct." *Id.* § 52.203-13. The FAR does not dictate, however, what types of potential ethical misconduct the internal corporate codes must address.

[10] Agencies that have adopted ethics regimes supplementing those contained in the FAR include the Department of Energy, Department of Health and Human Services, Department of the Treasury, Environmental Protection Agency, Nuclear Regulatory Commission, and United States Agency for International Development. Clark, *supra* note 2, Table VII. These supplemental regimes are not comprehensive, however, and generally apply only to specific types of contracts. By contrast, the Federal Deposit Insurance Corporation, though it is not covered by the FAR, has implemented a comprehensive ethics system that applies to all of its contractor employees. *Id.*; *see also* 12 C.F.R. § 366.0 *et seq.*

[11] *See, e.g.*, USAID Acquisition Regulation 148, *available at* http://www.usaid.gov/policy/ads/300/aidar.pdf.

areas, and that establish internal disciplinary processes for employee violations of such codes.[12] Nevertheless, the corporate codes do not generally require that unethical conduct that is not otherwise illegal or unlawful be reported to the contracting agency.[13] Furthermore, though the corporate codes provide certain protections for the government,[14] they generally only require contractor employees to protect against personal conflicts with their *employer's* interest rather than the *government's* interest.[15] Finally, many contractors (particularly those outside of the defense setting) do not have internal ethics codes.

Scope of the Problem

By dint of their work for and as part of the government, contractors performing certain services, particularly those that can influence government decisions or have access to non-public information, are in a position of public trust and responsibility for the protection of public resources, as is the government itself. It is therefore critical that their employees behave with the same high degree of integrity as government employees and do not exploit positions

[12] *See generally* DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, PUBLIC ACCOUNTABILITY REPORT (2009), *available at* http://www.dii.org/files/annual-report-2008.pdf. Many of the most extensive internal codes are implemented by companies that are members of the Defense Industry Initiative ("DII"), which includes 95 defense contractors that agree to implement such ethics codes and comply with certain values in maintaining an ethical workplace. Contractor employees can be disciplined internally for violating their company's ethics code, and companies commit to disclose violations of the law and "instances of significant employee misconduct" to the contracting agency. *Id.* at 49.

[13] *See id.* at 49–50 (contractors are only *required* to report those violations covered by FAR § 52.203-13).

[14] *See id.* at 33 (noting that DII member company codes require them to protect government property).

[15] *See id.* at 34 ("Employees are prohibited from having personal, business, or financial interests that are incompatible with their responsibility to their employer."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-169, ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DOD CONTRACTOR EMPLOYEES 3 (2008) ("Most of the contractor firms have policies requiring their employees to avoid a range of potential interests—such as owning stock in competitors—that conflict with the *firm's* interest. However, only three of these contractors' policies directly require their employees to disclose potential personal conflicts of interest with respect to their work at DOD so they can be screened and mitigated by the firms.").

of public trust for improper personal gain. Whether or not there is any widespread pattern of ethical abuses, the existence of significant ethical *risks* can erode public confidence in the government procurement process and in the government itself. Accordingly, it is entirely appropriate to hold those contractors and their employees to a high ethical standard of conduct.

As noted above, a significant disparity currently exists between the ethical standards applicable to government employees, which are comprehensive and consist predominantly of specific rules, and those applicable to contractor employees, which are largely developed and applied on an ad hoc basis and involve significantly vaguer standards.[16] Many contractors have undertaken laudable efforts to promote a culture of compliance through the implementation of company-specific ethics standards,[17] but not every contractor has such internal standards. The Conference believes that adoption of contractor ethics standards applicable to certain high-risk activities would protect the public interest and promote integrity in government contracting. In addition, the Conference aims to promote public confidence in the system of government contracting and in the integrity of the government.

Of course, the mere existence of a disparity between government employee and contractor ethics standards is not itself conclusive evidence that contractor employee ethics standards should be expanded. Indeed, simply applying the rules governing the ethics of government employees (particularly those dealing with financial disclosures to guard against personal conflicts of interest) directly to contractors could create excessive and unnecessary

[16] There are pending FAR rules relating to protection of non-public information, 76 Fed. Reg. 23,236 (Apr. 26, 2011), and preventing personal conflicts of interest for contractor employees performing acquisition activities closely related to inherently governmental functions, 74 Fed. Reg. 58,584 (Nov. 13, 2009), but these proposed rules are not yet adopted and also cover only some of the topics addressed in this recommendation.

[17] *See generally* DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, *supra* note 12.

compliance burdens for contractors and monitoring costs for agencies.[18] To address this concern, the Conference has focused on the most significant ethical risks that arise in government contracts as well as the activities most likely to implicate those risks. Specifically, the Conference has identified contractor employees' personal conflicts of interest and use of non-public information as two areas calling for greater measures to prevent misconduct. Of course, those are not necessarily the only risks in the current system, and individual agencies have chosen or may hereafter choose to impose ethics requirements in other areas as well. The Conference, however, believes those two identified areas warrant more comprehensive measures to prevent misconduct. The Conference believes those two identified areas call for ethics standards, although agencies should be mindful of risks requiring more particularized treatment that may be present in their specific contexts.

Personal Conflicts of Interest and Misuse of Certain Non-Public Information

The most common ethical risks currently addressed in specific agency supplements to the FAR (as well as in contractors' own internal codes of conduct) include personal conflicts of interest, gifts, misuse of government property, and misuse of non-public information.[19] Of these major ethical risks, existing criminal laws regulate contractors' offering or receipt of gifts and misuse of government property. With respect to gifts, criminal bribery laws would prohibit

[18] REPORT OF THE ACQUISITION ADVISORY PANEL 418 (Jan. 2007). Various agencies have extended certain aspects of the ethics standards applicable to government employees to contractor employees, *see, e.g.*, 12 C.F.R. § 366.0 *et seq.* (FDIC contractor regulations), and their decision to do so has not necessarily created excessive compliance or monitoring costs. Nevertheless, extending *all* government employee ethics rules to *all* contractor employees serving all agencies, without consideration of the specific ethical risks presented, would likely impose costs that are excessive in relation to the benefits received. Accordingly, the Conference believes that the FAR Council and individual agencies should proceed carefully in ensuring that any expansion of the current ethics regime is cost-effective, while at the same time protecting the government's interests.

[19] *See id.*; Kathleen Clark, *supra* note 2, Table VII; Marilyn Glynn, *Public Integrity & the Multi-Sector Workforce*, 52 WAYNE L. REV. 1433, 1436–38 (2006); DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, *supra* note 12, at 29–60.

a contractor employee's *offering* anything of value to a federal employee to obtain favorable treatment,[20] and the Anti-Kickback Act would prohibit a contractor employee from *accepting* gifts from a potential sub-contractor or other party that are aimed at improperly obtaining favorable treatment under the contract.[21] With respect to misuse of property, traditional criminal laws against larceny and embezzlement would prohibit a contractor employee's misappropriating public property, and federal criminal law prohibits a contractor employee's misusing or abusing government property.[22]

On the other hand, a contractor employee is less likely to face sanctions under existing laws if he or she acts despite a personal conflict of interest or exploits non-public information for personal gain. Though the Anti-Kickback Act would prevent a contractor employee's directing business to a third party in exchange for an actual payment,[23] nothing under current law would prevent a contractor employee from directing business towards a company in which he or she owns stock (*i.e.*, a personal conflict of interest). Similarly, though insider trading laws would apply if a contractor employee bought securities based upon information learned from government contracts,[24] nothing under current law would prevent a contractor employee from purchasing other items, such as land that will appreciate upon announcement of construction

[20] 18 U.S.C. § 201(c).

[21] 41 U.S.C. § 8702. Of course, in light of the severity of criminal sanctions, many instances of misconduct are likely to go unpunished under the current regime. For instance, resource constraints may make it unlikely that a United States Attorney would prosecute a contractor employee for accepting a lavish meal from a prospective sub-contractor. Nevertheless, the mere threat of criminal prosecution may deter potential misconduct.

[22] 18 U.S.C. § 641; Morissette v. United States, 342 U.S. 246, 272 (1952). In addition, agencies often stipulate by contract that government property may not be used for personal benefit (*e.g.*, a contractor employee's using government computers for personal use). Glynn, *supra* note 19, at 1437.

[23] 41 U.S.C. § 8702.

[24] Dirks v. Sec. Exch. Comm'n, 463 U.S. 646, 655 n.14 (1983); 17 C.F.R. § 240.10b5-2(b).

of a military base, on the basis of information learned while performing his or her contractual duties.

In this light, various governmental entities that have studied issues of contractor ethics have singled out preventing personal conflicts of interest and misuse of non-public information as areas that need to be strengthened.[25] By focusing on these two areas of risk, the Conference does not intend to discourage agencies from adopting additional ethics requirements regarding procurement activities by regulations or contract. Indeed, some agencies may choose to adopt rules regulating ethical risks such as contractor employee receipt of gifts or misuse of property as an additional prophylactic measure, notwithstanding the existence of criminal penalties covering similar conduct. Rather, the Conference believes that personal conflicts of interest and protection of non-public information are two areas for which greater measures to prevent misconduct are particularly appropriate, and it therefore recommends targeted measures designed to address those risks. The recommendation would serve as a floor upon which agencies could build and would not be intended to deter adoption of a more expansive ethics

[25] *See, e.g.*, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58,584, 58,588–89 (proposed Nov. 13, 2009) (setting forth proposed FAR rules regulating personal conflicts of interest and use of non-public information for private gain in the case of contractors performing acquisition activities closely related to inherently governmental functions); Glynn, *supra* note 19, at 1436–37 (article by general counsel of the Office of Government Ethics recommending, inter alia, extending ethics rules to include contractor employee conflicts of interest and misuse of non-public information); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15, at 31 ("We recommend . . . personal conflict of interest contract clause safeguards for defense contractor employees that are similar to those required for DOD's federal employees."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-693, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION 30 (2010) (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors' accessing sensitive information and on "establishing a requirement for prompt notification to appropriate agency officials of a contractor's unauthorized disclosure or misuse of sensitive information"); OFFICE OF GOV'T ETHICS, REPORT TO THE PRESIDENT & TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 38–39 (2006) (noting "expressions of concern" the Office has received regarding personal conflicts of interest and highlighting the possibility of agencies' including contract clauses to deal with such issues); REPORT OF THE ACQUISITION ADVISORY PANEL, *supra* note 18, at 423–25 (concluding that additional safeguards were necessary in order to protect against contractor employee personal conflicts of interest and misuse of confidential or proprietary information).

regime, either individually or through the FAR Council, to the extent the agencies find it appropriate.

"High Risk" Contracts

PCI-Risk Contracts: The Conference has sought to identify those types of activities most likely to create risks of personal conflicts of interest, situations in which a contractor employee may have some interest that may bias his or her judgment. Several statutes and regulations prohibit contractors from performing "inherently governmental functions," which are defined as functions "so intimately related to the public interest" as to require performance by government employees.[26] The FAR also contains a list of activities that "approach" being classified as "inherently governmental functions."[27] As a recent proposed policy letter from the Office of Federal Procurement Policy recognizes, contractors performing activities that are similar to "inherently governmental functions" should be subject to close scrutiny, given that the work that they perform is near the heart of the traditional role of the federal government.[28] Several of the functions listed as "approach[ing] . . . inherently governmental functions" involve activities wherein the contractor either advises in agency policymaking or participates in procurement functions, which raise particular risks of employee personal conflicts of interest. Other activities identified as raising particular risks of employee personal conflicts of interest include "advisory and assistance services" and "management and operating" functions.[29]

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[26] Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5(2)(A), 112 Stat. 2382, 2384; 48 C.F.R. § 2.101; OMB, Circular A-76, Performance of Commercial Activities, Attachment A § B.1.a. Though each of these authorities uses slightly different wording in defining "inherently governmental function," the differences are apparently of no legal significance. Office of Management & Budget, Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,190 (proposed Mar. 31, 2010).

[27] 48 C.F.R. § 7.503(d).

[28] Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. at 16,193–94.

[29] REPORT OF THE ACQUISITION ADVISORY PANEL, *supra* note 18, at 411.

The FAR contains provisions identifying activities that "approach" being "inherently governmental functions,"[30] feature "advisory and assistance services,"[31] or involve "management and operating" functions.[32] Many of these activities, such as those in which a contractor employee performs tasks that can influence government action, including the expenditure of agency funds, may pose a significant risk of personal conflicts of interest. Several contracting tasks, by their nature, elevate the risk of such conflicts. Those include substantive (as compared to administrative or process-oriented) contract work (hereinafter referred to as "PCI-Risk" contracts[33]) such as:

- Developing agency policy or regulations
- Providing alternative dispute resolution services on contractual matters; legal advice involving interpretation of statutes or regulations; significant substantive input relevant to agency decision-making; or professional advice for improving the effectiveness of federal management processes and procedures
- Serving as the primary authority for managing or administering a project or operating a facility
- Preparing budgets, and organizing and planning agency activities

[30] 48 C.F.R. § 7.503(d).

[31] *Id.* § 2.101.

[32] *Id.* § 17.601.

[33] The Conference believes that these activities are particularly likely to pose a risk of personal conflicts of interest. To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate contracts for such activities.

- Supporting substantive acquisition planning[34] or research and development activities
- Evaluating another contractor's performance or contract proposal
- Assisting in the development of a statement of work or in contract management
- Participating as a technical advisor to a source selection board or as a member of a source evaluation board (*i.e.*, boards designed to select or evaluate bids or proposals for procurement contracts)

Information-Risk Contracts: Existing regulations also do not comprehensively protect against contractor employees' disclosure or misuse of non-public governmental, business, or personal information learned while performing government contracts.[35] As with personal conflicts of interest, specific activities pose a grave risk of contractor disclosure or misuse of non-public information, which include (hereinafter referred to as "Information-Risk" contracts[36]):

[34] The FAR Council has issued a proposed rule that would establish personal conflict of interest standards for contractor employees performing acquisition activities closely associated with inherently governmental functions. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. at 58,588. To the extent it is ultimately implemented, this rule would obviate the need for any additional FAR contract clause with respect to these contracts.

[35] U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 25, at 30 (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors' accessing sensitive information and on "establishing a requirement for prompt notification to appropriate agency officials of a contractor's unauthorized disclosure or misuse of sensitive information").

