

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

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Special Committee To Review the Government in the Sunshine Act

ACTION: Notice of public meeting; location announcement.

SUMMARY: Pursuant to the Federal Advisory Committee Act (Pub. L. 92-463), notice was published on August 8, 1995 (60 FR 40342) of a notice of public hearing to be convened by the Special Committee to Review the Government in the Sunshine Act of the Administrative Conference of the United States. This notice announces the location of the hearing.

DATES: Tuesday, September 12, 1995, 9:00 am.

LOCATION: Occupational Safety and Health Review Commission Hearing Room, 1120 20th Street, NW., South Lobby, 9th Floor, Washington, DC.

FOR FURTHER INFORMATION: Jeffrey S. Lubbers, mm Office of the Chairman, Administrative Conference of the United States, 2120 L Street, NW., Suite 500, Washington, DC 20037. Telephone: (202) 254-7020.

SUPPLEMENTARY INFORMATION: The Special Committee to Review the Government in the Sunshine Act will hold a public hearing on September 12 to hear testimony on the operation of the Act.

See 60 FR 40342 (August 8, 1995) or more information about the scope of the public hearing and how to participate.

Dated: August 15, 1995.

Jeffrey S. Lubbers,

Research Director.

[FR Doc. 95-20559 Filed 8-17-95; 8:45 am]

BILLING CODE 6110-01-P

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States (ACUS) adopted five recommendations at its Fifty-Second Plenary Session. The recommendations concern: (1) Review of Existing Agency Regulations; (2) Streamlined Processes for Noncontroversial and Expedited Rulemaking; (3) Resolution of Government Contract Bid Protest Disputes; (4) Alternative Dispute Resolution Confidentiality and the Freedom of Information Act; and (5) Use of Mediation under the Americans with Disabilities Act.

FOR FURTHER INFORMATION CONTACT: Jeffrey S. Lubbers, 202-254 7020.

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 591-596. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). At its Fifty-Second Plenary Session, held June 15-16, 1995, the Assembly of the Administrative Conference of the United States adopted five recommendations.

Recommendation 95-3, "Review of Existing Agency Rules," proposes that agencies develop processes for systematically reviewing their rules. Such processes should be designed by and tailored to the individual agencies. Agencies should set priorities for rule review, and provide for public input into the priority-setting process. The petition for rulemaking process should be strengthened to ensure adequate agency response, but should not be allowed to dominate an agency's agenda. Agencies should devote adequate attention and resources to the task of reviewing their existing rules.

Recommendation 95-4, "Procedures for Noncontroversial and Expedited

Rulemaking," endorses two rulemaking procedures that can expedite rules in appropriate cases. Direct final rulemaking is appropriate where a rule is expected to generate no significant adverse comment, and allows an agency to avoid publishing both a proposed and final rule. The Recommendation also proposes that agencies using interim final rulemaking should always provide for post-promulgation comment, and should always respond to the comments and make any necessary modifications. Such post-promulgation procedures should be used in all rules where prepromulgation comment is excused under the "good-cause" exemption of 5 U.S.C. 553(b)(3)(B) as "impracticable" or "contrary to the public interest."

Recommendation 95-5, "Government Contract Bid Protests," proposes reexamination of the current jurisdictional arrangements for hearing the protests of disappointed seekers of government contracts. The recommendation urges that jurisdiction over bid protests, now available in four different forums (including the General Accounting Office, the General Services Board of Contract Appeals (for contracts involving information technology), the federal district courts, and the Court of Federal Claims) be streamlined by providing that all protests be heard initially in an administrative forum, with judicial review available exclusively in the U.S. Court of Appeals for the Federal Circuit. Should Congress not wish to consider exclusive appellate-level jurisdiction, the Conference alternatively proposes eliminating district court jurisdiction in favor of consolidated jurisdiction in the Court of Federal Claims. In addition, Recommendation 95-5 urges Congress to mandate empirical testing of the effect of the bid protest process to analyze the costs and benefits of that process and to determine whether it has improved the quality or reduced the cost of public procurement; the recommendation suggests several different approaches to such a study, among them a pilot study under which an agency or agencies would be permitted to conduct some or all procurement free of protest controls for a period of years, with the results to be compared to procurement conducted under protest controls.

Recommendation 95-6, "ADR Confidentiality and the Freedom of

Information Act," seeks to deal with a difficulty raised by the 1990 Administrative Dispute Resolution Act concerning the need for confidentiality of some documents generated by ADR proceedings (e.g., mediator's notes) and their availability under FOIA. This recommendation, based in large part, on a study by Professor Mark Grunewald that describes the state of the law and evaluates the need for change, calls on Congress to amend the ADR Act's confidentiality provisions to make clear that they constitute an exemption from disclosure under the FOIA.

Recommendation 95-7, "Use of Mediation under the Americans with Disabilities Act," urges that federal agencies with enforcement responsibilities under the Act cooperate to establish a coordinated program for voluntary mediation of ADA cases under all titles. The recommendation suggests establishing a joint committee to develop the program. Use of a common group of trained mediators is suggested to handle a variety of disputes arising under the Act, and several criteria are listed for evaluating the program.

The full texts of the recommendations are set out in the Appendix below. The recommendations will be transmitted to the affected agencies and to appropriate committees of the United States Congress. The Administrative Conference has advisory powers only, and the decision on whether to implement the recommendations must be made by the affected agencies or by Congress.

Recommendations and statements of the Administrative Conference are published in full text in the **Federal Register**. In past years Conference recommendations and statements of continuing interest were also published in full text in the *Code of Federal Regulations* (1 CFR Parts 305 and 310). Budget constraints have required a suspension of this practice in 1994. However, a complete listing of past recommendations and statements is published in the *Code of Federal Regulations*. Copies of all past Conference recommendations and statements, and the research reports on which they are based, may be obtained from the Office of the Chairman of the Administrative Conference. Requests for single copies of such documents will be filled without charge to the extent that supplies on hand permit (see 1 CFR § 304.2).

The transcript of the Plenary Session is available for public inspection at the Conference's offices at Suite 500, 2120 L Street NW., Washington, DC.

Dated: August 15, 1995.

Jeffrey S. Lubbers,
Research Director.

Appendix—Recommendations of the Administrative Conference of the United States

The following recommendations were adopted by the Assembly of the Administrative Conference on Thursday, June 15, 1995.

