

Notices

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

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted five recommendations at its Fifty-sixth Plenary Session. The appended recommendations address regulatory analysis requirements, midnight rules, immigration removal adjudication, the Paperwork Reduction Act, and improving coordination of related agency responsibilities.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2012-1, Reeve Bull; for Recommendations 2012-2 and 2012-3, Funmi Olorunnipa; for Recommendation 2012-4, Emily Bremer; and for Recommendation 2012-5, David Pritzker. For all five recommendations 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 <http://www.acus.gov>.

At its Fifty-sixth Plenary Session, held June 14-15, 2012, the Assembly of the Conference adopted five recommendations. Recommendation 2012-1, "Regulatory Analysis Requirements," considers the various

regulatory analysis requirements imposed upon agencies by both executive orders and statutes. It offers recommendations designed to ensure that agencies satisfy the existing requirements in the most efficient and transparent manner possible. It also provides recommendations on streamlining the existing analysis requirements.

Recommendation 2012-2, "Midnight Rules," addresses several issues raised by the publication of rules in the final months of a presidential administration. The recommendation offers a number of proposals for limiting the practice of issuing midnight rules by incumbent administrations and enhancing the powers of incoming administrations to review midnight rules.

Recommendation 2012-3, "Immigration Removal Adjudication," addresses the problem of case backlogs in immigration removals. The recommendation suggests a number of ways to enhance efficiency and fairness in these cases. Officials from the Department of Homeland Security (DHS) and the Department of Justice's Executive Office for Immigration Review (EOIR) had significant and helpful input during the committee process preceding the adoption of the recommendation by the full Assembly of the Conference.

At the end of the first day of the Fifty-sixth Plenary Session, during deliberation of Recommendation 2012-3, "Immigration Removal Adjudication," the Assembly had to adjourn due to the lack of a quorum. That determination came after three amendments proposed by DHS to sections 10(b) and 21 of the recommendation failed. There is doubt whether a quorum existed at the time the Assembly voted on those amendments. Moreover, because those amendments failed by relatively narrow margins (one was a tie), they might have succeeded had a quorum been present. The following day, after a quorum had been reestablished, the full recommendation (including the two sections that had been adopted prior to the quorum call) was adopted by a voice vote. In light of the uncertainty surrounding the votes on DHS's amendments, DHS and a number of other members have taken the reasonable view that those two sections

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carry less persuasive weight than they might otherwise.

An *ex post* review of all relevant sources has introduced some uncertainty as to whether procedures could have been managed differently. Because the mission of the Conference is to ensure consensus-driven and fair procedures, the Conference has sought and will continue to seek the input of its membership on ways to revise quorum procedures in the future, to ensure that the Conference acts only through a full quorum of its members. We look forward to working with DHS and the Department of Justice to implement the other 35 parts of this important and historic recommendation.

Recommendation 2012-4 addresses a variety of issues that have arisen since the Paperwork Reduction Act was last revised in 1995. It recommends ways to improve public engagement in the creation and review of information collection requests and to make the process more efficient for the agencies and the Office of Management and Budget. It also suggests ways to streamline the review and approval process without increasing the burden on the public of agency information collections.

Recommendation 2012-5 addresses the problem of overlapping and fragmented procedures associated with assigning multiple agencies similar or related functions, or dividing authority among agencies. The recommendation proposes some reforms aimed at improving coordination of agency policymaking, including joint rulemaking, interagency agreements, agency consultation provisions, and tracking and evaluating the effectiveness of coordination initiatives.

The Appendix (below) sets forth the full text of these five recommendations. The Conference will transmit them to affected agencies and to appropriate committees of the United States Congress. The recommendations are not binding, so the relevant agencies, the Congress, and the courts will make decisions on their implementation.

The Conference based these recommendations on research reports that it has posted at: <http://www.acus.gov/events/56th-plenary-session/>. A video of the Plenary Session is available at the same web address, and a transcript of the Plenary Session will be posted once it is available.

Dated: August 7, 2012.

Paul R. Verkuil,
Chairman.

