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

Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted three recommendations at its Fifty-Ninth Plenary Session. The appended recommendations address the use of social media to support agency rulemaking activities, provide guidance to courts and agencies in connection with the judicial remedy of remanding an agency action without vacating that action, and offer best practices to facilitate cross-agency collaboration. The recommendations address the processes and issues that have developed in the context of the relatively new and rapidly evolving e-rulemaking process.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2013–5, Emily Bremser; for Recommendation 2013–6, Stephanie Tatham; for Recommendation 2013–7, Funmi Olorunnipa; and for Statement # 18, Reeve Bull or Funmi Olorunnipa. For all four of these actions the address and phone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations for improvements to agencies, the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov.

At its Fifty-Ninth Plenary Session, held December 5–6, 2013, the Assembly of the Conference adopted three recommendations and one formal statement. Recommendation 2013–5, “Social Media in Rulemaking,” provides guidance to agencies on whether, how, and when social media might be used both lawfully and effectively to support rulemaking activities.

Recommendation 2013–6, “Remand Without Vacatur,” examines the judicial remedy of remand without vacatur on review of agency actions and equitable factors that may justify its application. The recommendation offers guidance for courts that remand agency actions and for agencies responding to judicial remands.

Recommendation 2013–7, “The GPRA Modernization Act of 2010: Examining Constraints To, and Providing Tools For, Cross-Agency Collaboration,” examines perceived and real constraints to cross-agency collaboration under the Government Performance and Results Act (GPRA) Modernization Act of 2010. The recommendation offers guidance to help agencies collaborate. It offers guidance to help increase transparency, improve information sharing, and facilitate better agency reporting under the Act. The recommendation is also aimed at enhancing the role of agency attorneys and other agency staff in facilitating cross-agency collaboration.

Statement # 18, “Improving the Timeliness of OIRA Regulatory Review,” highlights potential mechanisms for improving review times of rules under review by the Office of Information and Regulatory Affairs (OIRA), including promoting enhanced coordination between OIRA and agencies prior to the submission of rules, encouraging increased transparency concerning the reasons for delayed reviews, and ensuring that OIRA has adequate staffing to complete reviews in a timely manner.

The Appendix below sets forth the full texts of these three recommendations and the statement. The Conference will transmit them to the relevant agencies, the Congress, and the courts will make decisions on their implementation.

The Conference based these recommendations and the statement on research reports that are posted at: www.acus.gov/59th. A video of the Plenary Session is available at the same web address and a transcript of the Plenary Session will be posted when it is available.

Dated: December 12, 2013.

Shawne C. McGibbon,
General Counsel.

Appendix—Recommendations and Statement of the Administrative Conference of the United States

Administrative Conference Recommendation 2013–5

Social Media in Rulemaking

Adopted December 5, 2013

In the last decade, the notice-and-comment rulemaking process has changed from a paper process to an electronic one. Many anticipated that this transition to “e-Rulemaking” would precipitate a “revolution,” making rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic. But these grand hopes have not yet been realized. Although notice-and-comment rulemaking is now conducted electronically, the process remains otherwise recognizable and has undergone no fundamental transformation. At the same time, the Internet has continued to evolve, moving from static, text-based Web sites to dynamic multi-media platforms that facilitate more participatory, dialogic activities and support large amounts of user-generated content. These “social media” broadly include any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public. Examples of social media tools currently in widespread use include Facebook, Twitter, Ideascale, blogs, and various crowdsourcing platforms. But...
technology evolves quickly, continuously, and unpredictably. It is a near certainty that the tools so familiar to us today will evolve or fade into obsolescence, while new tools emerge.

The accessible, dynamic, and dialogic character of social media makes it a promising set of tools to fulfill the promise of e-Rulemaking. Thus, for example, the e-Rulemaking Program Management Office, which operates the federal government’s primary online rulemaking portal, Regulation.gov, requests agencies to “[e]xplore the use of the latest technologies, to the extent feasible and permitted by law, to engage the public in improving federal decision-making and help illustrate the impact of emerging Internet technologies on the federal regulatory process.” The Conference has similarly, albeit more modestly, recommended that “[a]gencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemaking.”