[36] The Conference believes that these activities are particularly likely to pose a risk of disclosure or misuse of non-public information. This recommendation does not define the term "non-public information"; the FAR Council would be responsible for drafting language more precisely defining the types of information and services covered. In doing so, the FAR Council could choose to draw on existing definitions created for similar purposes. *See, e.g.*, 5 C.F.R. § 2635.703 (defining "nonpublic information" and prohibiting government employees from misusing such information, including information routinely withheld under 5 U.S.C. § 552(b) (FOIA exemptions)); U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 25, at

- Contracts in which certain employees will receive access to information relating to an agency's deliberative processes, management operations, or staff that is not generally released to the public
- Contracts in which certain employees will have access to certain business-related information, including trade secrets, non-public financial information, or other non-public information that could be exploited for financial gain[37]
- Contracts in which certain employees will have access to personally identifying or other non-public personal information, such as social security numbers, bank account numbers, or medical records[38]

RECOMMENDATION

1. **The Federal Acquisition Regulatory Council ("FAR Council") should promulgate model language for use in contracts posing a high risk of either personal conflicts of interest**

4–5 (defining a category of information that requires safeguards against unauthorized disclosure). To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate such activities through appropriate solicitation provisions or contract clauses.

[37] For instance, if an employee of a contractor performing auditing functions for the government were to learn that a large manufacturing firm intends to open a new plant in coming months, the employee could purchase property near the plant and reap a substantial financial windfall. The contemplated regime would require that the contractor train employees privy to such information on their obligations to keep the information confidential and to avoid transacting business on the basis of such information, penalize employees who violate such obligations, and report any employee violations to the contracting agency.

[38] U.S. GOV'T ACCOUNTABILITY OFFICE, STRONGER SAFEGUARDS NEEDED FOR CONTRACTOR ACCESS TO SENSITIVE INFORMATION, *supra* note 24, at 6.

or misuse of certain non-public information.[39] Current law does not adequately regulate against the risks of contractor employee personal conflicts of interest and misuse of non-public information. On occasion certain agencies impose additional ethics requirements by supplemental regulation or contract. In addition, certain contractors, especially large companies, have adopted and enforced internal ethics codes. Nevertheless, coverage varies significantly from agency to agency and contract to contract. In order to bring consistency to this process and ensure that the government's interests are adequately protected, the FAR Council should draft model language in the Federal Acquisition Regulation ("FAR") for agency contracting officers to use, with modifications appropriate to the nature of the contractual services and risks presented, when soliciting and negotiating contracts that are particularly likely to raise issues of personal conflicts of interest or misuse of non-public information.

2. **The model FAR provisions or clauses should apply to PCI-Risk and Information-Risk Contracts.**[40] The proposed FAR provisions or clauses would apply only to PCI-Risk and Information-Risk contracts (or solicitations for such contracts). At the same time, contracting agencies should remain free to incorporate contract language (or to promulgate agency-specific supplemental regulations) dealing with other ethical risks they deem important whether or not the contract at issue qualifies as a PCI-Risk or Information-Risk contract. Thus, the model FAR provisions or clauses adopted in response to this recommendation would serve as a floor upon which agencies could build if they deemed it appropriate, but would not supplant existing

[39] The Conference takes no position on whether the contractual language adopted in individual contracts should "flow down" to sub-contractors and other persons besides prime contractors performing work on government contracts. That issue is best left to the discretion of the FAR Council.

[40] The draft language would appear in part 52 of the FAR and would consist of draft solicitation provisions (which are used in soliciting contracts) and contract clauses (which are integrated into negotiated contracts). The use of the plural forms "provisions" and "clauses" is not intended to exclude the possibility that the FAR Council could implement the recommendations with a single provision or clause. See the Preamble for the definition of "PCI-Risk" and "Information-Risk" contracts.

programs that now provide or may in the future provide more demanding or expansive ethical protections.

3. **Agencies should have the discretion whether to use or modify the model FAR provisions or clauses.** An agency contracting officer would have the option to use the model FAR provisions or clauses when soliciting and/or contracting for activities falling into the PCI-Risk or Information-Risk categories. Because the provisions or clauses would be optional, the contracting agency would enjoy the discretion to modify the FAR language on a case-by-case basis to fit the circumstances, and to decide to forego including any such language if it deems that the particular contract at issue is unlikely to pose a significant risk of personal conflicts of interest or misuse of non-public information by contractor personnel. Nevertheless, the FAR Council should encourage contracting officers to use the model FAR language when applicable.

4. **The FAR should include model provisions or clauses for use in PCI-Risk procurements.** The FAR Council should encourage agencies to include these model provisions or clauses in contracting actions involving PCI-Risk procurements.

The proposed FAR provisions or clauses should require the contractor to certify[41] that none of its employees who is in a position to influence government actions[42] has a conflict of

[41] The FAR should include a certification requirement rather than a disclosure process in order to minimize the burden on contractors. In order to fully perform their contractual obligations, contractors should be required to train their key personnel on recognizing and disclosing personal conflicts of interest. In the case of an anticipated conflict, a contractor employee should disclose the issue to the contractor, who must screen the employee from performing under the contract. The contractor should be responsible for disciplining employees who fail to disclose conflicts or honor a screening policy, and for disclosing such violations to the government.

[42] Every employee performing under the contract need not certify that he or she does not possess conflicting financial interests. For instance, in the case of a contractor assisting in the development of agency policy (a function falling within one of the "high risk" categories), employees performing administrative or other non-discretionary (particularly ministerial) tasks, such as those making copies of the report that the contractor will submit, need not perform such a certification.

interest or that conflicted employees will be screened from performing work under any contract. Once a contractor is selected, the contract itself should include a clause requiring the contractor to train employees on recognizing conflicts, to implement a system for employees who can influence government action to report conflicts to the contractor, to screen any conflicted employees from contract performance, to report to the agency periodically on its efforts to protect against employee conflicts, and to disclose to the agency any instances of employee misconduct (as well as disciplinary action taken against any offending employee). A contractor's failure to implement an adequate system for employee conflict certification, to disclose or correct instances of employee misconduct, or to take appropriate disciplinary measures against employees who commit misconduct may be grounds for contract termination. In addition, a contractor that repeatedly proves incapable or unwilling to honor such contractual obligations may be subject to suspension or debarment in appropriate circumstances.

5. **The FAR should include model provisions or clauses for use in Information-Risk procurements.** The FAR Council should encourage agencies to include these model provisions or clauses in contracting actions involving Information-Risk procurements.

The FAR language should require the contractor to ensure that its employees who have access to certain non-public information identified as posing an information risk are made aware of their duties to maintain the secrecy of such information and to avoid using it for personal gain. To the extent an employee breaches either of these obligations, the contractor should be responsible for reporting the breach to the government, minimizing the effects of the breach, and, where appropriate, disciplining the offending employee. A contractor's failure to observe these contractual requirements may be grounds for contract termination. In addition, a contractor that proves repeatedly incapable or unwilling to fulfill its duties may be subject to suspension or debarment in appropriate circumstances.

6. **Agencies not covered by the FAR also should consider using or modifying the model FAR provisions or clauses when negotiating contracts for activities falling in either of the "high risk" categories.** Agencies and government instrumentalities not covered by the FAR should nevertheless familiarize themselves with the FAR language promulgated in response to this recommendation. To the extent that they plan to enter into contracts for activities listed in the PCI-Risk or Information-Risk categories, they should consider employing or, if necessary, modifying these solicitation provisions and/or contract clauses.

Recommendation 2011-4

Agency Use of Video Hearings: Best Practice and Possibilities for Expansion

Background

Since the early 1990s, various entities in the public and private sectors have explored potential uses of video teleconferencing technology ("VTC") in administrative hearings and other adjudicatory proceedings. In the last 10 years, advances in technology and carrier services coupled with reduced personnel and increased travel costs have made the use of VTC more attractive to local, state and federal governments. Similarly, in the past 10 years, there has been an increase in the use of video hearings by federal agencies with high volume caseloads. Some applaud the use of VTC by administrative agencies because it offers potential efficiency benefits, such as reducing the need for travel and the costs associated with it, reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as well as increasing access for parties. Critics, however, have suggested that hearings and other adjudicatory proceedings conducted by video may hamper communication between a party and the decision-maker; may hamper communication between parties and their attorneys or representatives; and/or may hamper a decision-maker's ability to make credibility determinations.

Research Methodology

Funmi E. Olorunnipa, Attorney Advisor at the Administrative Conference, served as in-house researcher for the project. In that capacity, Ms. Olorunnipa conducted extensive research involving interviews with senior officials, administrative law judges and staff from several federal agencies that regularly use VTC in administrative hearings. Ms. Olorunnipa also reviewed cost-benefit analysis data regarding the use of video hearings at several agencies as well as data comparing the outcomes of cases involving the use of video hearings and those involving in-person hearings.

Data evaluating satisfaction of individuals who participated in video hearings was also examined. Based on the interviews, data and other background research conducted, Ms. Olorunnipa prepared a report using several agencies as case studies. The report also set forth some criteria and best practices for agency use of VTC in administrative hearings or proceedings.

Recommendation

After considering Ms. Olorunnipa's report, the Conference adopted Recommendation 2011-4, "Agency Use of Video Hearings: Best Practice and Possibilities for Expansion." The Recommendation focuses on federal agency use of VTC in administrative hearings or proceedings by setting forth some best practices and possibilities for expansion.

Based on the research, the Recommendation suggests that agencies should use VTC only after conducting an analysis of the costs and benefits of VTC use and determining that such use would improve efficiency (i.e., timeliness and costs of adjudications) and would not impair the fairness of the proceedings or the participants' satisfaction with them. The Recommendation sets forth some criteria that agencies should consider when determining whether to use VTC. For those agencies that determine the use of VTC would be beneficial, the Recommendation also sets forth best practices provided in part by agencies currently using VTC in administrative hearings.

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Administrative Conference Recommendation 2011-4

Agency Use Of Video Hearings: Best Practices And Possibilities For Expansion

Adopted June 17, 2011

Since the early 1990s, video teleconferencing technology ("VTC") has been explored by various entities in the public and private sectors for its potential use in administrative hearings and other adjudicatory proceedings.[1] In the last 10 years, advances in technology and carrier services coupled with reduced personnel and increased travel costs have made the use of VTC more attractive to local, state and federal governments. The rise in the use of VTC by federal and state courts has also been noted by academics.[2] Similarly, in the past 10 years, there has been an increase in the use of video hearings by federal agencies with high volume caseloads. Since pilot programs for video hearings at agencies first began in the early 1990s, VTC technology has become more advanced, more readily available and less expensive.

Certain federal agencies, such as the Social Security Administration's Office of Disability Adjudication and Review ("ODAR"), the Department of Veteran Affairs' Board of Veteran Appeals ("BVA") and the Department of Justice's Executive Office for Immigration Review

[1] *See, e.g.*, Robert Anderson, *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future*, 66 S. Cal. L. Rev. 1762, 1770 (1993).

[2] *See, e.g.*, Richard K. Sherwin, Neal Feigenson, & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. Sci. & Tech. L. 227, 229 (2006); Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 Ariz. L. Rev. 287, 295 (2006); Fredric Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's -- and Tomorrow's -- High Technology Courtrooms*, (State Justice Inst. 1999), *reprinted in* 50 S.C. L. REV. 799, 801 (2000).

("EOIR") have taken advantage of VTC for various adjudicatory proceedings. For example, in 2010, ODAR conducted a total of 120,624 video hearings, and a cost-benefit analysis conducted for the agency by outside consultants found that ODAR's current use of video hearings saves the agency a projected estimated amount of approximately $59 million dollars annually and $596 million dollars over a 10-year period. A study by the agency has also determined that the use of VTC has no effect on the outcome of cases.

Other agencies, such as the Railroad Retirement Board, the United States Postal Service, the Department of Health and Human Services' Office of Medicare Hearings and Appeals, specifically have regulations allowing for the use of video teleconferencing.[3] Similarly, agencies such as the U.S. Merit Systems Protection Board and the Commerce Trademark Trial and Appeal Board use VTC to conduct administrative hearings and other adjudicatory proceedings as a matter of practice under the broad statutory and/or regulatory discretion given to them.[4]

Despite the fact that some agencies within the federal government have been using VTC to conduct mass adjudications for years, other agencies have yet to employ such technology. This may be because the use of VTC for administrative hearings is not without controversy. Some applaud the use of VTC by administrative agencies because it offers potential efficiency benefits, such as reducing the need for travel and the costs associated with it, reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as well as increasing access for parties.[5] Critics, however, have suggested that hearings and other adjudicatory proceedings conducted by video may hamper communication between a party

[3] *See, e.g.*, 20 C.F.R. § 260.5; 39 C.F.R. § 966.9; and 42 C.F.R. § 405.

[4] *See, e.g.*, 5 U.S.C. § 1204(a)(1) and 37 C.F.R. § 2.129(a).

[5] *See* Meghan Dunn & Rebecca Norwick, Federal Judicial Center Report of a Survey of Videoconferencing in the Court of Appeals (2006), pp. 1-2, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf.

and the decision-maker; may hamper communication between parties and their attorneys or representatives; and/or may hamper a decision-maker's ability to make credibility determinations.[6]

Recognizing both the praise for and critique of the use of VTC in administrative hearings and other adjudicatory proceedings, the Administrative Conference issues this Recommendation regarding the use of VTC in federal agencies with high volume caseloads. The Conference has a long standing commitment to the values inherent in the agency adjudicatory process: efficiency, fairness and acceptability/satisfaction.[7] These values should drive decisions to use VTC. Therefore, this Recommendation suggests that agencies should use VTC only after conducting an analysis of the costs and benefits of VTC use and determining that such use would improve efficiency (i.e., timeliness and costs of adjudications) and would not impair the fairness of the proceedings or the participants' satisfaction with them. In addition, this Recommendation supports the Conference's statutory mandate of making improvements to the regulatory and adjudicatory process by improving the effectiveness and fairness of applicable laws. *See generally* Administrative Conference Act, 5 U.S.C §§ 591-596.

Accordingly, this Recommendation is directed at those agencies with high volume caseloads that do not currently use VTC as a regular practice in administrative hearings and/or other adjudicatory proceedings and that may benefit from the use of it to improve efficiency and/or reduce costs. Agencies with high volume caseloads are likely to receive the most benefit and/or cost savings from the use of VTC. However, the Conference encourages all

[6] *See* American Bar Association's Commission on Immigration Report entitled *"Reforming the Immigration System"* (2010), pp. 2-26-2-27.

[7] *See* Roger C. Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 591-93 (1972) (Professor Cramton is a former Chairman of the Conference); *see also* Paul R. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976) (describing the values of efficiency, fairness and satisfaction) (Mr. Verkuil is the current Chairman of the Conference). The balancing of these procedural values was undertaken in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

agencies (including those with lower volume caseloads) to consider whether the use of VTC would be beneficial as a way to improve efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of proceedings. This Recommendation sets forth some non-exclusive criteria that agencies should consider. For those agencies that determine that the use of VTC would be beneficial, this Recommendation also sets forth best practices provided in part by agencies currently using VTC.