Appendix—Recommendations of the Administrative Conference of the United States

*Administrative Conference
Recommendation 2012-1*

Regulatory Analysis Requirements

Adopted June 14, 2012

Over the past several decades, the United States Congress and various Presidents have imposed numerous regulatory analysis requirements on administrative agencies in connection with their rulemaking activities. Some of these requirements are relatively sweeping measures designed to ensure that agencies' regulations advance legitimate goals, such as Executive Order (EO) 12,866's requirement that executive agencies analyze the benefits and costs of proposed regulations.¹ Other requirements are more specific mandates that agencies take into account certain factors when drafting regulations, including the proposed rules' effects on small businesses,² intergovernmental relations,³ constitutionally protected property rights,⁴ or the well-being of families.⁵

Some of the regulatory analysis requirements created by statute and executive orders have similar elements. For instance, the Regulatory Flexibility Act (RFA), Paperwork Reduction Act (PRA), Unfunded Mandates Reform Act (UMRA), and EO 12866 all require agencies to discuss the need for a proposed regulatory action, assess the costs and benefits of the proposal, and discuss alternative regulatory actions that could have been selected.⁶ EO 13132 requires agencies to consider the impact of their regulations on State and local governments, and EO 13175 similarly requires agencies to assess the

impact of proposed rules on Native American tribal governments.⁷

Nevertheless, even relatively similar analytical requirements have distinct scopes, triggering events, and exceptions.⁸ For instance, although UMRA and EO 12866 cover the same agencies and require similar types of analysis, UMRA covers far fewer rules than the executive order. The various requirements also differ in the amount of discretion provided to agencies to determine whether an analysis is required. For example, EO 12,866's analysis requirement applies in any rulemaking with an annual economic effect of \$100 million or more. In contrast, EOs 13132 and 13175 are triggered when a regulation has "substantial direct effects" on State or Native American tribal governments, respectively, but neither executive order defines the phrase, thereby allowing agencies to determine what constitutes a "substantial direct effect."⁹ As a result, agencies may adopt differing perspectives on events that implicate any given regulatory analysis requirement, thereby resulting in inconsistency throughout the government. Therefore, although certain aspects of the various analysis requirements could theoretically be consolidated,¹⁰ the numerous distinctions among the requirements complicate any effort to consolidate and streamline them.

In this Recommendation, the Conference has sought to ensure that agencies fulfill the various regulatory analysis requirements in the most efficient manner possible and to enhance the transparency of the process by encouraging agencies to identify explicitly which of the requirements apply to any given rulemaking and why any applicable analytical requirements are not triggered. Also, agencies should be able to refer to a comprehensive list of cross-cutting regulatory analysis requirements, and they should identify any agency-specific or statute-specific requirements applicable to their rules.¹¹

¹ *See generally* Exec. Order No. 12,866, 58 FR 51735 (Oct. 4, 1993). Independent regulatory agencies, as defined in the Paperwork Reduction Act, 44 U.S.C. 3502(5), are not subject to that requirement.

² *See* Regulatory Flexibility Act, 5 U.S.C. 603–04 (requiring agencies to do initial and final "regulatory flexibility" analyses, describing the impact of the rule on "small entities").

³ *See generally* Exec. Order No. 13,132, 64 FR 43255 (Aug. 10, 1999).

⁴ *See generally* Exec. Order No. 12,630, 53 FR 8859 (Mar. 15, 1988).

⁵ *See generally* Public Law 105–277, § 654, 112 Stat. 2681, 2681–528–30 (1998).

⁶ Curtis W. Copeland, *Regulatory Analysis Requirements: A Review and Recommendations for Reform 51* (Feb. 23, 2012) (report to the Administrative Conference of the United States), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/03/COR-Copeland-Report-CIRCULATED.pdf>.

In addition, the Conference asks the Executive Office of the President and Congress to consider streamlining the existing regulatory analysis requirements. It encourages the Executive Office of the President and Congress to consider consolidating certain analysis requirements to the extent overlap exists and to promote uniformity in the determination of whether any given analysis requirement applies. Although the Conference seeks to assure that existing analytic requirements are applied in the most efficient and transparent manner possible, it does not address whether the number or nature of those requirements might not be reduced in light of their cumulative impact on agencies.

Recommendation

1. The Executive Office of the President should request that an appropriate agency prepare and post on its Web site a chart listing the various cross-cutting analytical rulemaking requirements (i.e., those that apply generally to a group of agencies rather than a specific agency or issue); the chart should provide links to the relevant statutes and executive orders establishing these requirements.¹² The chart should be designed to serve as a useful resource to agencies for identifying analysis requirements that might apply; it would not constitute a formal "checklist" that agencies must complete or represent a judgment that an agency need comply only with the requirements enumerated in the list.

2. To the extent certain regulatory analysis requirements are agency-specific or statute-specific, affected agencies should prepare and post on their Web sites a list of all such additional requirements (beyond the cross-cutting requirements described in Recommendation 1), along with links to the underlying statutes.