Federal agencies have embraced social media to serve a variety of non-rulemaking purposes, but few have experimented with such tools in the rulemaking context. One explanation for this reticence is uncertainty about how the Administrative Procedure Act (APA) and other requirements of administrative law apply to the use of social media, particularly during the process governed by the APA’s informal rulemaking requirements, beginning when the Notice of Proposed Rulemaking (NPRM) has been issued, through the comment period, and until the agency issues a final rule. In particular, agencies are uncertain whether public comments during agency online discussion are “comments” for purposes of the APA, thus triggering the agencies’ obligations to review and respond to the contributions and include them in the rulemaking record. Other concerns include how the Paperwork Reduction Act applies to agency inquiries through social media, whether the First Amendment might limit an agency from moderating a social media discussion, and how individual agencies’ “ex parte” communications policies might apply to the use of social media.

Apart from legal concerns are doubts as to whether, when, and how social media will benefit rulemaking. These doubts arise with respect to two distinct issues that often overlap. First, can social media be used to generate more useful public input in rulemaking? Second, is increased lay participation in rulemaking likely to be valuable? Experience suggests that both the quality of comments and the level of participation in online discussions are often much lower than one might hope. A third-party facilitator may be able to help an agency address these issues by encouraging public participation, helping participants understand the rulemaking process and the agency’s proposal, asking follow-up questions to produce more substantive input, and actively facilitating engagement among participants. Regardless of whether a third-party facilitator is used, however, creating the conditions necessary to foster a meaningful, productive dialogue among participants requires commitment, time, and thoughtful design. Since this kind of innovation can be costly, agencies are understandably reluctant to expend scarce resources in pursuit of uncertain benefits. Agencies also understand the practical difficulties of engaging participants. One such question is whether to require participants to identify themselves in agency-sponsored social media discussions. Another concern is that the use of ranking or voting tools may mislead some to believe that rulemaking is a plebiscite or allow some participants to improperly manipulate the discussion.

Social media can be valuable during the notice-and-comment phase of rulemaking, but on a selected basis. For example, if an agency needs to gauge the audience or determine public preferences or reactions in order to develop an effective regulation, social media may enable the collection of information and data that are rarely reflected in traditional rulemaking comments. Success requires an agency to thoughtfully identify the purpose(s) of using social media, carefully select the appropriate social media tools(s), and integrate those tools into the traditional notice-and-comment process. In addition, agencies must clearly communicate to the public how the social media discussion will be used in the rulemaking. Although the APA allows agencies the flexibility to be innovative, attention should be given to how the APA or other legal requirements will apply in the circumstances of a particular rulemaking.

Agencies may find, however, that it is both easier and more often valuable to use social media in connection with rulemaking activities, but outside the notice-and-comment process. For example, social media can be effective for public outreach, helping to increase public awareness of agency activities, including opportunities to contribute to policy or rule development, or the evaluation of existing regulatory regimes. The use of social media may also be particularly appropriate during the pre-rulemaking or policy-development phase. Here, the APA and other legal restrictions do not apply, and agencies are often seeking dispersed knowledge or answers to more open-ended questions that lend themselves to productive discussion through social media. For the same reasons, social media may be an effective way for agencies to seek input on retrospective review of existing regulations. It may also be helpful in connection with a negotiated rulemaking, where these tools may make it easier for the diverse interests to collaborate during and between meetings on a solution to the problem being addressed.

This recommendation provides guidance to agencies on whether, how, and when social media might be used both lawfully and effectively to support rulemaking activities. It seeks to identify broad principles susceptible of application to any social media tool that is now available or may be developed in the future. It is intended to encourage and facilitate the experimentation necessary to develop the most effective techniques for leveraging the strengths of social media to achieve the promises of e-Rulemaking.

Recommendation
1. Agencies should explore in the rulemaking process the use of social media—online platforms that can provide broad opportunities for public consultation, discussion, and engagement.