RECOMMENDATION

1. Federal agencies with high volume caseloads should consider using video teleconferencing technology ("VTC") to conduct administrative hearings and other aspects of adjudicatory proceedings. Agencies with lower volume caseloads may also benefit from this recommendation.

2. Federal agencies with high volume caseloads should consider the following non-exclusive criteria when determining whether to use video teleconferencing technology in administrative hearings and other adjudicatory proceedings:

(a) whether an agency's use of VTC is legally permissible under its organic legislation and other laws;

(b) whether the nature and type of administrative hearings and other adjudicatory proceedings conducted by the agency are conducive to the use of VTC;

(c) whether VTC can be used without affecting the outcome of cases heard by the agency;

(d) whether the agency's budget would allow for investment in appropriate and secure technology given the costs of VTC;

(e) whether the use of VTC would create cost savings, such as savings associated with reductions in personnel travel and with increased productivity resulting from reductions in personnel time spent on travel;

(f) whether the use of VTC would result in a reduction of the amount of wait time for an administrative hearing;

(g) whether users of VTC, such as administrative law judges, hearing officers and other court staff, parties, witnesses and attorneys (or other party representatives), would find the use of such technology beneficial;

(h) whether the agency's facilities and administration, both national and regional (if applicable), can be equipped to handle the technology and administration required for use of VTC;

(i) whether the use of VTC would adversely affect the representation of a party at an administrative hearing or other adjudicatory proceeding; and

(j) whether the communication between the various individuals present at a hearing or proceeding (including parties, witnesses, judges, hearing officers and other agency staff, translators and attorneys (or other party representatives)) would be adversely affected.

3. Federal agencies with high volume caseloads that decide to use video teleconferencing technology to conduct administrative hearings and other adjudicatory proceedings should consider the following best practices:

(a) Use VTC on a voluntary basis and allow a party to have an in-person hearing or proceeding if the party chooses to do so.

(b) Periodically evaluate the use of VTC to make sure that the use is outcome-neutral (i.e., does not affect the decision rendered) and that the use is meeting the needs of its users.

(c) Solicit feedback and comments (possibly through notice-and-comment rulemaking) about VTC from those who would use it regularly (e.g., administrative law judges, hearing officers and other administrative staff, parties, witnesses and attorneys (or other party representatives)).

(d) Begin the use of VTC with a pilot program and then evaluate the pilot program before moving to wider use.

(e) Structure training at the outset of implementation of VTC use and have technical support available for troubleshooting and implementation questions.

(f) Consult the staff of the Administrative Conference of the United States and/or officials at other agencies that have used VTC for best practices, guidance, advice, and the possibilities for shared resources and collaboration.

continuing recommendation projects

Four recommendations were adopted at the 55th Plenary Session on December 8-9, 2011. These projects were:

- Agency Innovations in e-Rulemaking;
- Incorporation By Reference;
- Federal Advisory Committee Act: Issues and Proposed Reforms; and
- International Regulatory Cooperation.

To ensure public participation and engage interested stakeholders, committee meetings are announced concurrently via the Federal Register, the ACUS website, and social media tools. They are also streamed live over the internet. The following projects are in varying stages of the research process. Project descriptions are provided in this section.

- Congressional Review Act
- Federal Executive Establishment
- Government in the Sunshine Act
- Immigration Adjudication
- Midnight Rules
- Paperwork Reduction Act
- Procedural Traps: 28 U.S.C. § 1500
- Review of Regulatory Analysis Requirements
- Science in the Administrative Process
- Social Security Administration Adjudication
- Conference Researchers, Past and Present
- ACUS Research Consultants, FY 2010-2011
- Past Consultants, Researchers and Contributors

Agency Innovations in e-Rulemaking

Background

Traditionally, the notice-and-comment rulemaking process required by 5 U.S.C. § 553 was conducted on paper: the government issued a paper notice and the public submitted paper comments. Today it seems obvious that notice should be issued, and comments received, electronically, over the Internet.

Starting in 2002, the government created an electronic system for receiving public comments on agency rules. The system consists of three parts: the Federal Docket Management System (FDMS), which is the database that contains electronic versions of rulemaking documents; fdms.gov, which is the secure interface via which government agencies access the database; and regulations.gov, which is the open interface via which the public submits comments and accesses publicly-available documents in the database. All executive agencies are required to use FDMS. Some independent agencies use FDMS and some have their own electronic systems.

The Conference has conducted a study of agency innovations and experiments in e-rulemaking. The study surveys existing e-rulemaking practices at federal agencies and identifies useful innovations and best practices that might be incorporated into FDMS and regulations.gov or otherwise spread to other agencies.

Research Methodology

Professor Cary Coglianese of the University of Pennsylvania Law School conducted a study of 90 agency websites and e-rulemaking initiatives. The agencies included in the study had reported completing an average of two or more rulemakings during each six-month period covered by the semi-annual agenda.

Recommendation

The Committee on Rulemaking considered a recommendation based on Professor Coglianese's report. The recommendation encouraged agencies to use the Internet to increase the visibility of rulemakings and improve public participation in rulemaking activities.

It suggested that agencies make rulemaking information, including open dockets, comment policies, and materials from completed rulemakings more electronically accessible.

Agencies were additionally urged to take steps to improve e-rulemaking participation by those who have historically faced barriers to access, including non-English speakers, users of low-bandwidth Internet connections, and individuals with disabilities.

The final recommendation looks forward to the future, urging agencies to continue to innovate and find cost-effective ways to engage the public in e-rulemaking.

Resources

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Incorporation By Reference

Background

Incorporation by reference allows agencies to fulfill their legal obligation to publish rules in the Code of Federal Regulations (CFR) by referring to standards or other materials that have been published elsewhere. For example, an agency may include technical specifications in a regulation by incorporating by reference a technical standard created by a private standard-setting organization.

Such incorporation by reference is common in part because federal policy requires regulatory agencies to use voluntary consensus standards in lieu of government-unique standards when doing so is not impractical or inconsistent with statutory mission. That policy builds upon Conference Recommendation, No. 78-4, "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulations," adopted in December 1978, encouraging the use of voluntary consensus standards in health and safety regulation. In the more than thirty years since the Conference issued Recommendation No. 78-4, agencies have promulgated thousands of regulations that incorporate by reference standards published elsewhere. As the practice of incorporation by reference has increased, common issues warranting examination have emerged.

The Conference has conducted a study examining legal and policy issues related to agency use of incorporation by reference. The practice raises common issues that individual agencies deal with differently, and the aim of the Conference's project is to consolidate the dispersed knowledge of affected agencies, identify best practices, and recommend ways to improve the process.

Specific challenges that will be addressed include updating regulations that incorporate extrinsic materials by reference, ensuring access to referenced materials, addressing copyright issues that may arise, and finding ways to improve procedures for approving and managing regulations that incorporate other materials by reference.

Research Methodology

In-house researcher Emily Schleicher Bremer interviewed representatives of over twenty federal agencies and interested private parties, including standard developers and public interest organizations, about incorporation by reference. She also comprehensively examined relevant documents, including statutes, judicial opinions, federal regulations, executive policy documents, scholarly works, and other private publications.

Recommendation

The recommendation focused on three categories of issues agencies frequently confront when incorporating by reference:

(1) ensuring materials incorporated by reference are reasonably available to regulated and other interested parties;
(2) updating regulations that incorporate by reference; and
(3) navigating procedural requirements and resolving drafting difficulties when incorporating by reference.
Research revealed that agencies have used a variety of approaches to address these issues within the constraints of federal law and regulatory policy.

The recommendation identifies and encourages those approaches that have proven most successful.

Resources

In-House Researcher

Emily Schleicher Bremer
ACUS Attorney Advisor

Staff Counsel

Scott Rafferty

Federal Advisory Committee Act: Issues and Proposed Reforms

Background

The Federal Advisory Committee Act ("FACA") governs the ability of the President and administrative agencies to obtain advice from committees that include one or more non-federal employees. It requires that committee meetings be open to the public and allow limited public participation, ensures that committees include a balanced membership, and requires that agencies justify new committees and reevaluate existing committees for continued relevance and value.

Several government officials have suggested that FACA hampers their ability to obtain outside advice, and some private sector interests contend that FACA does not sufficiently ensure transparency. The project examines those concerns and provides recommended improvements to the existing regime.

Research Methodology

The data-gathering effort for the project included: (a) two separate surveys, with one focusing on agency Committee Management Officers, who are responsible for compliance with FACA, and the other focusing on "clients" of advisory committees such as agency program officers and general counsel's offices; (b) a workshop with approximately 50 participants, including numerous agency representatives with extensive experience in the use of advisory committees and members of non-governmental organizations that promote government transparency; and (c) dozens of interviews of FACA experts both within and outside of the federal government. Some of the research was performed by Conference consultant James T. O'Reilly and some by Conference Attorney Advisor Reeve T. Bull, each of whom prepared a report detailing the results of his research.

Recommendation

Mr. Bull's report offered three sets of proposed revisions to the existing FACA regime. First, the report recommended certain clarifications in the scope of FACA, including the elimination of certain exemptions that create loopholes in the Act's coverage, the creation of a statutory "preparatory work" exemption, and the clarification of FACA's implementing regulations to recognize the permissibility of "virtual meetings" conducted via moderated web forums.

Second, the report recommended various reforms designed to alleviate the procedural burdens associated with the Act. It suggested that agencies centralize the committee formation process in a single office or individual and take a more streamlined approach to obtaining balanced committees, that the President eliminate the cap on the number of advisory committees created by executive order, and that various provisions of FACA that apply to negotiated rulemaking committees be modified.

Finally, the report offered proposals to increase the transparency and objectivity of advisory committees, including various "best practices" designed to ensure public involvement in the committee process and a set of suggested improvements to the existing ethics regime.

Resources

Research Consultant (Initial Phase)

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In-house Researcher

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International Regulatory Cooperation

Background

In 1991, the Administrative Conference adopted Recommendation 91-1, Federal Agency Cooperation with Foreign Government Regulators, which set out principles for how U.S. regulators should engage with their foreign counterparts. As trade in goods, services, and information has expanded in the past decades, the need for U.S. regulatory agencies to work together with foreign counterparts has grown.

In April 2011, the Administrative Conference and the U.S. Chamber of Commerce co-sponsored a discussion of global regulatory cooperation, its challenges, and potential solutions. Following up on this meeting, ACUS commissioned a study to review international regulatory cooperation in federal agencies and consider updates to Recommendation 91-1.

Research Methodology

The research reviewed how U.S. regulators interact with their foreign counterparts to better accomplish their domestic regulatory missions and eliminate unnecessary non-tariff barriers to trade. The study examined developments in global trade; U.S. participation in international regulatory partnerships; how global regulatory cooperation is pursued by the Executive Office of the President and several regulatory agencies; and the perspectives of business, regulated entities, and other stakeholders.

Recommendation

At the end of FY 2011, the Committee on Regulation considered a recommendation addressing promotion of U.S. regulatory principles to foreign counterparts; review of legal authority for international cooperation; mutual reliance between U.S. agencies and foreign regulators, as appropriate, to reduce costs and duplication while still achieving U.S. regulatory goals; exchanges of information, training, and employees between U.S. and foreign regulators; transparency and public input in U.S. engagements with foreign regulators; and coordination and leadership on international cooperation within the U.S. government.

At the plenary session, the recommendation passed and is now in the implementation phase.

Resources

In-House Researcher

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Congressional Review Act

Background

The Congressional Review Act (CRA) implements a process for Congressional review of agency rules. 5 U.S.C. §§ 801-08. Under the CRA, agencies must submit rules to both houses of Congress and to the Government Accountability Office prior to their taking effect, and major rules (such as those for which the economic impact exceeds $100 million) are delayed for 60 days to permit Congressional review. Congress may pass a joint resolution of disapproval that, if signed by the President, overturns the rule at issue.

Congress has recently considered legislation that would reverse the presumption that rules take effect if not disapproved, providing that all major rules shall have no force or effect until affirmatively approved by a joint resolution of Congress. *See* Regulations from the Executive in Need of Scrutiny Act of 2011 ("REINS Act"), S. 299, 112th Cong. (2011); H.R. 10, 112th Cong. (2011).

Project Details

The Administrative Conference is currently studying the CRA, potential improvements to its procedures for Congressional review of agency regulations, and potential improvements to agency practices under the CRA, through a research project being conducted by Conference consultant Morton Rosenberg, a former Specialist in American Public Law with the American Law Division of the Congressional Research Service.

Mr. Rosenberg conducted substantial research and prepared a draft report, which included a number of suggested potential improvements to procedures for Congressional review of agency regulations.

Mr. Rosenberg's draft report is currently under review by a Conference committee.

Resources

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Staff Counsel

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Project Advisor

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Federal Executive Establishment

Background

In 1980, the Congressional Research Service submitted a report to Congress called "The Federal Executive Establishment: Evolution and Trends." The report described the organization of the federal executive and classified its various units into categories. The report cataloged the considerable variety of different kinds of entities within the federal executive, including departments, agencies within departments, independent agencies within the executive branch, independent regulatory agencies, government-sponsored enterprises (of several different types), and intergovernmental entities. The report analyzed structural and organizational characteristics of each category, and gave examples. This kind of detailed information is not available in any other government publication, including the U.S. Government Manual.

The CRS report is 30 years out of date. Numerous changes have occurred within that period. For example, in 2002 the massive reorganization of the national security establishment took place with the creation of the Department of Homeland Security and later the Director of National Intelligence. The 1980 report is also not comprehensive, since it only provided examples of each agency type.

Project Details

The Conference is planning a publication that, like the 1980 report, would categorize the kinds of entities within the executive into useful analytical categories. Moreover, the report would catalog the entities within the federal government and characterize each along various dimensions. The report might, for example, characterize each agency as to whether its head or heads serve at the pleasure of the President or have tenure protection, specify the funding source for each agency, note which committee of Congress oversees each agency, and describe the agencies within agencies and the relationships between them. The report would also develop the relationships between agency structure and agency performance.

This project is not intended to lead immediately to a Conference recommendation, but rather to a reference volume for members of Congress, agency heads, presidential staff, federal judges, and others who need ready access to fundamental information about the structure of agencies.