3. In order to minimize the burden and duplication that agencies face in conducting separate regulatory analyses, the Executive Office of the President and Congress should review

process." Administrative Conference of the United States, Recommendation 85–2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 FR 28364 (July 12, 1985) (preamble). Specifically, the recommendation states that "[i]f regulatory analysis is to be used in a rulemaking, the agency decisionmaking process should be structured to involve agency regulatory analysts early in the evolution of the rule, before alternatives have been eliminated. Regulatory analysis should not be used to produce post hoc rationalizations for decisions already made, nor should it be allowed to unduly delay rulemaking proceedings." *Id.* ¶ 2(a).

¹² The Administrative Conference can provide appropriate assistance in accomplishing this endeavor.

requirements on an ongoing basis to determine if any of them should be consolidated or eliminated.

4. The Office of Information and Regulatory Affairs (OIRA) should notify agencies that an analytical requirement for which it plays a central coordinating role might be satisfied by another applicable analytical requirement, and that the agencies may not need to prepare a separate analysis to satisfy the former requirement in such instances.¹³

5. In developing any future guidance on regulatory analysis requirements,

OIRA should consider the cumulative impact of those requirements and, to the extent possible, integrate the requirements into existing formats for analysis.

6. In the preamble to each significant proposed or final rule, agencies should briefly indicate which of the cross-cutting and agency-specific or statute-specific regulatory analysis requirements arguably apply to the particular rulemaking under consideration, and why any specific

requirement is not triggered.¹⁴ In so doing, the agency may utilize the lists of regulatory analysis requirements described in the first and second recommendations. An example for a hypothetical regulation that might be construed to have potential effects on the economy, states, and the environment but that ultimately does not trigger any of the associated regulatory analysis requirements is provided in the form of a chart¹⁵:

Executive Order 12,866	OIRA has determined that the proposed rule will not have an “annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities,” and does not trigger the additional information requirements of § 6(a)(3)(C) of EO 12,866.
Executive Order 12,898	Data available to the agency indicate that the proposed rule does not have disproportionately high and adverse health or environmental effects on minority or low-income populations.
UMRA	Proposed rule will not “result in aggregate expenditure by State, local, and tribal governments, or by the private sector, of \$100,000,000 or more in any one year (adjusted annually for inflation)” and therefore does not trigger UMRA requirements.

*Administrative Conference
Recommendation 2012-2*

Midnight Rules

Adopted June 14, 2012

There has been a documented increase in the volume of regulatory activity during the last months of presidential terms.¹ This includes an increase in the number of legislative rules (normally issued under the Administrative Procedure Act’s (APA) notice and comment procedures)² and non-legislative rules (such as interpretive rules, policy statements, and guidance documents) as compared to other periods. This spurt in late-term regulatory activity has been criticized by politicians, academics, and the media

during the last several presidential transitions. However, the perception of midnight rulemaking as an unseemly practice is worse than the reality.

The Conference has found that a dispassionate look at midnight rules³ issued by past administrations of both political parties reveals that most were under active consideration long before the November election and many were relatively routine matters not implicating new policy initiatives by incumbent administrations.⁴ The Conference’s study found that while there are isolated cases of midnight rules that may have been timed to avoid accountability⁵ the majority of the rules appear to be the result of finishing tasks that were initiated before the

Presidential transition period or the result of deadlines outside the agency’s control (such as year-end statutory or court-ordered deadlines). Accordingly, it appears that the increase in rulemaking at the end of an administration likely results primarily from external delays, the ordinary tendency to work to deadline, or simply a natural desire to complete projects before departing. Nonetheless, the timing of such rulemaking efforts can put a new administration in the awkward position of having to expeditiously review a substantial number of rules and other actions to assess the quality and consistency with its policies.

Federal Register over specific time periods in various presidential administrations).

¹ See 5 U.S.C. 553.

² The U.S. House of Representatives’ Subcommittee on Commercial and Administrative Law has previously suggested midnight rules as a topic suitable for Conference study. See H. Subcomm. on Commercial & Admin. Law, 109th Cong., Interim Report on Administrative Law, Process and Procedure for the 21st Century 150 (Comm. Print 2007). (listing among “Areas for Additional Research” the following question: “Should a new President be authorized to stay the effectiveness of ‘midnight rules’ that are promulgated shortly before a new administration takes office? If so, should there be limits on the amount of time rules can be delayed?”).

³ See Jack M. Beermann, *Midnight Rules: A Reform Agenda* (Feb. 8, 2012) (report to the Administrative Conference of the U.S.), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/02/Midnight-Rules-Draft-Report-2-8-12.pdf>.

⁴ See, e.g., Beermann, *Midnight Rules*, *supra* note 4, at 28 n. 74, 54 n. 137 (citing examples of cases where an incumbent administration may have timed a midnight rule to avoid accountability).