Public Outreach
2. Agencies should use social media to inform and educate the public about agency activities, their rulemaking process in general, and specific rulemakings. Agencies should take an expansive approach to alerting potential participants to upcoming rulemakings by posting to the agency’s Web site and sending notifications through
multiple social media channels. Social media may provide an effective means to reach interested persons who have traditionally been underrepresented in the rulemaking process (including holders of affected interests that are highly diffused).

3. Agencies should recognize that raising awareness among missing stakeholders (those directly affected by the proposed rule who are historically unlikely to participate in the traditional comment process) and other potential new participants in the rulemaking process will require new outreach strategies beyond simply giving notice in the Federal Register, Regulations.gov, and the agency Web site. Social media may be particularly effective for successful outreach, and agencies using it for this purpose in connection with rulemaking should consider:

   (a) Developing one or more communications plans specifically tailored to the rule and to all types of missing stakeholders or other potential new participants the agency is trying to engage. These plans should be designed and designed to encourage all types of stakeholders to participate.

   (b) In outreach messages, clearly explaining the mechanisms through which members of the public can participate in the rulemaking, what the role of public comments is, and how the agency will take comments into account.

   (c) Encouraging public response by being clear and specific about how the proposed rule would affect the targeted participants and what input will be most useful to the agency.

   (d) Asking all interested organizations to spread the participation message to members or followers. Agencies should be prepared to explain why individual participation can be beneficial, and to encourage organizations to solicit substantive, individualized comments from their members.

   (e) Using multilingual social media outlets where appropriate.

4. The General Services Administration, the e-Rulemaking Program Management Office, and the Federal Register Online Payment System and other appropriate social media site dedicated to that rulemaking for purposes of providing information, updates, and clarifications regarding the scope and progress of the rulemaking. Agencies may also wish to explore using such a site to generate a dialogue.

11. When an agency sponsors a social media discussion in connection with a notice-and-comment rulemaking, it should determine and prominently indicate to the public how its comment will be treated under the APA (for administrative record purposes). The agency may decide, for example:

   (a) To include all comments submitted via an agency-administered social media discussion in the rulemaking record.

   (b) That no part of the social media discussion will be included in the rulemaking docket, that the agency will not consider the discussion in developing the rule, and that the agency will not respond to the discussion. An agency that selects this option should communicate the restriction clearly to the social media users.

6. Agencies should consider using social media prior to the publication of an NPRM or proposed policy where the goal is to understand the current state of affairs, collect dispersed knowledge, or identify problems. To enhance the amount and value of public input, an agency seeking to engage the public for these purposes should, to the maximum extent possible, make clear the sort of information it is seeking and how the agency intends to use public input received in this way. The agency should also directly engage with participants by acknowledging submissions, asking follow-up questions, and providing substantive responses.

7. Agencies should consider using social media in support of retrospective review of existing regulations, particularly to learn what actual experience has been under the relevant regulation(s).

Using Social Media in Notice-and-Comment Rulemaking

8. Although the use of social media may not be appropriate and productive in all rulemakings, agencies may use social media to supplement or improve the traditional commenting process. Before using social media in connection with a particular rulemaking, agencies should identify the specific goals they expect to achieve through the use of social media and carefully consider the potential costs and benefits.

9. Agencies should use the social media tools that best fit their particular purposes and goals and should carefully consider how to effectively integrate those tools into the traditional rulemaking process.

Effective Approaches for Using Social Media in Rulemaking

10. For each rulemaking, agencies should consider maintaining a blog or other appropriate social media site dedicated to that rulemaking for purposes of providing information, updates, and clarifications regarding the scope and progress of the rulemaking. Agencies may also wish to experiment using such a site to generate a dialogue.

15. Agencies should consider experimenting with collaborative drafting platforms, both internally and potentially, externally, for purposes of producing regulatory documents.

16. If an agency chooses to use voting or ranking tools, the agency should explain to the public how it intends to use the input generated through those tools (e.g., to help it decide which of several potential forms is easiest to use).

18. In appropriate circumstances, agencies should also use social media to provide compliance information. For example, an agency might use social media to inform and educate the public about paperwork requirements associated with a rule or the availability of regulatory guidance.