Recommendation 95-3, Review of Existing Agency Regulations

Federal agencies generally have systems in place to develop new regulations. Once those regulations have been promulgated, the agency's attention usually shifts to its next unaddressed issue. There is increasing recognition, however, of the need to review regulations already adopted to ensure that they remain current, effective and appropriate. Although there have been instances where agencies have been required to review their regulations to determine whether any should be modified or revoked, there is no general process for ensuring review of agency regulations.

The Administrative Conference believes that agencies have an obligation to develop systematic processes for reviewing existing rules, regulations and regulatory programs on an ongoing basis. If Congress determines that such a review program should be mandated, it should allow the President and agencies maximum flexibility to design processes that are sensitive to individual agency situations and types of regulations. Thus, such legislation should assign to the President the responsibility for overseeing agency compliance through general guidelines that take into account agency resources and other responsibilities. The obligation to review existing regulations should be made applicable to all agencies, whether independent or in the executive branch.

Given the difference among agencies, however, processes for review of existing regulations should not be "one-size-fits-all," but should be tailored to meet agencies' individual needs. Thus, the President, as well as Congress, should avoid mandating standardized or detailed requirements. Moreover, the review should focus on the most important regulations and offer sufficient time and resources to ensure meaningful analysis. Tight time frames or review requirements applicable to *all* regulations, regardless of their narrow or limited impact, may prevent agencies from being able to engage in a meaningful effort. It is important that priority-setting processes be developed

that allow agencies, in consultation with the Office of Management and Budget and the public (including but not limited to the regulated communities), to determine where their efforts should be directed.

Public input into the review process is critical. The Administrative Procedure Act already provides in section 553(e) for petitions for rulemaking, which allow the public to seek modifications or revocation of existing regulations as well as ask for new rules. The Administrative Conference has in the past suggested some improvements in the ways agencies administer and respond to such petitions. See Recommendation 86-6, "Petitions for Rulemaking." It suggests, among other things, that agencies establish deadlines for responding to petitions. The Conference reiterates that recommendation and proposes that, if necessary, the President by executive order or the Congress should mandate that petitions be acted upon within a specified time, for example 12-18 months.

Although petitions for rulemaking are a useful method for the public to recommend to agencies changes it believes are important, such petitions should not be allowed to dominate the agency's agenda. Agencies have a broad responsibility to respond to the needs of the public at large and not all members of the public are equally equipped or motivated to file rulemaking petitions. Thus, the petition process should be a part, but only a part, of the process for determining agency rulemaking priorities, both with respect to the need for new regulations and to review of existing regulations. Agencies should also develop other mechanisms for public input on the priorities for review of regulations, as well as on the impact and effectiveness of those regulations.

Properly done, reviewing existing regulations is not a simple task. It may require resources and information that are not readily available. Each agency faces different circumstances, depending on the number of its regulations, their type and complexity, other responsibilities, and available resources. These processes must be designed so that they take into account the need for ongoing review, the agency's overall statutory responsibilities, including mandates to issue new regulations, and other demands on agency resources. Because there are relatively few successful well-developed models available and no widely accepted methodologies, the Conference recommends that agencies experiment with various methods. Such programs might explore different

approaches with the aim of finding one (or several) that functions effectively for the particular agency. Agencies may want to look to activities at the state level, as well as the limited federal-level experience.

Review of existing regulations is primarily a management issue. As such, agency discretion must be recognized as important and judicial review should be limited. Agency denials of petitions for rulemaking under the APA are subject to judicial review, but courts have properly limited their scope of review in this context. There is no warrant for Congress to change current review standards, nor should any regularized or systematic program for review of existing regulations be subject to greater judicial scrutiny.

Recommendation

I. Review Requirements

All agencies (executive branch or "independent") should develop processes for systematic review of existing regulations to determine whether such regulations should be retained, modified or revoked. If Congress decides to mandate such programs, it should limit that requirement to a broad review, assign to the President the responsibility for overseeing the review process, and specify that each agency design its own program.

II. Focus of Regulation Review

Systematic review processes should be tailored to meet the needs of each agency, focus on the most important regulations, and provide for a periodic, ongoing review. The nature and scope of the review should be determined by, among other things, the agency's other responsibilities and demands on its resources. Sufficient time should be provided to allow meaningful information-gathering and analysis.

III. Setting Priorities

Agencies should establish priorities for which regulations are reviewed when developing their annual regulatory programs or plans,¹ and in consultation with OMB and the public. In setting such priorities, the following should be considered:

A. whether the purpose, impact and effectiveness of the regulations have been impaired by changes in conditions;²

B. whether the public or the regulated community views modification or

revocation of the regulations as important;

C. whether the regulatory function could be accomplished by the private sector or another level of government more effectively and at a lower cost; and

D. whether the regulations overlap or are inconsistent with regulations of the same or another agency.

Agencies should not exclude from their review those regulations for which statutory amendment might be required to achieve desired change. Agencies should notify Congress of such regulations and the relevant statutory provisions.

IV. Public Input

A. Agencies should provide adequate opportunity for public involvement in both the priority-setting and review processes. In addition to reliance on requests for comment or other recognized means such as agency ombudsmen³ and formally established advisory committees, agencies should also consider other means of soliciting public input. These include issuing press releases and public notices, convening roundtable discussions with interested members of the public, and requesting comments through electronic bulletin boards or other means of electronic communication.

B. The provisions of 5 U.S.C. § 553(e) authorizing petitions for rulemaking also provide a method for reviewing existing regulations. These provisions should be strengthened to ensure adequate and timely agency responses.⁴ Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time. Congress should not modify the current limited judicial review standard applicable to petitions for rulemaking.

V. Agency Implementation of Regulatory Review Processes

A. Agencies should provide adequate resources to and ensure senior level management participation in the review of existing regulations.

B. As part of the review process, agencies should review information in their files as well as other available information on the impact and the effectiveness of regulations and, where appropriate, should engage in risk assessment and cost-benefit analysis of specific regulations.

C. In developing processes for reviewing existing regulations, agencies should consider:

1. Frequency of review: Regulations could be reviewed on a pre-set schedule (e.g., regulations reviewed every [x] years; a review date set at the time a new regulation is issued; regulations subject to "sunset" dates) or according to a flexible priority list.

2. Categories of regulations to be reviewed: Regulations could be reviewed by age, by subject, by affected group, by agencies individually or on a multi-agency basis.

D. Agencies should consider experimenting with partial programs and evaluate their effectiveness.

Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking

Rulemaking has been the subject of considerable debate and review in recent times. Concern has been expressed that rulemaking processes provide adequate opportunity for meaningful public input while allowing agencies, in appropriate circumstances, to expedite the implementation of rules when they either are needed immediately or are routine or noncontroversial. Agencies have experimented with procedures to achieve these objectives. Two of these procedures, "direct final rulemaking," and "post-promulgation comment" rules (also called "interim final rulemaking") are discussed here.