¹³ Agencies should also be aware that certain analysis requirements outside of the purview of OIRA can be satisfied by performing similar analysis under a separate requirement. *See, e.g.*, Unfunded Mandates Reform Act, 2 U.S.C. 1532(c) (“Any agency may prepare any statement required under subsection (a) of this section in conjunction with or as a part of any other statement or analysis, provided that the statement or analysis satisfies the provisions of subsection (a) of this section.”); Regulatory Flexibility Act, 5 U.S.C. 605(a) (“Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.”).

¹⁴ As explored above, agencies should not treat this merely as a checklist and instead should consider the various analysis requirements throughout the rulemaking process. *See supra* note 11. This recommendation is merely intended to ensure that the agency provides the public a brief explanation of its determination that certain analysis requirements do not apply.

¹⁵ As a general matter, the various regulatory analysis requirements will fall into three potential categories: (a) the analysis requirement applies to the rulemaking; (b) the analysis requirement does

not apply to the rulemaking but its inapplicability is not immediately clear without additional explanation; and (c) the analysis requirement clearly does not apply to the rulemaking. An agency could use a chart similar to the exemplar provided for analysis requirements that fall into the second category. It would actually perform the analysis requirements falling into the first category, and it would not need to explain the inapplicability of requirements falling into the third category. An agency could choose to provide an explanation for the inapplicability of requirements in the third category. For instance, with respect to the analysis requirement created by the Assessment of Federal Regulation and Policies on Families (Pub. L. 105-277, sec. 654), an agency might add an entry to the chart stating “Proposed rule will not affect family well-being.”

¹ One study shows that, as measured by *Federal Register* pages, rulemaking activity increases by an average of 17 percent in the three months following a presidential election. *See* Antony Davies & Veronique de Rugy, *Midnight Regulations: An Update* (Mercatus Ctr. at George Mason Univ., Working Paper, 2008), available at http://mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf (studying the number of pages published in the

In addition, critics have suggested that administrations have used the midnight period for strategic purposes. First, administrations are said to have reserved particularly controversial rulemakings for the final months of an incumbent President's term in order to minimize political accountability and maximize influence beyond the incumbent administration's term. Such strategic timing is said to weaken the check that the political process otherwise provides on regulatory activity. Second, there is some concern about the quality of rules that may have been rushed through the rulemaking process. Third, some fear that midnight rulemaking forces incoming administrations to expend substantial time, energy, and political capital to reexamine the rules and address perceived problems with them. Although similar concerns have been raised with respect to non-legislative rules issued during the midnight period, such rules are not the focus of this Recommendation because they can be modified or amended without notice and comment procedures.

Given these criticisms, there have been many proposals to reform midnight rulemaking, some directed at limiting the ability of incumbent administrations to engage in it, some directed at enhancing the ability of incoming administrations to revise or rescind the resulting rules, and others directed at encouraging incumbent and incoming administrations to collaborate and share information during the rulemaking process.

The Conference believes that although it may be desirable to defer significant and especially controversial late-term rulemakings until after the transition of a presidential administration, shutting the rulemaking process down during this period would be impractical given that numerous agency programs require constant regulatory activity, often with statutory deadlines. Thus, the Conference believes that reforms directed at curtailing midnight rules should be aimed as precisely as possible at the activities that raise the greatest causes for concern. Reforms should target the problems of perceived political illegitimacy that arise from rules that are initiated late in the incumbent administration's term or that appear to be rushed through the regulatory process.

Accordingly, this Recommendation proposes reforms aimed at addressing problematic midnight rulemaking practices by incumbent administrations and enhancing the ability of incoming administrations to review midnight rules. This Recommendation defines

"midnight rules" as those promulgated by an outgoing administration after the Presidential election. It is directed at addressing midnight rulemaking of "significant" legislative rules,⁶ although the considerations that underlie it may apply to other agency regulatory activities that affect the public.

Recommendation

1. Incumbent administrations should manage each step of the rulemaking process throughout their terms in a way that avoids an actual or perceived rush of the final stages of the process.

2. Incumbent administrations should encourage agencies to put significant rulemaking proposals out for public comment well before the date of the upcoming presidential election and to complete rulemakings before the election whenever possible.

3. When incumbent administrations issue a significant "midnight" rule—meaning one issued by an outgoing administration after the Presidential election—they should explain the timing of the rule in the preamble of the final rule (and, if feasible, in the preamble of the proposed rule). The outgoing administration should also consider selecting an effective date that falls 90 days or more into the new administration so as to ensure that the new administration has an opportunity to review the final action and, if desired, withdraw it after notice and comment, before the effective date.