19. Agencies should collaborate to identify best practices for addressing issues that arise in connection with the use of social media in rulemaking.

Direct Final Rulemaking

20. Agencies should consider using social media before or in connection with direct final rulemaking to quickly identify whether...
there are significant or meaningful objections that are not initially apparent.

Key Legal Considerations

21. Agencies have maximum flexibility under the APA to use social media before an NPRM is issued or after a final rule has been promulgated.

22. Agencies should consider how the First Amendment applies to facilitating or hosting social media discussions, such as by making it clear that all comments policy that all discussions and comments on any given agency social media site will be moderated in a uniform, viewpoint-neutral manner. Through this posted policy, agencies may decide to define or restrict the topics of discussion, impose reasonable limitations to preserve decorum, decency, and prevent spam or, alternatively, terminate a social media discussion altogether.

23. Agencies that have “ex parte” contact policies for information obtained in connection with rulemaking should review those policies to ensure they address communications made through social media.

Administrative Conference Recommendation 2013-6

Remand Without Vacatur

Adopted December 5, 2013

Remand without vacatur is a judicial remedy that permits agency orders or rules to remain in effect after they are remanded by the reviewing court for further agency proceedings. Traditionally, courts have reversed and set aside agency actions they have found to be arbitrary and capricious, unlawful, unsupported by substantial evidence, or otherwise in violation of an applicable standard of review. Since 1970, however, the remedy of remanding without vacating the agency decision has been employed with increasing frequency. It has now been applied in more than seventy decisions of the Court of Appeals for the District of Columbia Circuit involving over twenty federal agencies and encompassing a variety of substantive areas of law including air pollution control, telecommunications, and national security.1

The Administrative Conference conducted a study of remand without vacatur that examined existing scholarship on the remedy as well as its application by courts in recent years. These recommendations and the supporting Report examine the legality and application of remand without vacatur in cases involving judicial review of agency actions. The Conference accepts the principle that remand without vacatur is within the court’s equitable remedial authority. It recognizes and approves of at least three general circumstances in which remand without vacatur may be appropriate. Finally, it offers advice to courts that are considering employing the remedy and to agencies responding to remands.

The remedy has generated academic and judicial debate over its advisability and legality. Those who support remand without vacatur point to the benefits that accrue in a variety of situations, such as when application of the device enhances stability in the regulatory regime, allows agencies to continue rulemaking, or promotes judicial activism, and allow deviation from legislative directives. Critics have also suggested that it reduces pressure on agencies to comply with APA obligations and to respond to a judicial remand. Given the relative infrequency of application of the remedy, these prudential and theoretical concerns, while possible, do not appear to cause systemic problems.

Some judges argue that remand without vacatur contravenes the plain language of the judicial review provisions of the APA.2 However, despite occasional dissenters or other separate judicial opinions, no cases were identified in which a federal court of appeals held that remand without vacatur was unlawful under the APA or another statutory standard of review. Rather, courts generally accept the remedy as a lawful exercise of equitable remedial discretion.3

The Conference recommends that the remedy continue to be considered an authorized exercise of judicial authority on review of cases that arise under the Administrative Procedure Act, 5 U.S.C. § 706(2), as well as under other statutory review provisions, unless they contain an express legislative directive to the contrary. In employing remand without vacatur, courts are essentially finding that agency errors that are sufficient to require remand may not always justify immediately setting aside the challenged action. Since this conclusion deviates from customary judicial norms, when courts invoke the remedy, they should explain their reasons for doing so. Equitable considerations that justify leaving the challenged agency action in place on remand are among circumstances. Longstanding judicial precedent in the DC Circuit supports application of the remedy after a finding that a challenged agency action, while invalid, is not sufficiently serious or when vacatur would have disruptive consequences.4 Courts also employ the remedy when vacatur would not serve the interests of the prevailing party or the public.5

Remand without vacatur may be appropriate in these circumstances as well as in others not considered here.