Resources

Research Consultant

David E. Lewis
Professor of Political Science
Vanderbilt University

Staff Counsel

Scott Rafferty

Government in the Sunshine Act

Background

The Government in the Sunshine Act, 5 U.S.C. § 552b, generally requires multi-member federal agencies (e.g., FCC, SEC) to hold their meetings in public and to give advance public notice of their meetings. Goals of the Sunshine Act include promoting public access to information about the decision-making processes of the federal government and improving processes by exposing them to public view. Congress designated the Conference as the agency with responsibility to assist multi-member agencies in the implementation of the Act.

A longstanding criticism of the Act has been that, despite its laudable goals, its actual effect is to discourage collaborative deliberations at multi-member agencies, because agency members are reluctant to discuss tentative views in public. Rather than deliberate in public, agencies may resort to escape devices, such as holding discussions among groups of fewer than a quorum of the agency's membership (which are not covered by the Act), communicating through staff, exchanging written messages, or deciding matters by "notation voting" (i.e., circulating a proposal and having members vote in writing).

Project Details

Previous ACUS studies (in 1984 and 1995) examined the effect of the Sunshine Act on agency behavior. This study will revisit prior findings in light of the last fifteen years of experience. The study will seek to consider changes in the Act or its implementation that will encourage collaborative discussion, while preserving the values of open government and transparency. The consultant, Professor Bernard Bell of Rutgers University, expects to rely extensively on surveys and interviews of commission and board members.

Candor and Authenticity in Open Meetings

Does the Sunshine Act discourage members of multi-member agencies from engaging in meaningful public debate? Many critics feel that public meetings have become scripted, diminishing the informative function intended by the openness required by the Act. The study may consider whether revising exemptions that allow closed meetings may improve the informative functions of debate at public meetings. It may also consider whether agencies provide sufficient information to enable public attendees to follow the discussion at open meetings.

Collegiality

The study will examine the types of communications that currently serve the function of informal or preliminary exchanges, such as communications between the respective staffs of commission or board members. One focus of this analysis is their impact on relationships among the principals, including the criticism that impacts of the Act may be to reduce collegiality, increase the power of staff, or even lead to polarization of decision-making by the multimember agency.

Impact of Technology

Since the Conference last examined the Sunshine Act, electronic mail has become a dominant technology. This has facilitated increased use of "notational voting," which can be a means of avoiding public meetings. The study will examine the process of notational voting, when it is used, and whether it is abused. The study will also consider whether widespread use of e-mail or mobile communications undermines the effectiveness of the Act. The study will examine each of these issues and evaluate proposals for statutory change or modifications in agency implementation.

Resources

Research Consultant

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Immigration Adjudication

Background

One of the biggest challenges in mass adjudication programs is the queue of pending proceedings for removal of persons alleged to be present in the country unlawfully. A study issued in August 2010 by the Transactional Records Access Clearinghouse at Syracuse University reports that the number of cases pending before immigration courts within the Executive Office for Immigration Review (EOIR) recently reached an all-time high of nearly 248,000 and that the average time these cases have been pending is 459 days. A February 2010 study by the American Bar Association's Commission on Immigration reports that the number of cases is "overwhelming" the resources that have been dedicated to resolving them.

Project Details

The Administrative Conference is currently studying how U.S. immigration adjudication removal procedures may be improved through a research project being conducted by Conference consultants Professor Lenni B. Benson of New York Law School and Russell Wheeler of the Governance Institute and the Brookings Institution. The project is limited to procedural improvements and will not address substantive immigration reform. Potential areas of improvement may include:

- Representation. The Conference's study will catalog existing barriers to representation, which may be legal, practical, technological, or financial; identify ways to overcome these barriers, including creative methods or technological innovations that might not require much additional funding; and estimate the costs and benefits for both private parties and the government if the barriers could be overcome.
- Case Management Practices. The Conference's study will consider case management practices throughout the immigration adjudication system (both at the trial and appellate levels) and examine potential ways to improve origination of removal cases, caseload management, staffing, immigration court management and other related issues.
- Video Hearings. Video teleconferencing offers potential efficiency benefits, but critics have suggested that it may hamper communication and credibility determinations. The study will consider the best uses of video teleconferencing in the immigration adjudication context.

The ultimate goal of the project is to formulate recommendations for improving immigration adjudication procedures that will be directed at the agencies conducting such procedures.

Resources

Research Consultants

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New York Law School

Russell Wheeler
Visiting Fellow, Governance Studies
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Staff Counsel

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Midnight Rules

Background

In the last three months of a presidential administration, rulemaking activity increases considerably when compared to the same period in a non-transition year. Although part of this increase likely results from ordinary procrastination and external delays, scholars have suggested that administrations also use the "midnight" period more strategically.

Administrations are said to have reserved particularly controversial rulemakings for the final months of an outgoing president's term. Administrations have also issued rules in their final months that some think have the main purpose of embarrassing or impeding the activities of the incoming administration. The scholarly literature largely condemns the practice of midnight rulemaking as undemocratic and inefficient.

Both the House Judiciary Committee's Subcommittee on Commercial and Administrative Law and the ABA Section on Administrative Law and Regulatory Practice have suggested the topic of midnight rules as suitable for study by the Administrative Conference.

Project Details

The Administrative Conference is currently studying the issue of midnight rules through a research project being conducted by Conference consultant Professor Jack M. Beermann of Boston University School of Law. The study will examine and establish whether midnight rules are indeed being used in strategic, undesirable ways. The study will also examine normative issues surrounding midnight rules, including setting forth possible explanations for why midnight rules happen and examining why midnight rules are viewed as undesirable.

The ultimate goal of the project is to set forth recommendations regarding midnight rules which recognize that an outgoing President remains in power until the last moment of his or her constitutionally assigned term and which can appropriately reconcile the interests of outgoing and incoming administrations regardless of political party.

As of October 2011, Professor Beermann has prepared an outline detailing the parameters of his research, which is currently on-going. Professor Beermann's draft report is expected in January 2012. The draft report and any recommendations contained therein will undergo review and consideration as a part of the Conference's project process.

Resources

Research Consultant

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Boston University School of Law

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Project Advisor

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Paperwork Reduction Act

Background

The Paperwork Reduction Act, 44 U.S.C. §§ 3501 et seq., is one of the most important government-wide administrative law statutes. The Act regulates "collections of information" by government agencies. Any covered agency wishing to conduct or sponsor a collection of information, as defined by the PRA, must first receive the approval of the Director of the Office of Management and Budget, in a process that requires a minimum of 90 days of public comment, and that in practice takes months to complete.

Although the PRA serves important goals, the PRA approval process has been criticized as having the effect of slowing down agency activities and discouraging agencies from gathering information, possibly leading agencies to act based on poor-quality information. A particular point of concern expressed by some is the PRA's application to voluntary collections of information.

Project Details

The Conference's consultant, Professor Stuart Shapiro of Rutgers University, will examine the costs and benefits of compliance with the PRA and will attempt to determine whether the PRA's useful purposes could be served in a more targeted and efficient manner.

The consultant will examine whether the PRA interacts well with new technologies and whether it requires any changes to account for social media and other web-based agency activities.

Professor Shapiro will also consider whether the PRA should apply to voluntary collections of information and collections of information from special government employees. Professor Shapiro will perform the study by gathering data on the costs and benefits of agency compliance with the PRA and interviewing relevant agency officials and legal experts. The report is expected in 2012.

Resources

Research Consultant

Stewart Shapiro
Professor of Political Science
Rutgers University

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Procedural Traps: 28 U.S.C. § 1500

Background

The Administrative Conference of the United States is currently engaged in a project aimed at identifying and recommending ways to eliminate purposeless procedural rules that result in the non-merits-based dismissal of claims by or against the federal government. As part of this project, the Conference is currently conducting a study of 28 U.S.C. § 1500, a statute that regulates the jurisdiction of the Court of Federal Claims (CFC).

The statute provides that the CFC must dismiss a claim if the plaintiff has a claim based on the same facts pending in another court. Because jurisdiction over different kinds of claims against the United States is divided between different courts, Section 1500 may compel a plaintiff who has multiple claims against the United States arising from a single incident to elect among the claims, contrary to the normal procedural principle that a plaintiff may simultaneously bring as many claims as he may have against a defendant.

Research Methodology

In-house researchers Emily Schleicher Bremer and Jonathan R. Siegel extensively studied the history of Section 1500, judicial interpretations of the statute, and the scholarly literature on the statute. Their research also included an empirical study of cases that have been dismissed under the statute and cases that have survived dismissal, and interviews with government attorneys and representatives of affected private parties.

Draft Recommendation

The Committee on Judicial Review is considering whether to recommend that Section 1500 be altered or repealed, and, if so, what measures, if any, should be put in its place.

Resources

In-House Researchers

Jonathan R. Siegel
ACUS Director of Research & Policy

Emily Schleicher Bremer
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Review of Regulatory Analysis Requirements

Background

Agencies wishing to promulgate regulations face an array of procedural requirements. In addition to the basic notice-and-comment requirements of the Administrative Procedure Act, (5 U.S.C. § 553), agencies are subject to numerous analysis requirements imposed by other statutes or by executive order.

For example, in appropriate cases, agencies must prepare a cost-benefit analysis, (Executive Orders 12,866, 13,563); a regulatory flexibility analysis, (5 U.S.C. § 603); a federalism impact statement, (Executive Order 13,132); analyses required by the Unfunded Mandates Act, (2 U.S.C. §§ 1532, 1535); an environmental impact statement, (42 U.S.C. § 4332); and an evaluation of the rule's environmental health, and safety effects on children, (Executive Order 13,045). The Conference has undertaken to study this array of regulatory analysis requirements.

Project Details

The Conference's consultant, Curtis Copeland, will examine whether there is any duplication in the required analyses that could be eliminated in a way that would produce cost savings and whether or not the requirements could otherwise be rationalized or streamlined while continuing to serve their valuable goals. He will also attempt to determine the costs and benefits of the required analyses and assess whether the required analyses are performed accurately.

Mr. Copeland will perform the study by engaging in a review of the scholarly literature, by a series of structured interviews with agency officials, and through a detailed examination of selected regulatory analyses. The report is expected in 2012.

Resources

Research Consultant

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Staff Counsel

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Science in the Administrative Process

Background

Science plays a crucial role in the administrative process, but a role that has become controversial. The project considers two major aspects of agencies' use of science.

First, it examines the procedures that agencies have implemented to ensure that their use of science is transparent and that members of the public can easily assess the scientific basis for decisions agencies ultimately make.

Second, it considers whether agencies permit scientists with dissenting viewpoints to express their views openly and without fear of reprisal.

Project Details

Professor Wendy E. Wagner of the University of Texas Law School, who is serving as the consultant on this project, has conducted a number of interviews with agencies that make extensive use of scientific research, including the Environmental Protection Agency, Food and Drug Administration, Department of Interior, Occupational Safety and Health Administration, and Nuclear Regulatory Commission ("NRC"). Roland Frye, a detailee with the Administrative Conference from the NRC who is working with Professor Wagner in conducting research for the project, will interview additional officials at the NRC to obtain their input on the two primary research topics.

Upon completing these interviews, Professor Wagner and Mr. Frye will consolidate their research findings and analyze the data collected. Professor Wagner will then prepare a report based on the information gathered and her review of the literature.

In the report, she will provide a series of recommendations to agencies designed to improve the transparency of the process by which they report results of scientific research they conduct and to ensure that dissenting viewpoints may be expressed freely and without fear of recriminations. The research report is expected to be completed in early 2012.

Resources

Research Consultant

Wendy E. Wagner
University of Texas Law School

Staff Counsel

Reeve T. Bull
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Social Security Administration Adjudication

Background

The Social Security Administration ("SSA") strives for consistent and accurate application of regulations and policies at all levels of adjudication related to its disability benefits programs, and is concerned about the program costs associated with awarding benefits to claimants who are not disabled, as well as the unequal application of justice for claimants who should be awarded benefits but are not because of improper application of agency policy. The agency is also concerned that the federal courts may be interpreting SSA rules in a manner inconsistent with their intent, resulting in inappropriate remands of cases.

Both of these issues pose potential program costs and administrative challenges. With its mission and expertise as an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, the Administrative Conference is uniquely positioned to provide its services to SSA in order to identify potential improvements in the disability appeals process.

Project Details

At the request of SSA, the Administrative Conference will engage a team of experts and use its in-house resources to conduct a study that will examine and address issues relating to adjudications in the Social Security Disability program.

Specifically, the study will analyze the role of courts in reviewing SSA disability decisions and consider measures that SSA could take to reduce the number of cases remanded to it by courts. In addition, the study will analyze the benefits of video hearings in the context of reducing agency burden and improving outcomes.

The study will also address significant variances among ALJs in decisional outcomes, length of hearings, and application of agency policies and procedures. As of October 2011, both SSA and the Administrative Conference are designing the parameters of the study, which is scheduled to commence in December 2011 and end in December 2012.

Resources

Staff Counsel

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conference researchers, past and present

The agency has a history of collaborating with researchers whose work has proven indispensable to the core of the Conference's mission.

Conference Researchers, Past and Present

The agency has a history of collaborating with researchers whose work has proven indispensable to the core of the Conference's mission.

Hundreds of the nation's leading academic and professional experts in government and administrative law, including then-professor, Antonin Scalia, have contributed to the Conference's mission of engaging in research that addresses the efficiency, adequacy, and fairness of administrative agencies in the carrying out of their programs.

This list includes consultants and researchers, both paid and pro bono, who have produced recommendations and reports over the course of the Conference's existence.

For a comprehensive list of Conference-related studies and publications, please see the ACUS Bibliography at http://www.acus.gov/library/bibliography/.