4. Incumbent administrations should refrain from issuing midnight rules that address internal government operations, such as consultation requirements and funding restrictions, unless there is a pressing need to act before the transition. While incumbent administrations can suggest such changes to the incoming administration, it is more appropriate to leave the final decision to those who would operate under the new requirements or restrictions.

5. Incumbent administrations should continue the practice of sharing appropriate information about pending rulemaking actions and new regulatory

initiatives with incoming administrations.

Recommendations to Incoming Presidential Administrations

6. Where an incoming administration undertakes to review a midnight rule that has already been published, and the effective date of the rule is not imminent, the administration should, before taking any action to alter the rule or its effective date, allow a notice-and-comment period of at least 30 days. The comment period should invite the public to express views on the legal and policy issues raised by the rule as well as whether the rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect. The administration should then take account of the public comments in determining whether to amend, rescind, delay the rule, or allow the rule to go into effect. If possible, the administration should initiate, if not complete, any such process prior to the effective date of the rule.

7. When the imminence of the effective date of a midnight rule precludes full adherence to the process described in paragraph six, the incoming administration should consider delaying the effective date of the rule, for up to 60 days to facilitate its review, if such an action is permitted by law.⁷ Before deciding whether to delay the effective date, however, the administration should, where feasible, allow at least a short comment period regarding the desirability of delaying the effective date. If the administration cannot provide a comment period before delaying the effective date of the rule, it should instead offer the public a subsequent opportunity to comment on when, if ever, the rule should take effect and whether the rule itself should be amended or rescinded.

Recommendation to Congress

8. In order to facilitate incoming administrations' review of midnight rules that would not otherwise qualify for one of the APA exceptions to notice and comment, Congress should consider expressly authorizing agencies to delay for up to 60 days, without notice and comment, the effective dates of such rules that have not yet gone into effect but would take effect within the first 60 days of a new administration.

⁶ Executive Order 12866 defines a rule as "significant" when it is likely to have "an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order." Exec. Order No. 12866, 58 FR 51735 (Oct. 4, 1993).

⁷ The Conference takes no position on whether—absent legislation such as paragraph eight suggests—the law authorizes administrations to delay the effective dates of rules not yet effective without notice and comment, but recognizes that prior administrations have done so.

Recommendation to the Office of the Federal Register

9. The Office of the Federal Register should maintain its current practice (whether during the midnight period or not) of allowing withdrawal of rules before filing for public inspection and not allowing rules to be withdrawn once they have been filed for public inspection or published, absent exceptional circumstances.

Administrative Conference Recommendation 2012-3

Immigration Removal Adjudication
Adopted June 15, 2012.

The U.S. immigration removal adjudication agencies and processes have been the objects of critiques by the popular press, organizations of various types, legal scholars, advocates, U.S. courts of appeals judges, immigration judges, Board of Immigration Appeals members and the Government Accountability Office. Critics have noted how the current immigration adjudication system fails to meet national expectations of fairness and effectiveness. One of the biggest challenges identified in the adjudication of immigration removal cases is the backlog of pending proceedings and the limited resources to deal with the caseload. A March 2012 study by the Transactional Records Access Clearinghouse at Syracuse University reports that the number of cases pending before immigration courts within the U.S. Department of Justice's Executive Office for Immigration Review (EOIR) recently reached an all-time high of more than 300,000 cases and that the average time these cases have been pending is 519 days.¹ A February 2010 study by the American Bar Association's Commission on Immigration reports that the number of cases is "overwhelming" the resources that have been dedicated to resolving them.² Another challenge identified is the lack of adequate representation in removal proceedings, which can have a host of negative repercussions, including delays, questionable fairness,

increased cost of adjudicating cases, and risk of abuse and exploitation. More than half of respondents in immigration removal proceedings and 84 percent of detained respondents are not represented.³

The numerous studies examining immigration removal adjudication have focused on the two agencies principally involved: The U.S. Department of Homeland Security (DHS), specifically two of its component agencies: the United States Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE), and EOIR. Prior studies about EOIR have noted the limited resources available to the agency and called for more resources to hire more immigration judges and support staff and thus ease the backlog of cases, criticized immigration judge hiring standards and procedures, and recommended enhanced orientation, continuing education, and performance monitoring.