Direct Final Rulemaking

Direct final rulemaking is a technique for expediting the issuance of noncontroversial rules. It involves agency publication of a rule in the **Federal Register** with a statement that, unless an adverse comment is received on the rule within a specified time period, the rule will become effective as a final rule on a particular date (at least 30 days after the end of the comment period). However, if an adverse comment is filed, the rule is withdrawn, and the agency may publish the rule as a proposed rule under normal notice-and-comment procedures.¹

The process generally has been used where an agency believes that the rule is noncontroversial and adverse comments will not be received. It allows the agency to issue the rule without having to go through the review process twice (i.e., at the proposed and final rule

¹ See Executive Orders 12,498 ("Regulatory Program" required by President Reagan) and 12,866 ("Regulatory Plan" required by President Clinton).

² See (V)(B), *infra*.

³ See "The Ombudsman in Federal Agencies," ACUS Recommendation 90-2.

⁴ See Recommendation 86-6, "Petitions for Rulemaking."

¹ When an agency believes that it can incorporate the adverse comment in a subsequent direct final rulemaking, it may use the direct final rulemaking process again.

stages),² while at the same time offering the public the opportunity to challenge the agency's view that the rule is noncontroversial.

Under current law, direct final rulemaking is supported by two rationales. First, it is justified by the Administrative Procedure Act's "good cause" exemption from notice-and-comment procedures where they are found to be "unnecessary." The agency's solicitation of public comment does not undercut this argument, but rather is used to validate the agency's initial determination. Alternatively, direct final rulemaking also complies with the basic notice-and-comment requirements in section 553 of the APA. The agency provides notice and opportunity to comment on the rule through its **Federal Register** notice; the publication requirements are met, although the information has been published earlier in the process than normal; and the requisite advance notice of the effective date required by the APA is provided.³

Because the process protects public comment and expedites routine rulemaking, the Administrative Conference recommends that agencies use direct final rulemaking in all cases where the "unnecessary" prong of the good cause exemption is available, unless the agency determines that the process would not expedite issuance of such rules. The Conference further recommends that agencies explain when and how they will employ direct final rulemaking. Such a policy should be issued as a procedural rule or a policy statement.⁴

The Conference recommends that agencies publish in the notice of the direct final rulemaking the full text of the rule and the statement of basis and purpose, including all the material that would be required in the preamble to a final rule. The Conference also

recommends that the public be afforded adequate time for comment.⁵

The direct final rulemaking process is based upon the notion that receipt of "significant adverse" comment will prevent the rule from automatically becoming final. Agencies have taken different approaches in defining "adverse" comments for this purpose. Some have said that a mere notice of intent to file an adverse comment is sufficient. Others have required that the comment either state that the rule should not be adopted or suggest a change to the rule; proposals simply to expand the scope of the rule would not be considered adverse. Some have said that a recommended change in the rule would not in and of itself be treated as adverse unless the comment states that the rule would be inappropriate as published. The Conference recommends that a significant adverse comment be defined as one where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. In determining whether a significant adverse comment is sufficient to terminate a direct final rulemaking, agencies should consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process.

To assure public notice of whether and when a direct final rule becomes effective, agencies should include in their initial **Federal Register** notices a statement that, unless the agency publishes a **Federal Register** notice withdrawing the rule by a specified date, it will become effective no less than 30 days after such specified date. Alternatively, an agency should publish a separate "confirmation notice" after the close of the comment period stating that no adverse comments were received and setting forth an effective date at least 30 days in the future. The effective date of the rule should be at least 30 days after the public has been given notice that the agency does not intend to withdraw the rule, unless the rule "grants or recognizes an exemption or relieves a restriction," 5 U.S.C. § 553(d)(1), or is otherwise exempted from the delayed effective date of section 553(d) of the APA. The fact that a rule has proved noncontroversial is not itself an appropriate basis for

dispensing with the delay in the effective date.

Agencies may also wish to consider using direct final rulemaking procedures in some cases where the text of the rule has been developed through the use of negotiated rulemaking. Where the course of the negotiations suggests that the result will be noncontroversial, the direct final rulemaking process offers the opportunity for expedited rulemaking while at the same time ensuring that the opportunity for comment is not foreclosed.

Although direct final rulemaking is viewed by the Conference as permissible under the APA as currently written, Congress may wish to expressly authorize the process. Authorization would alleviate any uncertainty and reduce the potential for litigation.

Post-Promulgation Comment Procedures ("Interim Final Rulemaking")

Agencies have increasingly used a post-promulgation comment process commonly referred to as "interim final rulemaking" to describe the issuance of a final rule without prior notice and comment, but with a post-promulgation opportunity for comment. By inviting comment, the agency is indicating that it may revise the rule in the future based on the comments it receives—thus leading to the label of an "interim-final" rule.

Although the process has been used in a variety of contexts, it is used most frequently where an agency finds that the "good cause" exemption of the APA justifies dispensing with prepromulgation notice and comment. Recognizing the value of public comment, however, the agency offers an opportunity for comment after the final rule has been published.⁶ This allows the agency both to issue the rule quickly where necessary and provide opportunity for some public comment. On the other hand, prepromulgation comment is generally considered preferable because agencies are perceived by commenters as more likely to accept changes in a rule that has not been promulgated as a final rule—and potential commenters are more likely to file comments in advance of the agency's "final" determination.

Under current law, agencies must be able to justify use of the good cause or other exemptions from notice-and-comment procedures under the APA if they are providing only post

² Rules are generally reviewed both by the agency and by the Office of Information and Regulatory Affairs. Internal agency review is often time-consuming. Under current practice, review of direct final rules by OIRA would be uncommon, since, under E.O. 12,866, only rules deemed to be "significant" are subject to review. Should this policy be changed, the Conference urges that agency rules issued through the direct final rulemaking process be subject to no more than one OIRA review.

³ A separate Federal Register notice stating that no adverse comment has been received and that the rule will be effective on a date at least 30 days in the future can also be used to further alleviate any concern regarding proper advance notice to the public.

⁴ The Conference has previously suggested that notice-and-comment procedures be used for procedural rules where feasible. See Recommendation 92-1, "The Procedural and Practice Rule Exemption From APA Notice-and-Comment Rulemaking Requirements."