When a reviewing court has decided to remand an agency action, it should consider asking the parties for their views on the appropriate remedy in light of this decision.6 In its final decision, the court should specify whether or not it is vacating the remanded agency action. Research indicates that ambiguous remand orders that do not clearly identify whether an agency’s action is also vacated occur with some regularity.7 This is particularly problematic where an agency rule or order regulates conduct of, or permits enforcement actions against, individuals or parties not parties to the litigation, and who cannot seek direct clarification of the court’s remedial intention. Remand without vacatur does not by itself provide relief for litigants after successful challenges to agency rules or orders. Thus, responsive agency action on remand is a matter of particular concern in such cases.8 Moreover, difficulties in identifying remanded decisions and agency responses can hinder oversight. Accordingly, agencies

1 Stephanie J. Tatham, The Unusual Remedy of Remand Without Vacatur, Appendix A (Report to the Administrative Conference of the United States, Nov. 13, 2013) (hereinafter Tatham Report). It has also been applied on review of agency action in the Courts of Appeals for the Federal, First, Third, Fifth, Eighth, Ninth, and Tenth Circuits. Id. at 26–28.


3 E.g., Envtl. Def. Fund v. EPA, 898 F.2d 183, 190 (D.C. Cir. 1990) (“no party disputes that the court vacate the EPA’s regulations, and to do so would at least temporarily defeat petitioner’s purpose, the enhanced protection of environmental values covered by the [statutory Prevention of Significant Deterioration] provisions”).

4 This reasoning appears to be the basis for a substantial number of cases involving the remedy and that arise under the Clean Air Act. Courts employ the remedial portion of all cases in which it is employed. See also Richard L. Revesz & Michael A. Livermore, Retaking Rationality 160–61 (2008) (describing how the remedy can provide greater relief with the benefit of continuing a weak rule while the case is on remand, rather than having no rule in the interim in the event of a successful challenge).

5 Courts have occasionally requested supplemental briefing on whether to vacate agency rules after they have announced an intention to remand the agency’s decision. E.g., Am. Trucking Ass’n v. EPA, 175 F.3d 1027, 1057 (D.C. Cir. 1999), aff’d in part, rev’d in part, Whitman v. Am. Trucking Ass’n, 531 U.S. 457 (2001); Int’l Union, UAW v. OSHA, 938 F.2d 1310, 1325–26 (D.C. Cir. 1991).

6 Courts might also consider soliciting the views of the parties at oral argument.


8 Courts have occasionally retained jurisdiction over cases remanded without vacatur to ensure responsive agency action. E.g., Nat’l Ass’n of Regulatory Util. Comm’rs v. DOE, 680 F.3d 819, 820 (D.C. Cir. 2012) (directing compliance within six months and retaining jurisdiction “so that any further review would be expedited”). Courts may also ask agencies to report on their progress on remanded issues. E.g., Chamber of Commerce v. DOE, 643 F.3d 890, 909 (D.C. Cir. 2006) (staying the court’s mandate that would vacate the remanded agency action until further order of the court and requiring the SEC to file a status report within 90 days).
should identify or post final judicial opinions vacating, or remanding without vacatur, agency rules or orders in the applicable online public docket, if any exists, and on agency Web sites, where appropriate.

Agencies should include a short statement identifying the judicial opinion and whether it vacates all or part of the challenged rule or order, together with any unique identifiers for the affected agency rule or order (such as a Regulation Identifier Number). Agencies should additionally work with the Office of the Federal Register to remove vacated regulations from the Code of Federal Regulations.9

To further public awareness, the Conference also recommends that agencies provide information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding their future plans with respect to rules that are remanded without vacatur. In any subsequent proceedings responding to remand without vacatur, agencies should identify the initial agency action together with any unique identifier, as well as the remanding judicial opinion.

Recommendations to Agencies

1. Agencies should specifically identify or post judicial decisions vacating or remanding without vacatur agency rules or orders in any applicable public docket, and, if appropriate, on the agency Web site. When a court remands but does not vacate an agency’s rule or order, the agency should include a statement explaining that the rule or order has not been vacated and is still in effect despite the remand.