Consultants for the Administrative Conference of the United States conducted a comprehensive and detailed study of potential improvements in immigration removal adjudication.⁴ Following the study and consistent with the Conference's statutory mandate of improving the regulatory and adjudicatory process, the Conference issues this Recommendation directed at reducing the caseload backlog, increasing and improving representation, and making the immigration adjudication system more modern, functional, effective, transparent and fair. This Recommendation urges a substantial number of improvements in immigration removal adjudication procedures, but does not address substantive immigration reform. A pervading theme of this Recommendation is enhancing the immigration courts' ability to dispose of cases fairly and efficiently. Many of the reforms are aimed at structuring the pre-hearing process to allow more time for immigration judges to give complex cases adequate consideration. This Recommendation is directed at EOIR and DHS agencies, USCIS and ICE. A few parts of this Recommendation would also impact the practices of United States Customs and Border

Protection (CBP), another component of DHS.

Recommendation

Part I. Immigration Court Management and Tools for Case Management

A. Recommendations to EOIR Regarding Immigration Court Resources, Monitoring Court Performance and Assessing Court Workload

1. To encourage the enhancement of resources for immigration courts, working within and through the U.S. Department of Justice (DOJ), the DOJ's Executive Office for Immigration Review (EOIR) should:

(a) Continue to seek appropriations beyond current services levels but also plan for changes that will not require new resources;

(b) Make the case to Congress that funding legal representation for respondents (*i.e.*, non-citizens in removal proceedings), especially those in detention, will produce efficiencies and net cost savings; and

(c) Continue to give high priority for any available funds for EOIR's Legal Orientation Program and other initiatives of EOIR's Office of Legal Access Programs, which recruit non-profit organizations to provide basic legal briefings to detained respondents and seek to attract pro bono legal providers to represent these individuals.

2. To monitor immigration court performance, EOIR should:

(a) Continue its assessment of the adaptability of performance measures used in other court systems;

(b) Continue to include rank-and-file immigration judges and U.S. Department of Homeland Security (DHS) agencies in the assessment of immigration courts' performance;

(c) Continue to incorporate meaningful public participation in its assessment; and

(d) Publicize the results of its assessment.

3. To refine its information about immigration court workload, EOIR should:

(a) Explore case weighting methods used in other high volume court systems to determine the methods' utility in assessing the relative need for additional immigration judges and allowing more accurate monitoring and analysis of immigration court workload;

(b) Expand its data collection field, upon introduction of electronic filing or other modification of the data collection system, to provide a record of the sources for each Notice to Appear form (NTA) filed in immigration courts;

(c) Continue its evaluation of adjournment code data, as an aid to

¹ *Immigration Court Backlog Tool*, Transactional Records Access Clearinghouse, Syracuse Univ. (Mar. 28, 2012), http://trac.syr.edu/phptools/immigration/court_backlog/ (providing comprehensive, independent, and nonpartisan information about U.S. federal immigration enforcement).

² Am. Bar Ass'n Comm'n on Immigration, Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 1-49 (2010) available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

³ *Id.*

⁴ See Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (June 7, 2012) (report to the Administrative Conference of the U.S.), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7-2012.pdf>.

system-wide analysis of immigration court case management practices, and devise codes that reflect the multiplicity of reasons for an adjournment;

(d) Evaluate the agency's coding scheme to consider allowing judges or court administrators to identify what the agency regulations call "pre-hearing conferences," sometimes known as "status conferences;" and

(e) Authorize, as appropriate, a separate docket in individual immigration courts for cases awaiting biometric data results with special coding for these cases to allow EOIR to measure the degree to which these types of security checks are solely responsible for case delays.⁵

B. Recommendations to EOIR Regarding Immigration Court Management Structure and Court Workforce

4. EOIR should consider assembling a working group of immigration judges and others familiar with court management structures to assist in its ongoing evaluation of alternatives to the current Assistant Chief Immigration Judge structure used by the agency.

5. To increase the immigration court workforce, EOIR should:

(a) Consider the use of temporary immigration judges where permitted by its regulations. If temporary immigration judges are used, EOIR should use transparent procedures to select such judges and usual procedures for monitoring judges' performance;

(b) Consider the National Association of Immigration Law Judges' (NAIJ) proposal for instituting senior status (through part-time reemployment or independent contract work) for retired immigration judges⁶; and

(c) Consider using appropriate government employees as temporary immigration court law clerks.

6. To promote transparency about hiring practices within the agency and consistent with any statutory restrictions to protect privacy, EOIR should periodically publish summary and comparative data on immigration judges, Board of Immigration Appeals members, and support staff as well as

⁵ In the immigration adjudication context, biometric data are collected from respondents and used to perform a background check on respondents for security reasons.