⁵ The Conference has previously recommended that the APA be amended to ensure that at least 30 days be allowed for public comment, while encouraging longer comment periods. Recommendation 93-4, "Improving the Environment for Agency Rulemaking," ¶IV and Preamble at p. 5.

⁶ The Administrative Conference has recommended such post-promulgation comment opportunity.

See Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements."

promulgation comment opportunity. Courts generally have not allowed post-promulgation comment as an alternative to the prepromulgation notice-and-comment process in situations where no exemption is justified. Where a rule is exempt from notice-and comment requirements, however, it is still advantageous to provide such procedures, even if offered after the rule has been promulgated. Public comment can provide both useful information to the agency and enhanced public acceptance of the rule.⁷

The Conference therefore recommends that, where an agency invokes the good cause exemption because notice and comment are "impracticable" or "contrary to the public interest," it should provide an opportunity for post-promulgation comment.⁸ This recommendation does not apply to temporary rules, i.e., those that address a temporary emergency or expire by their own terms within a relatively brief period, such as rules that close waterways for boat races or airspace for air shows.

When using post-promulgation comment procedures in this context, agencies should implement the following processes. The agency should include in the notice of the rule a request for public comment as well as a statement that it will publish in the *Federal Register* a response to significant adverse comments received along with modifications to the interim rule, if any. The Conference also suggests that an agency generally put a cross-reference notice in the "Proposed Rules" section of the *Federal Register* to ensure that the public is notified of the request for comment. The agency should then, and as expeditiously as possible, respond to any significant adverse comments and make any changes that it determines are appropriate. Agencies should consider including in the initial notice either a deadline by which they will respond to comments and make any appropriate changes or a "sunset" or termination date for the rule's effectiveness.

The Conference addresses these recommendations in the first instance to the agencies. If they do not implement these proposals, the Conference recommends that the President issue an

⁷ See also Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-2 (to be codified at 2 U.S.C. 1532) (requirement for preparing analysis in connection with "general notice of proposed rulemaking" for rules resulting in non-federal expenditures of \$100,000,000 or more).

⁸ This is consistent with the Conference's long-standing position that such opportunity for comment should be offered. See n. 6, supra. See also Recommendation 90-8, "Rulemaking and Policymaking in the Medicaid Program," ¶A(2).

appropriate executive order mandating use of post-promulgation comment procedures for rules issued under the good cause exemption (except those invoking the "unnecessary" clause). If necessary, or when the APA is otherwise reviewed, Congress should amend the APA to include such a requirement.

The Conference also suggests that agencies consider using similar procedures for other rules issued initially without notice and comment, such as interpretive rules, procedural rules, or rules relating to grants, benefits, contracts, public property, or military or foreign affairs functions.⁹ Only for those rules where notice and comment are considered unnecessary should such processes not be used; in such cases, agencies should consider direct final rulemaking.

Where an agency has used post-promulgation comment procedures, responded to significant adverse comments and ratified or modified the rule as appropriate, the Conference suggests that a reviewing court generally should not set aside that ratified or modified rule solely on the basis that adequate good cause did not exist to support invoking the exemption initially. At this stage, the agency's initial flawed finding of good cause should normally be treated as harmless error with respect to the validity of the ratified or modified rule.

Recommendation

I. Direct Final Rulemaking

A. In order to expedite the promulgation of noncontroversial rules, agencies should develop a direct final rulemaking process for issuing rules that are unlikely to result in significant adverse comment. Agencies should define "significant adverse comment" as a comment which explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without a change. Procedures governing the direct final rulemaking process should be established and published by each agency.

B. Direct final rulemaking should provide for the following minimum procedures:

1. The text of the rule and a notice of opportunity for public comment should be published in the final rule section of

⁹ Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy." Cf. Recommendation 92-1, "The Procedural and Practice Rule Exemption From APA Notice-and-Comment Rulemaking Requirements."

the *Federal Register*,¹⁰ with a cross-reference in the proposed rule section that advises the public of the comment opportunity.

2. The notice should contain a statement of basis and purpose for the rule which discusses the issues the agency has considered and states that the agency believes that the rule is noncontroversial and will elicit no significant adverse comment.

3. The public should be afforded adequate time (at least 30 days) to comment on the rule.

4. The agency's initial *Federal Register* notice should state which of the following procedures will be used if no significant adverse comments are received: (a) the agency will issue a notice confirming that the rule will go into effect no less than 30 days after such notice; or (b) that unless the agency publishes a notice withdrawing the rule by a specified date, the rule will become effective no less than 30 days after the specified date.¹¹

5. Where significant adverse comments are received or the rule is otherwise withdrawn, the agency should publish a notice in the *Federal Register* stating that the direct final rulemaking proceeding has been terminated.¹²

C. Agencies should also consider whether to use direct final rulemaking following development of a proposed rule through negotiated rulemaking.

D. If legislation proves necessary to remove any uncertainty that direct final rulemaking is permissible under the APA, Congress should amend the APA to confirm that direct final rulemaking is authorized.

II. Post-Promulgation Comment Procedures (Interim-Final Rulemaking)

A. Agencies should use post-promulgation comment procedures (so-called "interim final rulemaking") for all legislative rules that are issued without prepromulgation notice and comment because such procedures are either "impracticable" or "contrary to the public interest."¹³ 5 U.S.C. § 553(b)(3)(B) ("good cause

¹⁰ Agencies should also consider other mechanisms for providing public notice.

¹¹ 5 U.S.C. 553(d) provides for exemption from the 30-day advance notice where, for example, the rule "grants or recognizes an exemption or relieves a restriction."

¹² At that point, of course, the agency may proceed with usual notice-and comment rulemaking, or if the agency believes it can easily address the comment(s), it may proceed with another direct final rulemaking.

¹³ This recommendation does not apply to temporary rules, meaning those that expire by their own terms within a relatively brief period.

exemption".¹⁴ If necessary, the President should issue an appropriate executive order or Congress should amend the APA to include such a requirement.

B. When using post-promulgation comment procedures, agencies should:

1. publish the rule and a request for public comment in the final rules section of the **Federal Register**, and, in general, provide a cross-reference in the proposed rules section that advises the public that comments are being sought.

2. include a statement in the **Federal Register** notice that, although the rule is final, the agency will, if it receives significant adverse comments, consider those comments and publish a response along with necessary modifications to the rule, if any.

3. consider whether to include in the **Federal Register** notice a commitment to act on any significant adverse comments within a fixed period of time or to provide for a sunset date for the rule.

C. Where an agency has used post-promulgation comment procedures (i.e., appropriate agency ratification or modification of the rule following review of and response to post-promulgation comments), courts are encouraged not to set aside such ratified or modified rule solely on the basis that inadequate good cause existed originally to dispense with prepromulgation notice and comment procedures.