2. When a regulation has been vacated, the promulgating agency should work with the Office of the Federal Register to remove the vacated regulation from the Code of Federal Regulations.

3. In determining whether the remedy of remand without vacatur is appropriate, courts should consider equitable factors, including whether:

(a) correction is reasonably achievable in light of the nature of the deficiencies in the agency’s rule or order;

(b) the consequences of vacatur would be disruptive; and

(c) the interests of the parties who prevailed against the agency in the litigation would be served by allowing the agency action to remain in place.

4. When a court has decided to remand an agency action, it should consider hearing parties’ views on whether to vacate the agency action and on any related remedial issues.

5. In determining whether the remedy of remand without vacatur is appropriate, courts should consider equitable factors, including whether:

(a) correction is reasonably achievable in light of the nature of the deficiencies in the agency’s rule or order;

(b) the consequences of vacatur would be disruptive; and

(c) the interests of the parties who prevailed against the agency in the litigation would be served by allowing the agency action to remain in place.

6. When a court has decided to remand an agency action, it should consider hearing

GPRAMA Modernization Act of 2010: Examining Constraints To, and Providing Tools For, Cross-Agency Collaboration

Adopted December 6, 2013

The Government Performance and Results Act (GPRA) Modernization Act of 2010 (GPRAMA) became law on January 4, 2011.1 Among other things, the Act requires the Executive branch and federal agencies to develop cross-agency performance goals and specifies directives toward the advancement, use, review, and measurement of cross-agency collaboration.2 Cross-agency collaboration is widely viewed as a powerful means for government reform and improvement. Under GPRAMA, greater coordination across agencies offers the potential for the federal government to address complex policy challenges that lie inherently across agency boundaries and jurisdictions. In sum, cross-agency collaboration—when used thoughtfully for well-selected initiatives—holds great promise as a means of improving government performance, efficiency, and accountability. The effective development of these management tools may have an important role to play in the future environment of constrained funding that federal agencies may face in the years ahead.

GPRAMA specifically requires the Office of Management and Budget (OMB) to develop long-term, outcome-oriented goals for a limited number of cross-cutting management improvement areas (key performance areas, or Agency Priority (CAP) Goals), on such topics as: finances, human capital, information technology, procurement and acquisition and real property. CAP goals generally fall into two categories—mission-support goals, which focus on achieving the efficient execution of standard business functions and systems across agencies; and mission-oriented goals, which focus on coordinating authorities to pursue shared policy goals that cross-cut agencies. These goals are to be developed in coordination with agencies and in consultation with the Congress. Accordingly, agencies must proactively engage members of Congress and their staffs to inform them about cross-agency collaborative efforts and successfully navigate congressional concerns.

Similarly, when reviewing and commenting on pending legislation, officials at OMB should consider identifying areas that necessitate or allow for cross-agency collaboration, communicating with Congress regarding those areas, and seeking statutory direction for such collaboration where appropriate.

The law also requires an agency to describe how it is working with other relevant agencies and organizations to achieve individual Agency Performance Goals (APGs). GPRAMA also requires the development of a federal government-wide performance plan and individual agency performance plans; quarterly progress reviews of agency goals and the use of performance information to evaluate federal government and agency progress toward their stated priority goals; and enhanced transparency through the effective operation of Performance.gov, a single Web site about the federal government priority goals, performance plans, quarterly review results, and individual agency performance.

Within OMB, the Office of Performance and Personnel Management (OPPM) leads the effort to drive mission-focused performance gains across the federal government. In addition, the Performance Improvement Council (PIC), located within the U.S. General Services Administration (GSA) and composed of the designated Performance Improvement Officers (PIOs) of Federal agencies and departments, as well as senior OMB officials, collaborates to improve the performance of Federal programs and facilitates information exchange among agencies. The PIC also provides support to agency officials by aiding the coordination of cross-agency collaboration under GPRAMA. As designated agencies and OMB work to implement GPRAMA, they may face certain institutional constraints to effective collaboration and thus need tools to aid them in their efforts.3 Some agencies and federal

9 Anecdotal evidence indicates that occasionally rules that have been vacated are not removed from the Code of Federal Regulations in a timely fashion. Tatham Report at 38–39, n. 244. 1 CFR § 21.6 requires agencies to notice expired codified regulations in the Federal Register. See, e.g., Electronic On-Board Recorders for Hours-of-Service Compliance; Removal of Final Rule Vacated by Court 72 FR 28,447 (May 14, 2012).