⁶ See *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of NAJJ), available at <http://dl.dropbox.com/u/27924754/NAIJ%20Written%20Statement%20for%20Senate%20Judiciary%20Cmte%205-18-11%20FINAL.pdf> (citing the National Defense Authorization Act for FY 2010, Public Law 111-84 where Congress facilitated part-time reemployment of Federal employees retired under CSRS and FERS on a limited basis, with receipt of both annuity and salary).

summary information on judges' prior employment.⁷

7. EOIR should expand its Web page entitled "Immigration Judge Conduct and Professionalism" that discusses disciplinary action to include an explanation of why the agency is barred by statute from identifying judges upon whom it has imposed formal disciplinary action.⁸

8. EOIR should consider incorporating elements of the American Bar Association's and the Institute for the Advancement of the American Legal System's Judicial Performance Evaluation models into its performance evaluation process, including the use of a separate body to conduct agency-wide reviews.⁹

C. Recommendations to EOIR Regarding Enhancing the Use of Status Conferences, Administrative Closures and Stipulated Removals

9. To enhance the utility of status conferences, EOIR should:

(a) Assemble a working group to examine immigration judges' perceptions of the utility, costs and benefits of such conferences;

(b) Consider a pilot project to evaluate the effectiveness and feasibility of mandatory pre-hearing conferences to be convened in specified categories of cases;

(c) Evaluate situations in which the judge should order the trial attorney to produce essential records from the respondent's file;

(d) Evaluate the use of EOIR's Form-55¹⁰ and consider creating a new form (similar to scheduling orders used in other litigation contexts); and

(e) Recommend procedures for stipulations by represented parties.

10. To clarify the proper use of techniques for docket control in immigration removal adjudication cases, EOIR should:

⁷ Some examples of the types of data that may be published include: year of law school graduation, graduate education, languages spoken, past employment with DHS, past employment representing respondents in immigration cases, military experience, gender and race/ethnicity composition.

⁸ The Conference takes no position on whether EOIR should identify judges upon whom it has imposed formal disciplinary action or on the statute barring such action.

⁹ See *Quality Judges Initiative*, Inst. for the Advancement of the Am. Legal Sys., U. Denv. <http://www.du.edu/legalinstitute/jpe.html> (last visited June 20, 2012) (providing Judicial Performance Evaluation resources); Am. Bar Ass'n, Black Letter Guidelines for the Evaluation of Judicial Performance (2005), available at http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf (providing JPE resources).

¹⁰ See Exec. Office for Immigration Review, U.S. Dep't of Justice, Record of Master Calendar Pre-Trial Appearance and Order (2009), available at <http://www.justice.gov/eoir/vll/benchbook/index.html>.

(a) Amend the Office of the Chief Immigration Judge's (OCII) Practice Manual to specifically define "Motions for Administrative Closure"; and

(b) Amend appropriate regulations so that once a respondent has formally admitted or responded to the charges and allegations in an NTA, the government's ability to amend the charges and allegations may be considered by the immigration judge in the exercise of his or her discretion.

11. EOIR should expand its review of stipulated removals by considering a pilot project to systematically test the utility of stipulated removal orders (provided that respondents have been counseled by independent attorneys) as a mechanism to (a) reduce detention time, (b) allow judges to focus on contested cases, and (c) assess whether and when the use of stipulated removals might diminish due process protections.

12. In jurisdictions where DHS routinely seeks stipulated removal orders and asks for a waiver of the respondent's appearance, EOIR should consider designing a random selection procedure where personal appearance is not waived and the respondent is brought to the immigration court to ensure that the waivers were knowing and voluntary. If undertaking such a project, EOIR should encourage one or more advocacy organizations to prepare a video recording (with subtitles or dubbing in a number of languages) that explains the respondent's removal proceedings, general eligibility for relief, and the possibility of requesting a stipulated order of removal should the respondent wish to waive both the hearing and any application for relief including the privilege of voluntary departure.

D. Recommendation to EOIR and DHS Regarding the BIA

13. EOIR should finalize its 2008 proposed regulations to allow greater flexibility in establishing three-member panels for the Board of Immigration Appeals (BIA).

Part II. Immigration Removal Adjudication Cases and Asylum Cases

A. Recommendations to EOIR Regarding Prosecution Arrangements and the Responsibilities of Trial Counsel

14. EOIR should not oppose unit prosecution, which DHS's Immigration and Customs Enforcement (ICE) Chief Counsel has devised for prosecution in some immigration courts.¹¹

¹¹ The term "unit prosecution," also sometimes known as "vertical prosecution," is used in this Recommendation to refer to a practice used in some immigration courts.