ACUS Research Consultants, FY 2010-2011

Consultant	Project
Steven J. Balla	Rulemaking Comments
Bernard W. Bell	Sunshine Act
Jack M. Beermann	Midnight Rules
Lenni B. Benson	Immigration Adjudication
Kathleen Clark	Contractor Ethics
Cary Coglianese	E-Rulemaking Innovations
Curtis Copeland	Review of Regulatory Analysis Requirements
David E. Lewis	Federal Executive Establishment
James T. O'Reilly	FACA
Stuart Shapiro	Paperwork Reduction Act
Catherine M. Sharkey	Regulatory Preemption
Morton Rosenberg	Congressional Review Act
Wendy Wagner	Science in the Administrative Process
Russell Wheeler	Immigration Adjudication
David A. Wirth	Third Party Inspections

Researchers, Past and Present

Past Researchers Who are Current ACUS Members

Robert A. Anthony
Marshall Breger
Ronald A. Cass
E. Donald Elliott
Philip J. Harter
Sally Katzen
Ronald M. Levin
Jeffrey S. Lubbers
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Jerry Mashaw
Richard J. Pierce
Richard Revesz
Jonathan Rose
Antonin Scalia
Loren A. Smith
Peter L. Strauss
Paul R. Verkuil

Consultants, Researchers and Contributors

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Harvey Goldschmidt
Frank Goodman
Frank P. Grad
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Sen. Charles E. Grassley
Harold P. Green
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P

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Henry Perritt, Jr.
William D. Popkin
Anna Marie Portz
Charles Pou, Jr.
Burnele V. Powell
Monroe E. Price
David M. Pritzker

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Malcolm C. Rich
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Leonard L. Riskin
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Reuben B. Robertson
Glen O. Robinson
William F. Robinson, Jr.
Arnold Rochvarg
Victor Rosenblum
Ronald D. Rotunda
George Ruttinger

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Harold Sharlin
William Shaw
Allen Shoenberger
Michael J. Singer
Diane M. Stockton
Stuart A. Smith
Marianne K. Smythe
Abraham Sofaer
Ralph S. Spritzer
Thomas H. Stanton
John M. Steadman
Thomas O. Sargentich
Steven Schlesinger
Roy A. Schotland
Peter H. Schuck
Teresa M. Schwartz
Warren F. Schwartz
Kenneth E. Scott
Peter F. Shane
Brian D. Shannon
Ann Steinberg
Russell B. Stevenson
Charles A. Sullivan
Neil J. Sullivan
Peter Szanton

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Norman C. Thomas
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Edward A. Tomlinson

V

Katherine L. Vaughns
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W

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Theodore Wang
Leland Ware
Wallace Warfield
Russell L. Weaver
David Welborn
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Stephen F. Williams
Mason Willrich
Julia Wondolleck
Frank M. Wozencraft
Ronald Wright

Y-Z

Steven L. Yaffee
Lynda Zengerle
Nicholas Zeppos
Michael J. Zimmer

non-recommendation projects

ACUS is engaged in non-recommendation activities and projects critical to accomplishing its statutory mission of making government work better.

These projects are:

- Model Agency/Best Practices Initiative
- Council of Independent Regulatory Agencies
- Historical Documents Project
- Equal Access to Justice Act

From Need-to-Know to Know-How

Summary

The Administrative Conference of the United States is uniquely situated to help both new and established agencies build better organizations for the new century. To accomplish this, the Conference has begun a long-term project to identify and share best administrative and operational practices among agencies. The project was conceived by the Chairman and key federal agency general counsels, and has been met with enthusiasm in discussions on Capitol Hill.

The question this project is designed to answer is: What model practices can be widely adopted to help every Federal agency improve its operations and procedures? While the project will incorporate past and present ACUS research, recommendations and workshops; it will also include information about other agencies that present specific examples of good practices.

The hallmark of the entire effort will be collaboration with other federal agencies.

The primary vehicle to promote, solicit and share information about best practices will be an interactive website, www.acus.gov/best-practices. An award will be given each year to the agency with the best submission.

Status

The new website was launched in mid-October. Federal agencies are continuing to submit their best practices for posting on the website. Relevant ACUS recommendations—past and current have been identified and included on the website. An interactive forum has been established on the website so that users can communicate and share ideas.

The judging panel has been established, and they will begin reviewing submissions in November.

MODEL AGENCY

WALTER GELLHORN INNOVATION AWARD

Walter Gellhorn Innovation Award

Background

Walter Gellhorn was viewed by many as the father of administrative law. He was the longest serving member of the ACUS Council, having served from 1968 until 1995, and having been appointed by seven different U.S. Presidents. It is appropriate, therefore, that an ACUS award for the most innovative practice in the area of government administration be named after Mr. Gellhorn. Agency submissions are judged by a panel of esteemed experts, and the award is given to the agency with the best submission at the ACUS December plenary meeting.

Best Practice Criteria

- Degree of Innovation
- Cost Savings to the Government or the Public
- Ease of Duplicating the Best Practice at other Agencies
- Degree to which the Best Practice Enhances Transparency in Government
- Degree to which the Best Practice Increases Efficiency in Government

Participating Agencies Include

- Department of Agriculture (USDA)
- Department of Commerce
- Environmental Protection Agency
- Department of Homeland Security (TSA)
- Department of Labor (OSHA)
- Nuclear Regulatory Commission
- Office of the Federal Register
- Postal Regulatory Commission
- Social Security Administration
- Department of Transportation

Panel of Judges

- Sheila Bair, PEW Charitable Trusts and former FDIC Chair
- John Dilulio, Jr., Professor, University of Pennsylvania
- Robert Hahn, Director of Economics at the Smith School of Enterprise and the Environment at Oxford, a Professor of Economics at Manchester, and a Senior Fellow at the Georgetown Center for Business and Public Policy
- David Lewis, Professor, Political Science and Law (by courtesy) at Vanderbilt University
- Norm Ornstein, Co-director of the AEI-Brookings Election Reform Project

Contact

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The first recipient of the 2011 Walter Gellhorn Innovation Award was the Office of the Federal Register for its innovative website, FederalRegister.gov.

The Office of the Federal Register, in cooperation with the Government Printing Office, provides bulk access to the source code of the Federal Register and the Code of Federal Regulations. The value in this effort includes making data available in bulk so others may use it, working collaboratively with the community and encouraging innovation, and making source code for a government website available so other agencies and non-governmental organizations can make customized versions.

MEMBERS

U.S. Consumer Product Safety Commission

Federal Communications Commission

Federal Deposit Insurance Corporation

Federal Election Commission

Federal Energy Regulatory Commission

Federal Housing Finance Agency

Federal Maritime Commission

Federal Mine Safety and Health Review Commission

Federal Reserve Systems

Federal Trade Commission

U.S. International Trade Commission

National Labor Relations Board

Nuclear Regulatory Commission

Occupational Safety and Health Review Commission

Postal Regulatory Commission

Securities and Exchange Commission

Surface Transportation Board

Council of Independent Regulatory Agencies (CIRA)

Since its reconstitution, ACUS has reconvened a council for leaders in independent regulatory agencies.

The goal is to provide a forum for executives to discuss issues common to Independent regulatory agencies. Because these entities are subject to limited OMB oversight, they have limited mechanisms for sharing information and solving common administrative problems.

Over the last year, the Chairman reestablished the Council of Independent Regulatory Agencies and convened five meetings, to discuss common issues such as the effects of recent court decisions, the Sunshine Act, and the Congressional Review Act.

FY 2011 Meeting Dates

November 17, 2010
March 2, 2011
May 19, 2011
July 26, 2011
September 27, 2011

Historical Documents Project

For the last 15 years, American University has stored an estimated 350,000 pages of Conference papers. 1995 is immediately before the Government Printing Office began composing publications electronically. Carl Malamud has scanned most of our publications, including the annual volume of recommendations, Conference statements, and consultant reports.

More recently, Hein Online has begun scanning all the remaining papers. The Conference has organized the materials and removed duplicates, administrative correspondence, and other papers of limited continuing value. Hein is producing searchable electronic copies with the understanding that we can post them to our public website, and has also allowed us to download derivative works from their subscription collections.

Between 1968 and 1995, the Conference issued 208 recommendations and statements. The Conference will publish the debates and comments that led to these proposals. The archives also document the Conference's exceptional success in engaging with agencies to implement these and in working with the ABA to advise Congress on statutory reforms. Some of the more influential proposals, such as civil money penalties and negotiated rulemaking, have thousands of pages of correspondence reflecting years of joint work with agencies, continuing all the way through 1995. More than 20 of the consultant reports behind these recommendations were written by our current members and fellows. For the first time, these important publications will be available on-line, for free, to the public – clearly organized by topic.

Researcher

Scott Rafferty
Deputy Director, Research and Policy

THE VALUE OF PUBLISHING ACUS PROJECT FILES

The Conference will also publish complete "project files" – past initiatives that did not involve published recommendations. ACUS model adjudication rules, while not in the form of a recommendation, continue to assist new agencies and those reconsidering their processes. Missions to foreign governments helped spread values of American administrative law. In some cases, high-quality reports address critical issues of continuing concern to agencies, even though uncertainty in the law or a lack of consensus may have led the Conference to forego (or defer) publishing a formal recommendation. Many are long-term initiatives, such as Jerry Mashaw's work to bring consistency to mass adjudication, Phil Harter's studies of deregulation and alternative dispute resolution, and our government-wide analysis of science and risk management in the 1970's.

Equal Access to Justice Act (EAJA)

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Since the 1980s, the Equal Access to Justice Act (Title II of Pub. L. 96-481, 94 Stat. 2325) has provided for the award of attorneys' fees and expenses to certain parties who prevail over the federal government in administrative and court proceedings. The Act assigned important consultative and reporting responsibilities to the Chairman of the Administrative Conference. As part of its consultative role, in 1986 the Office of the Chairman published final revised model rules for implementation of EAJA in agency proceedings, which provided extensive guidance to agencies (51 FR 16665, May 6, 1986).

Prior to cessation of the Administrative Conference's activities in 1995, the Office of the Chairman compiled an annual report to Congress on the amount of fees and other expenses awarded in agency administrative proceedings during the preceding fiscal year pursuant to EAJA. The report described the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may have aided Congress in evaluating the scope and impact of such awards (5 USC 504(e)). The last such report covered fiscal year 1994.

Subsequently, the Federal Reports Elimination and Sunset Act of 1995 (Pub. L. 104-66) eliminated the statutory requirements for both the Conference's report on EAJA payments in administrative proceedings and a corresponding report by the Department of Justice on payments in court proceedings. Thus no statutory requirements are currently in effect for government-wide reporting of payments made under EAJA for either administrative or judicial proceedings. However, because of the continuing interest in Congress in acquiring data about payments under EAJA, including pending legislation in the 112th Congress, the Conference has undertaken to obtain and compile such information for FY 2010. The Chairman plans to publish a report for fiscal year 2010.

workshops + forums

- e-Rulemaking Brookings Forum
- High-Volume Caseload Workshop
- Retrospective Review Workshop
- International Trade and Cooperation with the Chamber of Commerce Workshop
- FACA Workshop
- Limited English Proficiency Workshop with the Department of Justice

Participating agencies included:

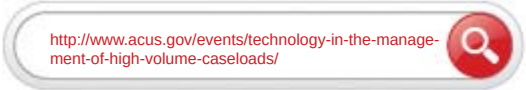
- Social Security Administration
- Department of Justice
- Department of Homeland Security
- Department of Veterans Affairs
- Executive Office of the President
- Internal Revenue Service

Colin Rule, Director of Online Dispute Resolution for eBay, and Ethan Katsh, Director of the National Center for Technology and Dispute Resolution, helped to facilitate the discussion.

Technology in the Management of High-Volume Caseloads Workshop

On November 1 2010, the Administrative Conference and the Office of Government Information Services (OGIS) of the National Archives and Records Administration held a workshop to bring together experts from the public and private sector to discuss technological best practices in dealing with high-volume case loads. Attendees included a small group of Federal agency representatives from agencies with high volume caseloads (such as disability claims, immigration review, and medical records access).

Congress has directed the Administrative Conference to help Federal agencies study mutual problems, exchange best practices, and recommend improvements to Federal administrative processes. To these ends, the Conference is looking at how agencies can employ technology to reduce unnecessary litigation and to resolve disputes more efficiently. OGIS also is focusing on dispute prevention and dispute resolution in the administration of the Freedom of Information Act (FOIA).



The Future of e-Rulemaking Forum

On November 30, the Administrative Conference of the United States and the Center for Technology Innovation at Brookings hosted a public forum to explore how new technologies can promote more effective public participation and greater efficiency in the rulemaking process. Chairman Paul Verkuil provided introductory remarks and Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, explained the administration's commitment to e-rulemaking. Darrell West, Vice President and Director of Governance Studies at Brookings, moderated the discussion.

Senior state and federal officials, leading academics and other experts reviewed progress in meeting the challenges that have arisen in the implementation of electronic rulemaking. Sally Katzen, who chaired the Committee on the State and Future of Federal e-Rulemaking, outlined how technology can enhance agency expertise and consistency in making regulations.

SPEAKERS

Paul Verkuil
Chairman, Administrative Conference of the United States

Cass Sunstein
Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

Darrell M. West
Vice President and Director, Governance Studies

Panel 1: Digitization – Past, Present, and Short-Term Future

Neil Eisner
Assistant General Counsel for Regulation and Enforcement
U.S. Department of Transportation

Scott D. Pattison
Executive Director
National Association of State Budget Officers

Steven VanRoekel
Managing Director
Federal Communications Commission

Presentation: Leveraging Technology to Enhance Agency Expertise

Sally Katzen
Senior Advisor
Podesta Group

Panel 2: Transforming the Process

Gary Bass
Director, OMB Watch

Jerry Brito
Senior Research Fellow
Mercatus Center, George Mason University

Stuart Shulman
Assistant Professor
University of Massachusetts at Amherst

http://www.acus.gov/events/the-future-of-erulemaking/

Speakers

Paul R. Verkuil
Chairman, Administrative Conference of the United States

C. Boyden Gray
Founding Partner, Gray & Schmitz, Former Ambassador to the EU, Former White House Counsel

Michael Fitzpatrick
Associate Administrator, OIRA, OMB

Dan Price
Senior Partner, Sidley Austin, Former Assistant to the President and Deputy National Security Advisor for International Economic Affairs
Former Deputy Director for International, NEC

Mindel De La Torre
Chief, International Bureau, FCC

Steve Wood
Assistant Chief Counsel for Vehicle Rulemaking & Harmonization NHTSA

Jeff Weiss
Senior Director, Technical Barriers to Trade, USTR

Ralph Carter
Managing Director, Legal, Trade & International Affairs, FedEx

Michael Walls
Vice President, Regulatory & Technical Affairs American Chemistry Council

International Regulatory Cooperation Workshop

In April 2011, the Conference joined with the U.S. Chamber of Commerce to co-host a discussion of global regulatory cooperation, its challenges, and potential solutions. The panel discussions featured Presidential appointees from the current and prior Administrations, international affairs officials from regulatory agencies, and representatives of business interests.

At this workshop, officials from government and industry identified a variety of challenges in international regulatory cooperation, from the perspective of regulatory effectiveness and facilitation of commerce, and suggested areas in which Conference Recommendation 91-1 could be updated to provide more specific guidance.