2 See, e.g., Jane Fountain, IBM Center for the Business of Government, The Performance Improvement Council (PIC), located within the U.S. General Services Administration (GSA) and composed of the designated Performance Improvement Officers (PIOs) of Federal agencies and departments, as well as senior OMB officials, collaborates to improve the performance of Federal programs and facilitates information exchange among agencies.

3 Some agencies and federal
officials have developed strategies to address the legal and other institutional challenges posed by such collaborative efforts. For others, obstacles to the kinds of cross-agency collaboration demanded by GPRAMA have proven frustrating and difficult to overcome. While a large body of research addresses interagency coordination or cross-agency collaboration generally, little attention has been given to exploring the legal barriers and other constraints to implementation of GPRAMA—whether real or perceived—and providing tools that agency officials may use to address such constraints.

Accordingly, the Conference commissioned the study underlying this recommendation to provide attention to the key challenges to cross-agency collaboration under GPRAMA, as well as suggesting tools for federal officials to implement the Act’s collaboration and other mandates. This study examines the use of tools by officials at OMB, the PIC, senior agency officials, legal counsel, managers and others to overcome and work within institutional challenges to cross-agency collaboration. Such tools include the use of interagency agreements, memoranda of understanding, forms, documents, and other information useful in facilitating cross-agency collaboration efforts; the use of shared information systems and the sharing of data.

Consistent with the Administrative Conference’s statutory mandate of increasing government efficiency and enhancing transparency, the Conference issues this recommendation to suggest practices to facilitate cross-agency collaboration under GPRAMA and to encourage wider use of tools that may advance such collaboration between federal agencies. The Recommendation covers practices and tools to better facilitate cross-agency collaboration that must be multi-faceted, must address institutional challenges on a number of fronts, and must be directed to a number of actors, including OMB and the PIC, as well as agency legal counsel and other agency officials leading cross-agency collaboration efforts.

Objectives

The PIC should work with other relevant agency officials to facilitate greater compliance with the GPRAMA requirement that agencies identify all organizations (including other agencies, programs, or activities) that contribute to the achievement of an agency priority goal (APG). OMB should continue to encourage agencies to properly report their involvement with other agencies that have made contributions to progress on their priority goals, including situations in which two agencies coordinate their respective APGs or a particular APG is related to a CAP goal.

3. Improving Information Sharing. To improve the sharing and harmonization of data and information systems or subsystems, the PIC, in consultation with other relevant agency officials, should identify shared systems and cyber infrastructure within agencies that may be utilized, with modifications, to further cross-agency streamlining and collaboration. When directed and whenever legally permissible, agency attorneys charged with interpreting statutory language related to data should work with agency officials to facilitate the sharing of information and data among agencies.

4. Facilitating Better Use of Cross-Agency Collaboration. To help agency officials better utilize the tools available for cross-agency collaboration, OMB and the PIC should:

(a) clarify the distinction between mission-oriented goals (which are designed to coordinate authorities to pursue policy goals that are shared by multiple agencies) and mission-supported goals (which are designed to achieve consolidation of standard business functions and systems across agencies), so that agency officials can properly identify the relevant tools to use;

(b) encourage agencies to have their legal counsel share, when feasible, interagency agreements, memoranda of understanding, forms, documents and other information containing specific language that has proved useful in facilitating cross-agency collaboration efforts.

5. Enhancing the Role of Other Agency Officials. Agency officials leading cross-agency collaborative initiatives should engage agency attorneys as early as practicable and work with them to determine the best way to coordinate authority, information, operations, personnel and resources among agencies within the confines of relevant legal and statutory requirements.