D. Agencies should consider using post-promulgation comment procedures for all rules that are issued without prepromulgation notice and comment, including interpretive rules, procedural rules, rules relating to contracts, grants etc., or military or foreign affairs functions.¹⁵

Recommendation 95-5, Government Contract Bid Protests

In contrast to the private contracting system, which relies mainly on profit maximization and reputation to constrain the discretion of private purchasers in dealing with potential sellers, United States law provides a variety of opportunities for disappointed seekers of government contracts to air their grievances against the contracting process and its results. In addition to pursuing redress within the purchasing agency, a disappointed offeror can challenge the government's

conduct in one of four protest forums: the General Accounting Office (GAO), the General Services Board of Contract Appeals (GSBCA) (for contracts involving automated data processing and telecommunications equipment), the federal district courts, and the Court of Federal Claims. In no other area of public administration have Congress and the courts provided so large and diverse an array of avenues for challenging the decisions of government officials.

This complex system evolved in a number of steps over the last 75 years. Soon after its creation in 1921, GAO began accepting bid protests under its authority to settle and adjust claims involving the United States and to issue advisory decisions concerning questions of payment by the government. In a series of court opinions from the mid-1950's to 1970 [most notably the 1970 decision in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970)], the federal district courts took on an expanded role in oversight of bid protests, and Congress extended authority to grant equitable relief in pre-award bid protest cases to the Claims Court (now the Court of Federal Claims) in the Federal Courts Improvement Act of 1982. The Competition in Contracting Act of 1984 (CICA) completed the foundation for the modern bid protest structure. CICA reflected a strong congressional presumption that government purchasing agencies should use competitive procurement techniques to increase opportunities for firms to compete for contract awards. It bolstered the bid protest mechanism and increased the ability of complaining offerors to gain access to information about the government's decisionmaking process.

The eleven years that have passed since enactment of that legislation provide a basis for reexamination of the Act's premises and its impact. In addition, the government procurement process has been the subject of much recent study by scholars, professional associations, and blue ribbon commissions including the Acquisition Law Advisory Panel and the National Performance Review. Congress has also given extensive recent consideration to procurement reform. Severe budget pressures have inspired several congressional committees to consider statutory changes that would reduce procurement transaction costs and induce a broader array of firms to compete for government contracts. The Federal Acquisition Streamlining Act of 1994, enacted last fall, changed many features of procurement regulation and signaled a new congressional receptivity

to proposals for restructuring the procurement process, although it did not significantly change the structure of the bid protest process. Legislation introduced this spring and supported by the Clinton Administration would, among other things, establish a uniform arbitrary-and-capricious standard of review for all bid protests and eliminate the jurisdiction of the federal district courts. Other legislative initiatives are in development.

Proposals for reorganizing the bid protest process have been numerous and varied, including suggestions for a single administrative bid protest forum (one of the existing forums or a new entity), as well as for different combinations of existing or new forums. Issues such as the appropriate standard of review, available discovery, formality of procedure, and availability of a stay of the procurement pending the proceedings have also prompted widely varying suggested alternatives. Although much attention has been devoted to the bid protest process, however, it has been largely theoretical. Without additional, currently unavailable empirical information, the Administrative Conference does not believe it can recommend a specific design for an ideal forum or combination of forums to process bid protests.

Certain streamlining modifications to the existing system of alternatives, however, seem clearly appropriate without further study. In particular, the Conference sees no persuasive justification for preserving direct court jurisdiction over bid protests. The administrative options for hearing bid protests today are considerably more substantial than those that existed when *Scanwell* was decided or when Congress granted protest jurisdiction to the Court of Federal Claims. Moreover, the factual and legal issues involved in these cases are well within the competence of an administrative forum. Provision for direct judicial review of administrative protest decisions in the Court of Appeals for the Federal Circuit should adequately protect the rights of litigants (provided that the administrative decision includes clearly stated reasons, so that there will be a record adequate for judicial review) and promote the development of a consistent body of law related to protests.

Even if Congress decides to preserve direct recourse to the courts, there is no longer a need for initial district court jurisdiction. The Court of Federal Claims provides a satisfactory forum for court consideration of these cases. The caseload in question is not large enough to burden that court unduly, and through travel and, when appropriate,

¹⁴ The Conference does not recommend a change in the coverage of the "good cause" exemption, but does not oppose a change if such a change is understood simply as a codification of existing practice.

¹⁵ However, this recommendation does not apply to rules issued under the "unnecessary" clause of the good cause exemption; in such cases, agencies should consider using direct final rulemaking. See Part I, above.

telecommunications, the Court of Federal Claims adequately meets the needs of litigants outside of Washington, DC.

To make wise decisions about the exact type of administrative forum (or forums) that should hear bid protests, however, requires empirical data on the impact of bid protests on government procurement that is not now available. Moreover, these issues raise questions about the basic premises underlying the bid protest system. Current law, and many of the debates about the number and nature of forums for review of bid protests, assume that a robust protest mechanism improves government procurement performance by spurring savings-generating competition for government contracts and by monitoring the performance of government officials who may not exercise discretion to the benefit of taxpayers. But there is scant empirical evidence for judging whether public purchasing officials are more prone to shirk their responsibility to maximize taxpayer interests than private purchasing officials are to shirk their responsibility to maximize shareholder interests, or what net effect the modern system of protest controls, including CICA and related protest reforms, has had on procurement outcomes.

Fundamental questions about the bid protest process—whether it is effective in increasing the efficiency and fairness of government procurement, what remedies it should provide to disappointed offerors, or what standard of review oversight tribunals (regardless of their number or location) should apply—are being debated in this empirical void. The Administrative Conference believes that informed decisions on these issues require a foundation of detailed empirical research that cannot adequately be conducted without Congressional authorization. In particular, Congress might pass legislation allowing selected government purchasing agencies to conduct business free from protest oversight for a period of time, with the results to be compared with those at agencies operating under traditional protest controls.¹ Additional avenues of research, including comparison of pre- and post-Competition in Contracting

¹ The pending legislation would authorize the Administrator of the Office of Federal Procurement Policy to “waive any provision of law, rule or regulation necessary” to assist agencies in conducting test programs to evaluate specific changes in acquisition policies or procedures. S.669, Title V, Section 5001, amending section 15 of the Office of Federal Procurement Policy Act (41 USC § 413). This broad provision might be read to include authority to waive laws requiring the availability of protest mechanisms.