Following this discussion, ACUS commissioned a research project on international regulatory cooperation, which led to a proposed recommendation currently under consideration, as discussed in the projects section above.

http://www.acus.gov/events/regulatory-workshop-on-trade-and-enforcement/

Retrospective Review of Regulations Under Executive Order 13563 Workshop

On January 18, 2011, President Obama issued Executive Order 13563, Improving Regulation and Regulatory Review, which supplements President Clinton's EO 12866 on Regulatory Planning and Review. Section 6 of EO 13563 requires agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." As an initial step, the Order required each agency, within 120 days, to develop a preliminary plan for periodically reviewing its existing significant regulations with the goal of making regulatory programs "more effective or less burdensome in achieving the regulatory objectives."

To help agencies meet the retrospective review requirements of the Order, the Administrative Conference presented a workshop on March 10, 2011. The aim was to enable representatives of agencies that had substantial experience with planning and carrying out reviews of existing rules to share the lessons learned and best practices. The workshop program included presentations by officials from the Department of Labor, Department of Transportation, Environmental Protection Agency, Food and Drug Administration, and Federal Deposit Insurance Corporation. There was also a presentation on lessons learned from a study published in 2007 by the Government Accountability Office: Reexamining Regulations, Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews (GAO-07-791). More than 50 federal officials representing 27 agencies participated in the workshop discussions.

After the workshop, the Administrative Conference published a summary document, intended to share actionable strategies and best practices gleaned from fellow regulatory subject matter experts, and to encourage an ongoing discussion regarding improving the regulatory process. The summary was distributed to all attendees and posted on the Conference's website. Also available were materials from prior Conference work on this subject, relating to Recommendation 95-3, Review of Existing Agency Regulations, 60 FR 43108 (August 18, 1995).

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Download the Workshop Summary

http://www.acus.gov/library/regulatory-review-materials/

The workshop convened officials at government agencies that operate or work with advisory committees, representatives from non-profit organizations advocating openness in government, law professors with expertise in the operation of FACA, and other interested participants.

Federal Advisory Committee Act Workshop

In connection with its study of the Federal Advisory Committee Act ("FACA"), the Conference conducted a workshop designed to obtain input on potential issues under the existing FACA regime.

The discussion focused on five topics identified in the FACA literature as being particularly important to agencies and members of the public interested in the work of advisory committees:

1. Conflict of interest standards for committee members;
2. Details of the committee formation process, including the chartering and re-chartering of committees;
3. The propriety of various exemptions in FACA's coverage;
4. Identification of "best practices" for increasing the transparency of advisory committees; and
5. The usefulness of conducting "virtual meetings" via a moderated web forum.

In addition, workshop participants had an opportunity to provide their views on any other aspects of FACA that they found particularly problematic. The comments at the workshop provided an important source of information in support of the recommendations proposed by Attorney Advisor Reeve T. Bull in his report on the FACA project.

http://www.acus.gov/events/faca-workshop/

Language Access in Federal Administrative Hearings Workshop

On September 22, 2011, the Administrative Conference and the U.S. Department of Justice (DOJ) co-hosted a workshop on promising agency practices to ensure that individuals with limited English proficiency (LEP individuals) have meaningful access to administrative hearings and proceedings pursuant to Executive Order 13166.

The workshop featured opening remarks by Paul Verkuil, Chairman of the Administrative Conference; Thomas Perez, Assistant Attorney General for the U.S. Department of Justice Civil Rights Division; and Mark Childress, Senior Counselor for the U.S. Department of Justice Access to Justice Initiative.

The workshop also featured two panels of experts from within the federal government, who discussed addressing language access issues in federal agency administrative hearings and proceedings and a variety of promising practices, including the cost-effectiveness of addressing language barrier issues prior to a hearing or proceeding.

Over 70 participants from various federal agencies had the opportunity to engage in collaborative dialogue with a number of representatives from agencies and share ideas about how to provide meaningful access for LEP individuals.

http://www.acus.gov/events/dojacus-language-access-workshop/

Budget and Finance

The following section addresses the financial health of the Administrative Conference and is organized in the following areas:

Part I: Financial Performance Overview
- Sources of Funds
- Audit Results
- Financial Statements
- Management Controls, Systems, and Compliance
- Prompt Payment Act
- Accountability of Tax Dollars Act (ATDA)
- Improper Payments Information Act

Part II: Audited Financial Statements

Audit Results

The Conference received an unqualified audit opinion on FY 2011 financial operations.

There were no material internal control weaknesses or instances of substantial noncompliance with relevant laws and regulations that could have a material impact on the financial statements.

Part I: Financial Performance Overview

As of September 30, 2011, the financial condition of the Administrative Conference was sound. The Conference has sufficient funds to meet program needs and adequate financial controls in place.

The accompanying financial statements have been prepared in conformity with the hierarchy of accounting principles approved by the Federal Accounting Standards Advisory Board and the Office of Management and Budget Circular A-136, Financial Reporting Requirements.

Sources of Funds	The Conference receives a Congressional appropriation to support its programs. The Conference received a two-year appropriation in both FY 2010 and FY 2011 that may be used, within statutory limits, for operating expenditures. The appropriated budget authority for FY 2011 was $2,750,000.
Audit Results	The Conference received an unqualified audit opinion on FY 2011 financial operations. There were no material internal control weaknesses or instances of substantial noncompliance with relevant laws and regulations that could have a material impact on the financial statements.
Financial Statements	The Conference's financial statements summarize the financial activity and financial position of the agency in FY 2011. The financial statements and notes appear in the next section. The principal financial statements have been prepared to report the financial position and results of operations of the entity, pursuant to the requirements of 31 U.S.C. 3515 (b). While the statements have been prepared from the books and records of the entity in accordance with GAAP for Federal entities and the formats prescribed by OMB, the statements are in addition to the financial reports used to monitor and control budgetary resources, which are prepared from the same books and records. The statements should be read with the realization that they are for a component of the U.S. government, a sovereign entity.
Management Controls, Systems, and Compliance	The Accountability of Tax Dollars Act (ATDA) requires federal agencies to provide an annual statement of assurance regarding management controls and financial systems. The statement of assurance is provided in the message from the Chair at the beginning of this report. This statement was based on the review and consideration of internal analyses, reconciliations and the independent auditor's opinion on the Conference's financial statements.
Prompt Payment Act	The Prompt Payment Act requires Federal agencies to make timely payments to vendors, including any interest penalties for late invoice payments. In FY 2011, the Conference did not pay any interest penalties on invoices processed.
Accountability of Tax Dollars Act (ATDA)	The ATDA requires Federal agencies to report on agency substantial compliance with Federal financial management system requirements, Federal accounting standards, and the U.S. Government Standard General Ledger. Under this law, the agency head is required to assess and report on whether these systems comply with ATDA on an annual basis. In assessing compliance with ATDA, the Conference adheres to ATDA implementation guidance provided by OMB and considers the results of annual financial statement audits and any other information available. Based on all of the information considered, the Executive Director has determined that the Conference is compliant with ATDA requirements.
Improper Payments Information Act	The Improper Payments Information Act (Public Law 107-300) defined requirements to reduce improper/erroneous payments made by the Federal government. OMB also has established specific reporting requirements for agencies with programs that possess a significant risk of erroneous payments and for reporting on the results of recovery auditing activities. A significant erroneous payment as defined by OMB guidance is an annual payment in a program that exceeds both 2.5 percent of the program payments and $10 million. The Conference has not identified any programs where significant erroneous payments have occurred within the agency. The agency will continue to review programs on an annual basis to determine if any significant erroneous payments exist.

REPORT ON

FINANCIAL STATEMENTS AUDIT

OF

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

FOR THE YEAR ENDED SEPTEMBER 30, 2011

REGIS & ASSOCIATES, PC

MANAGEMENT CONSULTANTS &
CERTIFIED PUBLIC ACCOUNTANTS

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REGIS & ASSOCIATES, PC
MANAGEMENT CONSULTANTS &
CERTIFIED PUBLIC ACCOUNTANTS

INDEPENDENT AUDITORS' REPORT

To the Chairman and Executive Director
Administrative Conference of the United States
Washington, DC

In accordance with the Accountability of Tax Dollars Act of 2002, we are responsible for conducting the audit of the Administrative Conference of the United States financial statements for the year ended September 30, 2011. In our audit of the Administrative Conference of the United States financial statements for fiscal year ended September 30, 2011, we found:

- the financial statements are presented fairly, in all material respects, in conformity with U.S. Generally Accepted Accounting Principles,
- no material weaknesses in internal control over financial reporting (including safeguarding assets), and compliance with laws and regulations,
- no reportable noncompliance with laws, and regulations we tested.

The following sections discuss in more detail (1) these conclusions, (2) our audit objectives, scope and methodology, and (3) our evaluation, and agency comments.

Opinion on Financial Statements

In our opinion, the financial statements including the accompanying notes present fairly, in all material respects, the assets, liabilities, and net position of the Administrative Conference of the United States as of September 30, 2011; and the related net cost, changes in net position, and budgetary resources for the year then ended, in conformity with accounting principles generally accepted in the United States of America.

Consideration of Internal Control

In planning and performing our audit, we considered the Administrative Conference of the United States' internal control over financial reporting and compliance. We did this to determine our procedures for auditing the financial statements, and to comply with OMB audit guidance, not to express an opinion on internal control. Accordingly, we do not express an opinion on internal control over financial reporting and compliance, or on management's assertion on internal control. However, for the controls we tested, we found no material weakness in internal control over financial reporting (including safeguarding assets) and compliance.

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A control deficiency exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect misstatements on a timely basis. A significant deficiency is a control deficiency, or combination of control deficiencies, that adversely affects the Administrative Conference of the United States' ability to initiate, authorize, record, process, or report financial data reliably in accordance with generally accepted accounting principles, such that there is more than a remote likelihood that a misstatement of the Administrative Conference of the United States' financial statements that is more than inconsequential will not be prevented or detected by the Administrative Conference of the United States' internal control.

A material weakness is a significant deficiency, or combination of significant deficiencies, that results in more than a remote likelihood that a material misstatement of the financial statements will not be prevented or detected by the Administrative Conference of the United States' internal control.

Our consideration of internal control over financial reporting and compliance was for the limited purpose described in the first paragraph of this section, and was not designed to identify all deficiencies in internal control over financial reporting that might be deficiencies, significant deficiencies, or material weaknesses. Our internal control work would not necessarily disclose all deficiencies in internal control that might be material weaknesses or other significant deficiencies.

Compliance with Laws and Regulations

Our tests of the Administrative Conference of the United States' compliance with selected provisions of laws and regulations for fiscal year 2011 disclosed no instances of noncompliance that would be reportable under U.S. generally accepted government auditing standards, or OMB audit guidance. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed no instances of noncompliance or other matters that are required to be reported under U.S. generally accepted government auditing standards, or OMB audit guidance.

Objectives, Scope, and Methodology

The Administrative Conference of the United States' management is responsible for (1) preparing the financial statements in conformity with U.S. generally accepted accounting principles, (2) establishing, maintaining, and assessing internal control to provide reasonable assurance that the broad control objectives of the Federal Managers' Financial Integrity Act are met, and (3) complying with applicable laws and regulations.

We are responsible for obtaining reasonable assurance about whether the financial statements are presented fairly, in all material respects, in conformity with U.S. generally accepted accounting principles. We are also responsible for (1) obtaining a sufficient understanding of internal control over financial reporting and compliance to plan the audit, (2) testing

compliance with selected provisions of laws and regulations that have a direct and material effect on the financial statements and laws for which OMB audit guidance requires testing, (3) performing limited procedures with respect to certain other information appearing in the Annual Financial Statement, and (4) expressing an opinion on these financial statements based on our audit.

In order to fulfill the above responsibilities, we

- examined, on a test basis, evidence supporting the amounts and disclosures in the financial statements;
- assessed the accounting principles used, and significant estimates made by management;
- evaluated the overall financial statement presentation;
- obtained an understanding of the entity and its operations, including its internal control related to financial reporting (including safeguarding assets), and compliance with laws and regulations (including execution of transactions in accordance with budget authority);
- tested relevant internal controls over financial reporting and compliance, and evaluated the design and operating effectiveness of internal control;
- considered the design of the process for evaluating and reporting on internal control and financial management systems under the Federal Managers' Financial Integrity Act;
- tested compliance with selected provisions of the following laws and regulations: the Anti-Deficiency Act; Provisions Governing Claims of the U.S. Government (31 U.S.C. 3711-3720E), including the Debt Collection Improvement Act of 1996 (DCIA), the Prompt Payment Act; the Pay and Allowance System for Civilian Employees as provided primarily in Chapters 51-59 of title 5, United States Code; the Civil Service Retirement Act, 5 U.S.C. Chapter 83; Federal Employee Health Benefits Act, 5 U.S.C. Chapter 89; Federal Employees Compensation Act (FECA), 5 U.S.C. Chapter 81; and the Federal Employee's Retirement System (FERS) Act of 1986, 5 U.S.C. Chapter 84.

We did not evaluate all internal controls relevant to operating objectives, as broadly defined by the Federal Managers' Financial Integrity Act, such as those controls relevant to preparing statistical reports and ensuring efficient operations. We limited our internal control testing to controls over financial reporting and compliance. Because of inherent limitations in internal control, misstatements due to error or fraud, losses, or noncompliance may nevertheless occur and not be detected. We caution that our internal control testing may not be sufficient for other purposes. In addition, we also caution that projecting our evaluation to future

periods is subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with controls may deteriorate.

We did not test compliance with all laws and regulations applicable to the Administrative Conference of the United States. We limited our tests of compliance to selected provisions of laws and regulations that have a direct and material effect on the financial statements and those required by OMB audit guidance that we deemed applicable to the Administrative Conference of the United States' financial statements for the fiscal year ended September 30, 2011. We caution that noncompliance may occur and not be detected by these tests, and that such testing may not be sufficient for other purposes.

We performed our audit in accordance with U.S. generally accepted government auditing standards and OMB audit guidance.

Agency Comments and Our Evaluation

The Administrative Conference of the United States concurred with the facts and conclusions in our report. See Appendix A.