6. Enhancing the Role of Other Agency Officials. Agency officials leading cross-agency initiatives should undertake the following best practices to help facilitate effective cross-agency collaboration:

(a) set and communicate clear, compelling direction, strategy and shared goals;

(b) utilize a variety of collaborative techniques to achieve stated goals;

(c) establish specific roles and responsibilities for agency staff;

(d) develop clear decision making processes, including conflict resolution measures; and

(e) where appropriate and permissible, work with relevant non-federal stakeholders to gain additional perspective, critique, or support for cross-agency collaborative efforts; and
Improving the Timeliness of OIRA Regulatory Review

Adopted December 6, 2013

For more than three decades, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has conducted centralized review of federal agencies’ draft proposed and final regulations. The fundamental structures and principles governing the regulatory review process are currently set forth in Executive Order (EO) 12,866,1 and subsequent EOs have reaffirmed this system of regulatory reviews. The OIRA Executive Order (EO) 12,866 to include: ensuring consistency with the centralized OIRA regulatory review process; making the regulatory process more efficient.4 OIRA analyses accompanying the rule; and making enhancing coordination of regulatory policy.

4 OIRA review process could well have serious consequences.9—are now firmly entrenched among agency attorneys and other officials.

In order to ensure that OIRA review proceeds in a timely manner, EO 12,866 generally requires OIRA to “waive review or notify the agency in writing of the results of its review” within 90 calendar days.

The Executive Order specifically underscores the importance of timeliness in the regulatory review process. When stating: “An efficient regulatory planning and review process is vital to ensure the Federal Government’s regulatory system best serves the American people.” Id. § 2.

Historically, OIRA has completed most of its reviews of agency rules well within the 90-day review period.13 For example, from 1994–2011, the average time for OIRA review was 50 days for all rules.14 Since 2011, however, average OIRA review times have trended significantly upward. In 2012, the average time for OIRA review for all rules rose to 79 days, and in the first half of 2013, the average review time increased even further to 140 days.15 It is important to note that, as OIRA completes review for rules that have been in the backlog for some time, the average review times will likely increase, with the average review time for the first half of 2013.

Approximately four dozen reviews completed in 2013 have taken more than a year.16 However, average review times and the length of completed reviews are lagging indicators of OIRA performance, and the recent increases in average review times reflect the significant headway that OIRA has made during the past year in reducing the backlog of rules and improving review times. The number of reviews lasting more than one year has been cut from 51 reviews in mid-May 2013 to 27 reviews in mid-September 2013. Of the 38 reviews that, as of June 30, 2013, had been ongoing for more than a year, 14 of them were completed by mid-September 2013.

Senior agency employees provided a variety of perspectives as to why they believe that OIRA review times increased in 2012–13, including one or more of the following reasons: (1) Concerns by some in the Executive Office of the President (EOP) about the issuance of potentially costly or otherwise controversial rules during an election year, (2) coordinative reviews by other agencies and offices within EOP that took more time than in preceding years,17 and (3)
a reluctance by OIRA to use return letters. Both senior agency employees and other observers (including several former OIRA officials) also suggested that a decrease in OIRA staffing in recent years may have been another contributing factor. In addition, the executive review process has become more complicated for all parties involved as regulations have grown increasingly complex, interagency coordination has become more important, and various transparency and procedural requirements have prevailed.

The Conference has long supported effective executive review of agency rulemaking, and has emphasized the importance of timeliness and transparency in this process. In Recommendation 88–9, the Conference stated that “[t]he process of presidential review of rulemaking, including agency participation, should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to applicable administrative, executive, judicial and statutory deadlines.” Similarly, in Recommendation 93–4, the Conference asserted that “the reviewing or oversight entity should avoid, to the extent practicable, administrative, executive, judicial and statutory deadlines.”

In accordance with the

Notice of Request for Extension of Approval of an Information Collection; Importation of Ovine Meat From Uruguay

Agency: Animal and Plant Health Inspection Service, USDA.

Action: Extension of approval of an information collection associated with the regulation for the importation of ovine meat from Uruguay into the United States.

Summary: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service’s intention to request an extension of approval of an information collection associated with the regulations for the importation of ovine meat from Uruguay into the United States.