Act agency procurement, detailed study of the impact of GAO or GSBCA review on specific agency procurement, examination of state and local approaches to procurement and bid protests, or comparison of the procurement activity and results of a major government purchasing agency and a major private company purchasing department, would be aided significantly by legislative authorization to collect data and funding support. With the successful completion of such research, Congress and other policy makers would be able to make better informed judgments about the need for extensive protest oversight of government procurement activity and the proper forum and standard of review for any such protest oversight.

Recommendation

I. Initial Jurisdiction to Review Bid Protests

Congress should streamline the system for handling bid protests by reducing the alternatives available for initial jurisdiction over bid protests.

A. All bid protests should be heard initially in some administrative forum independent of the agency office conducting the procurement.² To achieve this end, Congress should eliminate the direct jurisdiction of the Court of Federal Claims and of the federal district courts over bid protests. The United States Court of Appeals for the Federal Circuit should be given exclusive jurisdiction over all appeals from administrative bid protest decisions.

B. If Congress decides, notwithstanding Recommendation I(A), that the courts should retain direct jurisdiction over bid protests, then such initial court jurisdiction should be consolidated in the Court of Federal Claims for both pre-award and post-award protests.

II. Testing Bid Protest Systems

Congress should mandate empirical testing of the effect of the bid protest process to analyze the costs and benefits of that process and to determine

² The Administrative Conference takes no position in this recommendation on the preferred structure of, or standard of review to be applied by, such administrative forum(s). The Conference notes, however, that if GAO continues to be involved in handling bid protests and such cases are directly reviewable in the Court of Appeals for the Federal Circuit, the reviewing court would effectively review the contracting agency's decision on the procurement, as informed by the GAO opinion; to facilitate this process, agencies should conclude action on a procurement that has been reviewed by the GAO by issuing a clear statement of the agency's final determination and the reasons for it.

whether it has improved the quality or reduced the cost of public procurement. This analysis should include evaluation of the impact of the bid protest process (and any alternatives under consideration) on existing and prospective bidders for government contracts as well as on the government. It should involve consideration of the potential impact of adjustments to the bid protest process (such as application of different standards of review of agency procurement decisions and imposition of sanctions for the filing of frivolous bid protests) as well as examination of the premises underlying the bid protest system as a whole. Specific approaches Congress should consider supporting include:

A. Cross-agency comparison—a pilot study in which one or more federal agencies that conduct a substantial amount of procurement activity would be permitted to conduct procurement with respect to some discrete type or types of contracts (e.g., computer or telephone equipment contracts) free of most or all bid protest controls for a specific period of years (e.g., five years), with the agencies' performance to be compared with their own performance before the beginning of the pilot and/or on bid protest-controlled contracts during the pilot period and with that of agencies continuing to operate under the existing bid protest system;

B. Competition in Contracting Act comparison—a comparison of the pre- and post-Competition in Contracting Act procurement experience of major government purchasing agencies to identify changes in agency behavior and procurement results;

C. GAO/GSBCA comparison—an examination of specific major procurement to determine whether GAO and GSBCA bid protest determinations (including the specific procedures available and standards of review applied in these forums) have produced desirable outcomes in particular procurement and to assess the impact of GAO and GSBCA rulings on purchasing agency conduct;

D. Government/private sector comparison—a comparison between the procurement experience of a major government purchasing organization and that of a major private company purchasing department to determine differences in the outcomes of efforts to purchase comparable goods or services over time;

E. Federal/state comparison—a comparison of federal government procurement experience with that of state and local governments that may employ procurement oversight

mechanisms different in kind or degree from those at the federal level.

In pursuing any of these options or other studies of the procurement system, Congress should assign responsibility for research and evaluation to an independent body that is not directly involved in conducting major procurement or resolving bid protests. In the case of a pilot study, Congress should provide for regular collection of appropriate data during the pilot period to permit adequate evaluation.

Recommendation 95-6, ADR Confidentiality and the Freedom of Information Act

The Administrative Dispute Resolution Act (ADRA) accords a substantial measure of confidentiality to oral or written communications made in a covered dispute resolution proceeding. This protection was based upon Administrative Conference Recommendation 88-11, which recognized that in promoting the use of alternative dispute resolution (ADR) in federal agencies "a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements."

The confidentiality section of the ADRA, 5 U.S.C. 574, consists of a detailed set of standards reflecting generally the balance proposed in Recommendation 88-11. It is narrow in scope in that it is limited to communications prepared for the purposes of a dispute resolution proceeding. It does not protect an agreement to enter into a dispute resolution proceeding or the agreement or award reached in such a proceeding. It does not prevent the discovery or admissibility of otherwise discoverable evidence merely because the evidence was presented in a dispute resolution proceeding. It does not have any effect on the information and data necessary to document or justify an agreement reached in a dispute resolution proceeding. It also permits disclosure of a dispute resolution communication in special circumstances where all parties to the proceeding consent; where the communication has already been made public or is required by statute to be made public; or where a court determines disclosure is, on balance, necessary to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health and safety sufficient to justify disclosure.

In the final stages of the legislative process leading to the passage of the

ADRA, a question arose as to the relationship between the confidentiality section and the Freedom of Information Act (FOIA). With the understanding that the importance of passing the dispute resolution bill without delay justified an interim solution, a provision, subsection 574(j), was added on the Senate floor¹ providing that the confidentiality section would not be considered an Exemption 3 statute under FOIA.²

This last minute addition has created a narrow, but significant, problem in accomplishing fully the purposes of the ADRA. In those circumstances in which dispute resolution communications become "agency records" within the meaning of FOIA, the confidentiality of the records is determined not by the provisions of section 574, but rather by the terms of the exemptions to FOIA. For users of ADR, the trumping effect of FOIA in this class of cases means that confidentiality is not governed by the careful balance struck in section 574 but rather by the complex body of FOIA law which accords no special protection for dispute resolution communications on the basis of the process needs of ADR. While some dispute resolution communications that become agency records—for example because they come under the control of a government-employee neutral—may be exempt from mandatory disclosure under FOIA, the scope of the exemptions and possible gaps in coverage create uncertainty as to the confidentiality of such records.

This uncertainty, in turn, has become a disincentive to the use of ADR.³ Even though the ADRA has been in place for only four years, concern about the

¹ During this colloquy, Senator Levin summarized as follows: I am pleased that we were able, for the purposes of passing this bill this year and getting the ADR process rolling, to temporarily resolve the confidentiality issue. As the Administrative Conference of the United States wrote in its recommendation on this subject, * * * since settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements. ts. The provisions in this bill, as amended, do not as yet achieve that balance, and I am pleased that Senators Grassley and Leahy have agreed to address this issue more completely next year. 136 Cong. Rec. at S18088 (daily ed. Oct. 24, 1990).