Regis & Associates, PC
Washington, DC

November 15, 2011

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

BALANCE SHEET
As of September 30, 2011

		2011
Assets:		
Intragovernmental:		
Fund Balance With Treasury (Note 2)	$	1,771,022
Total Intragovernmental		1,771,022
Assets With the Public:		
Accounts Receivable, net (Note 3)		
General Property, Plant, and Equipment (Note 4)		261,777
Total Assets	**$**	**2,032,799**
Liabilities: (Note 5)		
Intragovernmental:		
Accounts Payable	$	22,833
Other (Note 6)		6,383
Total Intragovernmental		29,216
Liabilities With the Public:		
Accounts Payable		11,880
Other (Note 6)		148,855
Total Liabilities With the Public		160,735
Total Liabilities	$	189,951
Net Position:		
Unexpended Appropriations - Other Funds		1,699,242
Cumulative Results of Operations		143,606
Total Net Position		1,842,848
Total Liabilities and Net Position	**$**	**2,032,799**

The accompanying notes are an integral part of these financial statements.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

STATEMENT OF NET COST
For the Year Ended September 30, 2011

		2011
Program Costs:		
Program A:		
Gross Costs (Note 8)	$	3,362,078
Net Program Costs		3,362,078
Net Cost of Operations	**$**	**3,362,078**

The accompanying notes are an integral part of these financial statements.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

STATEMENT OF CHANGES IN NET POSITION
For the Year Ended September 30, 2011

	2011	
	All Other Funds	**Consolidated Total**
Cumulative Results of Operations:		
Beginning Balances	$ 286,283	$ 286,283
Budgetary Financing Sources:		
Appropriations Used	3,137,434	3,137,434
Other Financing Resources (Non-Exchange):		
Imputed Financing	81,966	81,966
Total Financing Sources	3,219,400	3,219,400
Net Cost of Operations (+/-)	(3,362,078)	(3,362,078)
Net Change	(142,678)	(142,678)
Cumulative Results of Operations	$ 143,605	$ 143,605
Unexpended Appropriations:		
Beginning Balances	$ 2,092,176	$ 2,092,176
Budgetary Financing Sources:		
Appropriations Received	2,750,000	2,750,000
Other Adjustments	(5,500)	(5,500)
Appropriations Used	(3,137,433)	(3,137,433)
Total Budgetary Financing Sources	(392,933)	(392,933)
Total Unexpended Appropriations	1,699,243	1,699,243
Net Position	**$ 1,842,848**	**$ 1,842,848**

The accompanying notes are an integral part of these financial statements.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

STATEMENT OF BUDGETARY RESOURCES
For the Year Ended September 30, 2011

		2011 Budgetary
Budgetary Resources:		
Unobligated Balance:		
Beginning of Period	$	1,720,438
Recoveries of Prior Year Obligations		457,142
Budget Authority:		
Appropriations Received		2,750,000
Earned		
Collected		2,000
Subtotal	$	2,752,000
Permanently Not Available		(5,500)
Total Budgetary Resources	**$**	**4,924,080**
Status of Budgetary Resources:		
Obligations Incurred		
Direct (Note 9)	$	3,623,303
Unobligated Balances		
Apportioned		550,777
Unobligated Balances - Not Available		750,000
Total Status of Budgetary Resources	**$**	**4,924,080**
Change in Obligated Balances:		
Obligated Balance, Net:		
Unpaid Obligations, Brought Forward, October 1	$	462,940
Obligations Incurred		3,623,303
Gross Outlays (-)		(3,158,856)
Recoveries of Prior-Year Unpaid Obligations, Actual (-)		(457,142)
Obligated Balance, Net, End of Period:		
Unpaid Obligations (+) (Note 10)		470,245
Total, Unpaid Obligated Balance, Net, End of Period	**$**	**470,245**
Net Outlays:		
Gross Outlays (+)		3,158,856
Offsetting Collections (-)		(2,000)
Net Outlays	**$**	**3,156,856**

The accompanying notes are an integral part of these financial statements.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
NOTES TO FINANCIAL STATEMENTS
SEPTEMBER 30, 2011

NOTE 1 – SIGNIFICANT ACCOUNTING POLICIES

(a) Reporting Entity

The Administrative Conference of the United States (the Conference) is an independent agency of the Executive Branch of the United States Government. The Conference has been re-established after an absence of over 14 years. The Conference was created in 1968, as an independent agency of the federal government, for the purpose of developing recommendations to improve the fairness and effectiveness of the rulemaking, adjudication, licensing, and investigative functions of federal agency programs.

The Conference ceased operations on October 31, 1995, due to termination of funding by Congress, but the statutory provisions that established the Conference were not repealed. Subsequently, Congress reauthorized the Conference in 2004 and again in 2008. The 2004 legislation expanded the responsibilities of the Conference to include specific attention to achieving more effective public participation and efficiency, reducing unnecessary litigation, and improving the use of science in the rulemaking process. Funding was approved in 2009, and the Conference was officially re-established in April 2010, when the Senate confirmed President Obama's nominee, Paul Verkuil as Chairman.

(b) Basis of Presentation

These financial statements have been prepared from the accounting records of the Conference in accordance with Generally Accepted Accounting Principles (GAAP), as promulgated by the Federal Accounting Standards Advisory Board (FASAB); and the form and content for entity financial statements specified in Office of Management and Budget's (OMB) Circular A-136, *"Financial Reporting Requirements."* GAAP for Federal entities is the hierarchy of accounting principles prescribed in Statement of Federal Financial Accounting Standards (SFFAS) 34, *"The Hierarchy of Generally Accepted Accounting Principles, Including the Application of Standards issued by the Financial Accounting Standards Board."*

OMB Circular A-136, requires agencies to prepare principal statements, which include a Balance Sheet, a Statement of Net Cost, a Statement of Changes in Net Position, and a Statement of Budgetary Resources. The Balance Sheet presents, as of September 30, 2011, amounts of future economic benefits owned or managed by the Conference (assets); amounts owed by the Conference (liabilities); and amounts, which comprise the difference (net position). The Statement of Net Cost reports the full cost of the Conference's operations, which includes costs of identifiable supporting services provided by other federal agencies. The Statement of Budgetary Resources reports the Conference's budgetary activity.

NOTE 1 – SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

(c) Basis of Accounting

Transactions are recorded on the accrual basis of accounting, in accordance with OMB Circular A-136. Under the accrual basis of accounting, revenues are recognized when earned, and expenses are recognized when a liability is incurred, without regard to the receipt or payment of cash.

(d) Use of Estimates

The preparation of financial statements requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities, the disclosure of contingent assets and liabilities at the date of the financial statements, and the reported amounts of revenues and expenses during the reporting period. Actual results may differ from those estimates.

(e) Budgets and Budgetary Accounting

The Conference follows standard federal budgetary accounting policies and practices in accordance with OMB Circular A-11, *"Preparation, Submission, and Execution of the Budget,"* dated July 2010. Budgetary accounting facilitates compliance with legal constraints and controls over the use of federal funds. The Conference recognizes budgetary resources as assets when cash (funds held by Treasury) is made available through warrants, and when spending authority from the offsetting collection is incurred.

(f) Revenues and Other Financing Sources

The Conference received the funding necessary to support its programs, from appropriations in FY2009, FY2010, and FY2011. None of the appropriations are "earmarked" funds.

(g) Imputed Financing Sources

In certain instances, operating costs of the Conference are paid out of funds appropriated to other federal agencies. In accordance with SFFAS 5, *"Accounting for Liabilities of the Federal Government,"* all expenses of a federal entity should be reported by that agency, regardless of whether the agency will ultimately pay those expenses. Amounts for certain expenses of the Conference, which will be paid by other federal agencies, are recorded in the Statement of Net Cost. A related amount is recognized in the Statement of Changes in Net Position as an imputed financing source. The Conference records imputed expenses and financing sources for employee retirement plan contributions, group term life insurance, and health benefit costs, which are paid by the Office of Personnel Management (OPM).

(h) Personnel Compensation and Benefits

Salaries and wages of employees are recognized as accrued payroll expenses and related liabilities, as earned. These expenses are recognized as a funded liability when accrued.

NOTE 1 – SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

Annual leave is accrued as it is earned by employees, and is included in personnel compensation and benefit costs. An unfunded liability is recognized for earned, but unused annual leave, since from a budgetary standpoint, this annual leave will be paid from future appropriations when employees use the leave. The amount accrued is based upon current pay rates for employees. Sick leave and other types of leave that are not vested are expensed when used, and no future liability is recognized for these amounts.

The Conference's employees participate in one of two retirement programs, either the Civil Service Retirement System (CSRS); or the Federal Employees Retirement System (FERS), which became effective on January 1, 1987. The Conference and its employees both contribute to these systems. Although the Conference funds a portion of the benefits under CSRS and FERS, and makes the necessary payroll withholdings, it does not report assets associated with these benefit plans, in accordance with SFFAS 5.

For CSRS employees, the Conference contributes an amount equal to 11.2% of the employees' basic pay, to the plan. For FERS employees, the Conference contributes an amount equal to 7% of the employees' basic pay, to the plan.

Both CSRS employees and FERS employees are eligible to participate in the Thrift Savings Plan (TSP). The TSP is a defined contribution retirement plan, intended to supplement the benefits provided under CSRS and FERS. For FERS employees, the Conference contributes an amount equal to 1% of the employee's basic pay to the TSP, and matches employee contributions up to an additional 4%. CSRS employees receive no matching contribution from the Conference.

OPM is responsible for reporting assets, accumulated plan benefits, and unfunded liabilities, if any, applicable to CSRS participants and FERS employees, government-wide, including the Conference's employees. The Conference has recognized an Imputed Cost and Imputed Financing Source for the difference between the estimated service cost and the contributions made by the Conference and its covered employees. The estimated cost of pension benefits is based on rates issued by OPM.

Employees are entitled to participate in the Federal Employees Group Life Insurance (FEGLI) Program. Participating employees can obtain "basic life" term life insurance, with the employee paying two-thirds of the cost, and the Conference paying one-third. Additional coverage is optional, to be paid fully by the employee. The basic life coverage may be continued into retirement if certain requirements are met. OPM administers the FEGLI Program, and is responsible for the reporting of related liabilities. Each fiscal year, OPM calculates the U.S. Government's service cost for the post-retirement portion of basic life coverage. Because the Conference's contributions to the basic life coverage are fully allocated by OPM to the pre-retirement portion of coverage, the Conference has recognized the entire service cost of the post-retirement portion of basic life coverage as an Imputed Cost and Imputed Financing Source.

NOTE 1 – SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

(i) Assets and Liabilities

Intra-governmental assets and liabilities arise from transactions between the Conference and other Federal entities.

Funds with the U.S. Treasury comprise the majority of assets on the Conference's balance sheet. All other assets result from activity with non-federal sources.

Liabilities represent amounts that are likely to be paid by the Conference as a result of transactions that have already occurred. The accounts payable portion of liabilities consists of amounts owed to federal agencies and commercial vendors, for goods, services, and other expenses received, but not yet paid.

Liabilities covered by budgetary or other resources are those liabilities of the Conference for which Congress has appropriated funds, or funding is otherwise available to pay amounts due.

(j) Fund Balance with Treasury

The U.S. Department of the Treasury (Treasury) processes the Conference's receipts and disbursements. Fund Balance with Treasury is the aggregate amount of the agency's accounts with Treasury for which the agency is authorized to liquidate obligations, pay funded liabilities, and make expenditures. The fund balance is increased through the receipt of Treasury warrants for appropriations. The Fund Balance with Treasury is reduced through non-expenditure Treasury Warrants for recissions, disbursements, and other expenditure cash outflows of funds.

The Conference's funds with the U.S. Treasury are cash balances from appropriations as of the fiscal year-end, from which the Conference is authorized to make expenditures and pay liabilities resulting from operational activity.

(k) Property, Plant, and Equipment (PPE)

PPE consists of capitalized equipment, furniture and fixtures, and software. There are no restrictions on the use or convertibility of property, plant, or equipment.

The Conference capitalizes PPE with a useful life of at least two (2) years and individually costing more than $5,000 ($15,000 for leasehold improvements). Bulk purchases of lesser value items are capitalized when the aggregate cost is $10,000 or greater.

Assets are depreciated on a straight-line basis over the estimated used life of the property. Information Technology (IT) equipment and software are depreciated over a useful life of five (5) years. All other equipment is depreciated over a five (5) year useful life, and leasehold improvements are depreciated over seven (7) years, or the remaining life of the lease.

NOTE 1 – SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

(l) Prepaid and Deferred Charges

Payments in advance of the receipt of goods and services are recorded as prepaid charges at the time of prepayment, and recognized as expenses when the related goods and services are received.

(m) Liabilities

Liabilities represent amounts expected to be paid as the result of a transaction or event that has already occurred. Liabilities covered by budgetary resources are liabilities incurred, which are covered by realized budgetary resources as of the balance sheet date. Available budgetary resources include new budget authority, spending authority from the offsetting collections, recoveries of unexpired budget authority through downward adjustments of prior year obligations, and unobligated balances of budgetary resources at the beginning of the year. Unfunded liabilities are not considered to be covered by such budgetary resources. Examples of unfunded liabilities are actuarial liabilities for future Federal Employees' Compensation Act payments and annual leave. The Government, acting in its sovereign capacity, can abrogate liabilities arising from other than contracts.

(n) Contingencies

The criteria for recognizing contingencies for claims are: (1) a past event or exchange transaction has occurred as of the date of the financial statements; (2) a future outflow or other sacrifice of resources is probable; and (3) the future outflow or sacrifice of resources is measurable (reasonably estimated). The Conference recognizes material contingent liabilities in the form of claims, legal action, administrative proceedings, and environmental suits that have been brought to the attention of legal counsel, some of which will be paid by the Treasury Judgment Fund. It is the opinion of management and legal counsel that the ultimate resolution of these proceedings, actions and claims, will not materially affect the financial position or results of operations.

(o) Net Position

Net position consists of unexpended appropriations and cumulative results of operations. Unexpended appropriations represent amounts of budget authority, to include unobligated or obligated balances not rescinded or withdrawn. Cumulative results of operations are comprised of the following: (1) the difference between revenues and expenses, (2) the net amount of transfers of assets in and out, without reimbursement; and (3) donations, all since inception of the fund(s).

NOTE 2 – FUND BALANCE WITH TREASURY

The Conference's funds with the U.S. Treasury consist only of appropriated funds. The Conference received an annual appropriation of $1,500,000 in FY 2009.

NOTE 2 – FUND BALANCE WITH TREASURY (CONTINUED)

In FY 2010, the Conference received a multi-year appropriation of $1,500,000. Using Public Law 111-8 (123 Statute 676), Section 609, the Conference submitted a request to the Committees on Appropriations of the House of Representatives and the Senate for approval to allow 50% ($750,000) of the unobligated balances at the end of fiscal year 2009, to remain available through September 30, 2010. This request was approved on May 4, 2010, allowing 50% of the FY 2009 unobligated balance to remain available through FY 2010. In FY 2011, the Conference received a multi-year appropriation of $2,744,500. The status of these funds as of September 30, 2011 is as follows:

	2011
A. Fund Balance with Treasury	
General Fund	$1,771,022
Total	$1,771,022
B. Status of Fund Balance with Treasury	
1) Unobligated Balance	
a) Available	550,777
b) Unavailable	750,000
2) Obligated Balance not yet Disbursed	470,245
Total	$1,771,022

NOTE 3 – ACCOUNTS RECEIVABLE

The Conference has no accounts receivable balance for fiscal year 2011.