² Under Exemption 3, the FOIA disclosure requirements do not apply to matters that are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

³ Some added uncertainty has been raised by the ADRA's protection of "any information concerning" a dispute resolution communication. The recommendation calls for dropping this language.

impact of FOIA on confidentiality has had a chilling effect on the use of ADR. This effect could become even more substantial if a case arose in which expected confidentiality was undermined by a FOIA claim. To accomplish the objectives of Recommendation 88-11, the confidentiality standards of section 574 should be given effect with respect to all covered dispute resolution communications, even where those communications become agency records under FOIA.⁴

Recommendation

1. The confidentiality section of the Administrative Dispute Resolution Act, 5 U.S.C. 574, should be amended to provide that records confidential under that section and generated by or initially submitted to the government in a dispute resolution proceeding are exempt from disclosure under the Freedom of Information Act, Exemption 3, 5 U.S.C. 552(b)(3).

2. Any alternative confidentiality procedures agreed to by the parties and neutral under subsection 574(d) should not, for purposes of Exemption 3, be construed to provide broader confidentiality than is otherwise available under section 574.

3. The words "any information concerning" should be deleted from section 574 (a) and (b).

The following recommendation was adopted by the Assembly of the Administrative Conference on Friday, June 16, 1995.

Recommendation 95-7, Use of Mediation under the Americans with Disabilities Act

Despite the efforts of the agencies charged with enforcing the Americans with Disabilities Act (ADA), there are substantial backlogs of cases at the investigation stage at many agencies, creating unusually lengthy delays in enforcement. Because of enforcement delays, many individuals are not obtaining needed relief in a timely manner and respondents are not relieved of the burden of pending non-meritorious charges. In this era of shrinking government, an influx of significant additional public resources for investigation and litigation seems unlikely. The Equal Employment Opportunity Commission (EEOC) and the Department of Justice have each begun to experiment with alternative dispute resolution (ADR) as one approach to reducing backlogs and

⁴ This recommendation pertains solely to the provisions of the ADRA. The Conference recognizes that agencies, in some circumstances, conduct similar processes under other authority.

achieving compliance with the statute.¹ The Conference believes that mediation is the ADR technique that offers greatest immediate promise for resolving ADA cases more quickly and to the satisfaction of the parties involved, and that agencies with enforcement responsibilities under the ADA should offer the opportunity for mediation in appropriate cases. Mediation has the potential to preserve relationships between the parties and to empower them to take greater responsibility in resolving their disputes. In addition compliance with mediated settlements is generally high because of the parties' participation in developing the solution.

This recommendation is intended to encourage additional efforts to implement the use of mediation and to provide guidance on undertaking and evaluating a joint program.² The mediation program proposed in this recommendation expands on prior agency pilot mediation programs by including additional types of cases, and also provides a coordinated framework for mediation of ADA cases under all four titles of the statute.

Because several agencies are charged with enforcement of the various titles of the ADA (EEOC, Department of Justice, Department of Transportation, and Federal Communications Commission), it is important that they jointly participate in designing the recommended mediation program. This collaborative effort will minimize costs and maximize benefits by using a common group of trained mediators to mediate a variety of ADA cases, selected for referral to mediation based on criteria established by the agencies. The joint effort should also develop sources of mediators who can serve at low cost or pro bono, at least at the inception of the program, and should consider ways to finance the costs of using mediators where such arrangements cannot be made.

Extensive evaluation of the program pursuant to criteria established as part of the program design will enable the agencies to gather the information necessary to refine the program so that it is used most effectively to resolve disputes at a low cost, in a manner that is fair to the parties and consistent with

the statute. The evaluation should include analysis of the comparative costs of mediation, the effectiveness of mediation for different types of disputes, the satisfaction level of the participants, the impact on the case backlog, the effect on processing time of cases, the impact on systemic litigation, consistency of mediated results with the statute, and whether mediation disadvantages individuals with disabilities or other historically disadvantaged groups.

Analysis of the program results, along with the results of EEOC and Department of Justice pilot mediation programs, should provide the information necessary to ensure that mediation is furthering the goal of elimination of discrimination against the individuals with disabilities. The contemplated evaluation will permit the agencies to focus future mediation efforts on those cases where mediation is most effective. Additionally, successful experience with agency-sponsored mediation may encourage and empower actual or potential parties to use private mediation or even negotiation without neutral assistance to resolve future disputes, further conserving government and private resources.

Recommendation

Coordinated Mediation Program

1. The Americans with Disabilities Act (ADA) enforcement agencies³ should establish a joint committee composed of representatives of each of the agencies to develop a program for voluntary mediation of ADA cases under all titles, in order to achieve the rapid, mutually agreeable resolution of disputes over compliance with the requirements of the ADA.⁴ This committee also could serve the purpose of improving consistency in

³The primary enforcement agencies should be involved in establishing the program. These include the Department of Justice, Equal Employment Opportunity Commission, Department of Transportation, and Federal Communications Commission. Other agencies that could provide input into the process, refer cases to the program, and participate in the educational effort are the Federal Mediation and Conciliation Service and the Title II investigative agencies designated in 28 C.F.R. § 35.190: the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, the Interior, and Labor.

⁴Since there have been few cases under Title IV, which amends the Communications Act to ensure the availability of communication by wire or radio for individuals with speech or hearing disabilities, there may also be less opportunity to use mediation. Also, the FCC's enforcement process differs from those of the other ADA enforcement agencies. Nevertheless, efforts should be made to include appropriate Title IV cases in the mediation program to enable the best possible assessment of mediation's effectiveness.

enforcement of the statute among the agencies. In order to assist the joint committee in creating a mediation program that will attract participants and meet their needs, the agencies should appoint an advisory committee pursuant to the Federal Advisory Committee Act, composed of representatives of potential participants, such as businesses, state and local government entities, representatives of organizations whose purpose is to represent persons with disabilities, and civil rights and labor organizations, to provide advice in program design.