NOTE 4 - GENERAL PROPERTY, PLANT AND EQUIPMENT, NET

The Conference's total cost, accumulated depreciation, and net book value for PPE for the year ended September 30, 2011 is as follows.

2011	Equipment	Furniture & Fixtures	Software	Total
Cost	$335,582			$335,582
Accum. Depr.	($73,805)			($73,805)
Net Book Value	$261,777	$0	$0	$261,777

NOTE 5 – LIABILITIES NOT COVERED BY BUDGETARY RESOURCES

Liabilities of the Conference are classified as liabilities covered or not covered by budgetary resources. As of September 30, 2011, the Conference had liabilities covered by budgetary resources of $71,779, and liabilities not covered by budgetary resources of $118,172.

NOTE 5 – LIABILITIES NOT COVERED BY BUDGETARY RESOURCES (CONTINUED)

Liabilities covered by budgetary resources are composed of Accounts Payable of $28,958; Disbursements in Transit of $5,755; Employer Contributions and Payroll Taxes Payable of $7,615; and Accrued Funded Payroll and Leave of $29,451.

	2011
With the Public:	
Other	118,172
Total liabilities not covered by budgetary resources	118,172
Total liabilities covered by budgetary resources	71,779
Total Liabilities	$189,951

NOTE 6 – OTHER LIABILITIES

Other liabilities with the public consist of Accrued Funded Payroll and Leave of $29,451; Unfunded leave of $118,172; and Employer Contributions and Payroll Taxes Payable – TSP of $1,232. Other Intragovernmental liabilities consist of Employer Contributions and Payroll Taxes Payable $6,383.

	With the Public	Non-Current	Current	Total
2011	Other Liabilities	118,172	30,683	$148,855

	Intragovernmental	Non-Current	Current	Total
2011	Other Liabilities	0	6,383	$6,383

NOTE 7 – LEASES

Entity as Lessee:

The Conference leases office space, located at 1120 20th Street, NW; Suite 706 South, in Washington, DC. The lease was entered into, and became effective, on August 9, 2010; and has a term of 60 months. The lease terminates on August 8, 2015.

The following is a schedule of future minimum lease payments required by the lease:

Year Ending September 30, 2012	$ 287,456
2013	$ 290,538
2014	$ 293,714
2015	$241,700
Total Future Lease Payments	$ 1,113,408

NOTE 8 – INTRAGOVERNMENTAL COSTS

The portion of the Conference's program costs related to Intragovernmental Costs, and Costs with the Public, are shown as follows (note that as the Conference earns no revenue from its operations, gross and net costs are identical). Intragovernmental costs are costs incurred from exchange transactions with other federal entities (e.g., building lease payments to GSA). Costs with the Public are incurred from exchange transactions with non-Federal entities (i.e., all other program costs).

	Total 2011
Program A	
Intragovernmental costs	953,575
Public costs	2,408,503
Total Program A costs	3,362,078
Total Program A	3,362,078

NOTE 9 – APPORTIONMENT CATEGORIES OF OBLIGATIONS INCURRED: DIRECT VS. REIMBURSABLE OBLIGATIONS

The Conference is subject to apportionment. All obligations are category B, which is the amount of direct obligations incurred against amounts apportioned under category B on the latest SF 132.

	Total 2011
Direct	
Category B	3,623,303
Total Obligations	3,623,303

NOTE 10 – UNDELIVERED ORDERS AT THE END OF THE PERIOD

The amount of Unpaid Obligated Balance, Net, End of Period, shown on the Statement of Budgetary Resources includes obligations relating to Undelivered Orders (goods and services contracted for, but not yet received at the end of the year), and Accounts Payable (amounts owed at the end of the year by the Conference for goods and services received). The amount of each is as follows:

	Undelivered Orders	Accounts Payable	Unpaid Obligated Balance Net
2011	398,466	71,779	$470,245

NOTE 11 – RECONCILIATION OF NET COST OF OPERATIONS (PROPRIETARY) TO BUDGET

Budgetary resources obligated are obligations for personnel, goods, services, benefits, etc. made by the Conference in order to conduct operations or acquire assets. Other (i.e., non-budgetary) financing resources are also utilized by the Conference in its program (proprietary) operations. For example, spending authority from offsetting collections and recoveries are financial resources from the recoveries of prior year obligations (e.g., the completion of a contract where not all of the funds were used) and refunds or other collections (i.e., funds used to conduct operations that were previously budgeted). An imputed financing source is recognized for future federal employee benefits costs incurred for Conference employees that will be funded by OPM. Changes in budgetary resources obligated for goods, services, and benefits ordered, but not yet provided, represents the difference between the beginning and ending balances of undelivered orders. (Note that goods and services received during the year based on obligations incurred in the prior year represent a cost of operations not funded from budgetary resources). Resources that finance the acquisition of assets, are budgetary resources used to finance assets, and not cost of operations (e.g., increases in accounts receivable or capitalized assets). Financing sources yet to be provided represents financing that will be provided in future periods for future costs that are recognized in determining the net cost of operations for the present period. Finally, components not requiring or generating resources, are costs included in the net cost of operations that do not require resources (e.g., depreciation and amortized expenses of assets previously capitalized).

A reconciliation between budgetary resources obligated, and net cost of operations (i.e. providing an explanation between budgetary and financial (proprietary) accounting) is as follows: (Please note that in prior years, this information was presented as a separate financial statement (the Statement of Financing)):

	FY 2011
Budgetary Resources Obligated	$ 3,623,303
Spending Authority from Recoveries and Offsetting Collections	(459,141)
Imputed Financing from Costs Absorbed by Others	81,967
Changes in Budgetary Resources Obligated for Goods, Services, and Benefits Ordered but Not Yet Provided	(26,728)
Resources that Finance the Acquisition of Assets	2,651
Financing Sources Yet to be Provided	72,846
Components Not Requiring or Generating Resources	67,180
Net Cost of Operations	$ 3,362,078

APPENDIX A -

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES COMMENTS ON DRAFT AUDIT REPORT

APPENDIX A -

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES COMMENTS ON DRAFT AUDIT REPORT

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

November 22, 2011

Regis Associates, PC
Peter Regis, CPA
1400 Eye Street, NW; Suite 425
Washington, DC 20005

Dear Mr. Regis:

We have reviewed the draft audit report provided to us relating to your audit of the Administrative Conference of the United States for the fiscal year ended September 30, 2011. We concur with the facts and conclusions in the draft report.

Sincerely,

Michael T. McCarthy
Executive Director

Harry M. Seidman
Administrative Director

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appendix

A. Administrative Conference Act
B. Bylaws

Appendix A
Administrative Conference Act

United States Code
Title 5. Government Organization and Employees
Part I. The Agencies Generally
Chapter 5. Administrative Procedure
Subchapter V. Administrative Conference of the United States

§ 591. Purposes

The purposes of this subchapter are--

(1) to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest;

(2) to promote more effective public participation and efficiency in the rulemaking process;

(3) to reduce unnecessary litigation in the regulatory process;

(4) to improve the use of science in the regulatory process; and

(5) to improve the effectiveness of laws applicable to the regulatory process.

§ 592. Definitions

For the purpose of this subchapter--

(1) “administrative program” includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) “administrative agency” means an authority as defined by section 551(1) of this title; and

(3) “administrative procedure” means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

§ 593. Administrative Conference of the United States

(a) The Administrative Conference of the United States consists of not more than 101 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of--

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 595(b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 40 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 594. Powers and duties of the Conference

To carry out the purposes of this subchapter, the Administrative Conference of the United States may--

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure;

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure;

(4) enter into arrangements with any administrative agency or major organizational unit within an administrative agency pursuant to which the Conference performs any of the functions described in this section; and

(5) provide assistance in response to requests relating to the improvement of administrative procedure in foreign countries, subject to the concurrence of the Secretary of State, the Administrator of the Agency for International Development, or the Director of the United States Information Agency, as appropriate, except that--

(A) such assistance shall be limited to the analysis of issues relating to administrative procedure, the provision of training of foreign officials in administrative procedure, and the design or improvement of administrative procedure, where the expertise of members of the Conference is indicated; and

(B) such assistance may only be undertaken on a fully reimbursable basis, including all direct and indirect administrative costs.

Payment for services provided by the Conference pursuant to paragraph (4) shall be credited to the operating account for the Conference and shall remain available until expended.

§ 595. Organization of the Conference

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to--

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposal so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to--

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to--

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251-260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS-15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of Federal agencies and of State and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes, property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 1342 of title 31;

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedure;

(15) exercise such additional authority as the Council or Assembly delegates to him; and

(16) request any administrative agency to notify the Chairman of its intent to enter into any contract with any person outside the agency to study the efficiency, adequacy, or fairness of an agency proceeding (as defined in section 551(12) of this title).

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 596. Authorization of appropriations

There are authorized to be appropriated to carry out this subchapter not more than $3,200,000 for fiscal year 2009, $3,200,000 for fiscal year 2010, and $3,200,000 for fiscal year 2011. Of any amounts appropriated under this section, not more than $2,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.

Appendix B
ACUS Bylaws

To be codified as: Title 1, Code of Federal Regulations, Part 302 (Adopted December 2010)

§ 302.1 Establishment and Objective

The Administrative Conference Act, 5 U.S.C. §§ 591 et seq., 78 Stat. 615 (1964), as amended, authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the federal government. The purposes of the Administrative Conference are to improve the administrative procedure of federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest, to promote more effective participation and efficiency in the rulemaking process, to reduce unnecessary litigation and improve the use of science in the regulatory process, and to improve the effectiveness of laws applicable to the regulatory process. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

§ 302.2 Membership

(a) General

(1) Each member is expected to participate in all respects according to his or her own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly, either in person or by telephone or videoconference if that is permitted for the session or meeting involved. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the nonattendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

Non-Government members are appointed by the Chairman with the approval of the Council. The Chairman shall, by random selection, identify one-half of the non-Government members appointed in 2010 to serve terms ending on June 30, 2011, and the other half to serve terms ending on June 30, 2012. Thereafter, all non-Government member terms shall be for two years. No non-Government members shall at any time be in continuous service beyond three terms; provided, however, that such former members may thereafter be appointed as senior fellows pursuant to paragraph (e) of this section; and provided further, that all members appointed in 2010 to terms expiring on June 30, 2011, shall be eligible for appointment to three continuous two-year terms thereafter.

(c) Eligibility and Replacements

(1) A member designated by a federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he or she leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he or she enters full-time government service. In the event a non-Government member of the Conference appointed by the Chairman resigns or becomes ineligible to continue as a member, the Chairman shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a suitably informed alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of or liaisons to the Conference for six or more years, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals in even-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Senior fellows shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(f) Special Counsels

The Chairman may, with the approval of the Council, appoint persons who do not serve under any of the other official membership designations to the position of special counsel. Special counsels shall advise and assist the membership in areas of their special expertise. Their terms shall terminate at 2-year intervals in odd-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Special counsels shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§ 302.3 Committees

(a) Standing Committees

The Conference shall have the following standing committees:

1. Committee on Adjudication
2. Committee on Administration
3. Committee on Public Processes
4. Committee on Judicial Review
5. Committee on Regulation
6. Committee on Rulemaking

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. The Chairman, with the approval of the Council, may establish additional standing committees or rename, modify, or terminate any standing committee.

(b) Special Committees

With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. Such special committees shall expire after two years, unless their term is renewed by the Chairman with the approval of the Council for an additional period not to exceed two years for each renewal term. The Chairman may also terminate any special committee with the approval of the Council when in his or her judgment the committee's assignments have been completed.

(c) Coordination

The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

§ 302.4 Liaison Arrangements

The Chairman may, with the approval of the Council, make liaison arrangements with representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations. Persons appointed under these arrangements shall have all the privileges of members, but may not vote, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§ 302.5 Avoidance of Conflicts of Interest

(a) Disclosure of Interests

(1) The Office of Government Ethics and the Office of Legal Counsel have advised the Conference that non-Government members are special government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of sections 201-224 of Title 18, United States Code, in accordance with their terms. Accordingly, the Chairman of the Conference is authorized to prescribe requirements for the filing of information with respect to the employment and financial interests of non-Government members consistent with law, as he or she reasonably deems necessary to comply with these provisions of law, or any applicable law or Executive Order or other directive of the President with respect to participation in the activities of the Conference (including but not limited to eligibility of federally registered lobbyists).

(2) The Chairman will include with the agenda for each plenary session and each committee meeting a statement calling to the attention of each participant in such session or meeting the requirements of this section, and requiring each non-Government member to provide the information described in paragraph (a)(1), which information shall be maintained by the Chairman as confidential and not disclosed to the public. Except as provided in this paragraph (a) or paragraph (b), members may vote or participate in matters before the Conference to the extent permitted by these by-laws without additional disclosure of interest.

(b) Disqualifications

(1) It shall be the responsibility of each member to bring to the attention of the Chairman, in advance of participation in any matter involving the Conference and as promptly as practicable, any situation that may require disqualification under 18 U.S.C. § 208. Absent a duly authorized waiver of or exemption from the requirements of that provision of law, such member may not participate in any matter that requires disqualification.

(2) No member may vote or otherwise participate in that capacity with respect to any proposed recommendation in connection with any study as to which he or she has been engaged as a consultant or contractor by the Conference.

(c) Applicability to Senior Fellows, Special Counsel, and Liaison Representatives

This section shall apply to senior fellows, special counsel, and liaison representatives as if they were members.

§ 302.6 General

(a) Meetings

In the case of meetings of the Council and plenary sessions of the Assembly, the Chairman (and, in the case of committee meetings, the committee chairman) shall have authority in his or her discretion to permit attendance by telephone or videoconference. All sessions of the Assembly and all committee meetings shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to special counsel, and to liaison representatives (and to consultants and staff members insofar as matters on which they have been engaged are under consideration), and to persons who, prior to the commencement of the session or meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly (or, in the case of committee meetings, the approval of the chairman of the committee and unanimous consent of the committee).

(b) Quorums

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council. Action by the Council may be effected either by meeting or by individual vote, recorded either in writing or by electronic means.

(c) Separate Statements

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation. A member's failure to file or join in such a separate statement does not necessarily indicate his or her agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Director not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(d) Amendment of Bylaws

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(e) Procedure

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

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