2. The mediation program should follow the broad outlines set forth herein, as refined by the agencies' joint committee after consultation with the advisory committee. The program should utilize a common group of trained mediators to mediate a variety of disputes arising under the ADA. The joint committee should determine the criteria for mediator participation in the program, considering the pilot projects already established, which include mediator training, and the training previously conducted by the EEOC and the Department of Justice. If the number of trained mediators is insufficient, the agencies should jointly conduct or sponsor any necessary training. Mediators must also have sufficient knowledge of the various titles of the ADA, familiarity with resources for ADA compliance, and knowledge of the impact of various disabilities. The joint committee should identify potential sources of mediators who are willing to serve pro bono or at low cost, at least at the inception of the program, as well as sources of technical expertise⁵ to assist in mediation.

3. The agencies should engage in extensive educational efforts to encourage use of the mediation process in a variety of cases and to enable unrepresented parties to participate effectively. The educational efforts should focus on informing parties and potential parties about the process to increase both participation rates and the effectiveness of participation.

4. The agencies should determine the selection criteria for referral of cases to mediation, refining and modifying the criteria based on evaluation of effectiveness. The agencies should consider combining mediation with an early assessment program which will assist in determining allocation of resources for investigative processes.

⁵For example, architects, engineers, or vocational rehabilitation experts may be able to serve as mediators, or to act as advisers to inform parties of available technical options to help resolve disputes.

¹The ADA, 42 U.S.C. § 12212, explicitly encourages the use of ADR, where appropriate and authorized by law, to resolve disputes arising under its provisions. General authority for use of ADR may also be found in the Administrative Dispute Resolution Act, 5 U.S.C. § 572.

²Though mediation currently appears to be the most promising ADR technique for disputes arising under the ADA, the Conference encourages examination and experimentation with other ADR techniques. See Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution."

Review and Evaluation

5. The mediation program should incorporate an after-the-fact agency review of settlements reached in mediation to examine their enforceability, consistency with the ADA, and whether the process reduces the time needed to resolve individual cases (both elapsed time and person-hours). This review should not result in overturning individual mediated settlements, nor should it impair the confidentiality of the mediation process or otherwise discourage participation in it.

6. In designing the program, the joint committee should establish program objectives, evaluation criteria, and a system for collecting the data necessary for evaluation. The evaluation process should be designed to provide data and analysis that will enable (i) a determination of the circumstances under which mediation is appropriate and effective for resolving ADA cases and (ii) the identification of any systemic problems that are not addressed by mediated settlements. The following issues should be included in the evaluation:

- (a) in what types of cases is mediation most effective?
- (b) at what point in the investigative process is mediation most effective, taking into account the costs of any investigation that precedes mediation?
- (c) does mediation reduce the cost of processing cases for the parties and/or the government?
- (d) what is the effect of mediation on processing time of cases, including whether mediation adds to processing time where it is unsuccessful?
- (e) what is the impact of mediation on the investigation and case backlog?
- (f) what is the satisfaction level of the participants in mediation, including separate measures of satisfaction for complainants (charging parties) and respondents?
- (g) what are the best sources of qualified mediators?
- (h) is the use of a common group of mediators for various types of cases effective, taking into account costs, settlement rates, settlement results, and mediator performance?
- (i) how are the costs of using mediators to be financed?
- (j) are the results of mediated settlements, settlements reached through other processes, and litigation in similar cases comparable?
- (k) does the mediation program impact systemic litigation?
- (l) is agency review of mediated settlements effective and necessary?

(m) is the process equally fair and effective for represented and unrepresented parties?

(n) are individuals with disabilities disadvantaged in mediation?

(o) does availability of technical expertise affect settlement rates?

(p) what is the rate of compliance with mediated settlements?

Additional criteria deemed necessary and appropriate should be added by the joint committee designing the program.

7. The joint committee should review the mediation program regularly pursuant to the evaluation criteria and in consultation with the advisory committee, modifying the program as suggested by the results of the evaluation to ensure its continued effectiveness and consistency with statutory goals.

Consideration of Other ADR Techniques

8. The ADA enforcement agencies should jointly continue to study and evaluate other alternative dispute resolution techniques for disputes arising under the ADA.⁶

[FR Doc. 95-20560 Filed 8-17-95; 8:45 am]

BILLING CODE 6110-01-W

DEPARTMENT OF AGRICULTURE**Forest Service****Klamath Provincial Advisory Committee (PAC)**

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Klamath Provincial Advisory Committee will meet on September 7 and September 8, 1995 at the Oregon Institute of Technology, 3201 Campus Drive, Klamath Falls, Oregon. The meeting will begin at 10:30 a.m. on September 7 and adjourn at 5:00 p.m. The meeting will reconvene at 8:00 a.m. on September 8 and continue until 3:00 p.m. Agenda items to be covered include: (1) forest health and salvage opportunities in the Province; (2) coordination with other existing groups within the Province; (3) research and monitoring opportunities for coordination; and (4) a public comment period. All PAC meetings are open to the public. Interested citizens are encouraged to attend.

FOR FURTHER INFORMATION CONTACT: Jim Anderson, USDA, Klamath National Forest, at 1312 Fairlane Road, Yreka, California 96097; telephone 916-842-6131, (FTS) 700-467-1300.

⁶ See Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," and the ADA, 42 U.S.C. § 12212.

Dated: August 11, 1995.

Robert J. Anderson,

Land Management Planning Staff Officer.

[FR Doc. 95-20506 Filed 8-17-95; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF COMMERCE**Agency Form Under Review by the Office of Management and Budget**

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Survey of Income and Program Participation - 1996 Panel.

Form Number(s): SIPP-16003.

Agency Approval Number: None.

Type of Request: New collection.

Burden: 105,800 hours.

Number of Respondents: 105,000.

Avg Hours Per Response: 30 minutes.

Needs and Uses: The Bureau of the Census conducts the Survey of Income and Program Participation (SIPP) to collect information from a sample of households concerning the distribution of income received directly as money or indirectly as in-kind benefits. SIPP data are used by economic policymakers, the Congress, state and local governments, and Federal agencies that administer social welfare and transfer payment programs such as the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Agriculture. The SIPP is a longitudinal survey, in that households in the "panel" are interviewed at regular intervals or "waves" over a number of years. The survey is molded around a central "core" of labor force and income questions, health insurance questions, and questions concerning government program participation that remain fixed throughout the life of a panel. The core questions are asked at Wave 1 and are updated during subsequent interviews. The core is periodically supplemented with additional questions or "topical modules" designed to answer specific needs. This request is for clearance of the Core questions and the topical modules for Waves 1 & 2 of the 1996 Panel. Topical modules for waves 3 through 13 will be cleared later. The topical modules for Wave 1 are Reciprocity History and Employment History. Wave 1 interviews will be conducted from February through May 1996. Wave 2 topical modules are Work Disability History, Fertility History, Education and Training History, Marital