Continued

15. EOIR should consider providing immigration judges with additional guidance directed at ensuring that trial counsel are prepared and responsible for necessary actions that the parties must complete between hearings. Specifically, EOIR should consider:

- (a) Amending the OCIJ's Practice Manual to explicitly include best practices for the activities of trial counsel in immigration removal proceedings;
- (b) Instructing judges to document, in the record, the responsibilities, commitments, actions and omissions of trial counsel in the same case; and
- (c) Clarifying the authority for judges to make conditional decisions on applications for relief where trial counsel has not provided necessary information.

B. Recommendations to EOIR Regarding Representation

16. To increase the availability of competent representation for respondents, EOIR should:

- (a) Undertake a more intensive assessment of the paraprofessional programs that provide legal representation and the accreditation process for such programs;
- (b) Continue its assessment of the accuracy and usefulness of the pro bono representation lists provided at immigration courts and on the agency's Web site; and
- (c) Develop a national pro bono training curriculum, tailored to detention and non-detention settings:

(i) The training curriculum should be developed in consultation with groups that are encouraging pro bono representation.

(ii) The training curriculum should be offered systematically and in partnership with educational, CLE and/or non-profit providers.

17. To enhance the guidance available to legal practitioners and pro se respondents, EOIR should:

(a) Work with a pro bono organization to develop materials that explain the legal terms and concepts within the OCIJ Practice Manual;

(b) Share supplemental instructions developed by individual immigration courts or judges to aid the parties in preparing submissions to the immigration court; and

(c) Evaluate the cost and utility of developing access to electronically-available information in immigration court waiting rooms or similar spaces so

immigration courts, whereby the ICE Chief Counsel organizes ICE trial attorneys into teams and then assigns the teams to cover the dockets of specific judges.

that the respondents can access the court Web site and find instructional materials.

18. To enhance the number and value of know-your-rights (KYR) presentations given to detained respondents, EOIR should:

(a) Ensure that KYR presentations are made sufficiently in advance of the initial master calendar hearings to allow adequate time for detained individuals to consider and evaluate the presentation information (to the extent consistent with DHS requirements for KYR providers);

(b) Consider giving LOP providers electronic access to the court dockets in the same manner as it is currently provided to DHS attorneys representing the government in cases (with appropriate safeguards for confidentiality and national security interests); and

(c) Encourage local EOIR officials to obtain from detention officers aggregate data about new detainees (such as, where possible, lists of new detainees, their country of origin, and language requirements) at the earliest feasible stage for both the immigration courts and LOP providers.

19. EOIR should study and develop the circumstances where the use of limited appearances, (the process by which counsel represent a respondent in one or more phases of the litigation but not necessarily for its entirety), is appropriate and in accordance with existing law. After further study, EOIR should consider taking appropriate action such as:

(a) Modifying appropriate and underlying regulations as necessary;

(b) Issuing an Operating Policies and Procedures Memorandum (OPPM) entry to explain to immigration judges the circumstances in which they may wish to permit limited appearances and the necessary warnings and conditions they should establish; and

(c) Amending the OCIJ Practice Manual to reflect this modified policy.

20. EOIR should consider whether pro se law clerk offices would save costs, enhance fairness, and improve efficiency.

21. To encourage improvement in the performance of attorneys who appear in the immigration court, EOIR should:

(a) Continue its efforts to implement the statutory grant of immigration judge contempt authority;¹²

(b) Evaluate appropriate procedures to allow immigration judges to address trial counsel's lack of preparation, lack of substantive or procedural knowledge,

or other conduct that impedes the court's operation; and

(c) Explore options for developing educational and training resources such as seeking pro bono partnerships with reputable educational or CLE providers and/or seeking regulatory authority to impose monetary sanctions to subsidize the cost of developing such materials.

C. Recommendations to DHS Regarding Notice To Appear Forms

22. DHS should consider revising the NTA form or instruct its completing officers to clearly indicate officer's agency affiliation, being specific about the entity preparing the NTA, in order to enhance the immigration court's ability to better estimate future workload.¹³

23. DHS should conduct a pilot study evaluating the feasibility of requiring (in appropriate cases) the approval of an ICE attorney prior to the issuance of any NTA. The pilot study should be conducted in offices with sufficient attorney resources and after full study of the efficiencies and operational changes associated with this requirement, DHS should consider requiring attorney approval in all removal proceedings.

D. Recommendations to EOIR Regarding the Asylum Process

24. To facilitate the processing of defensive asylum applications, EOIR should consider having the OCIJ issue an OPPM entry, which:

(a) Explains that appropriate procedures for a respondent's initial filing of an asylum application with the immigration court do not require the participation of the judge and oral advisals made on the record at the time of the initial filing;¹⁴

(b) Authorizes court personnel to schedule a telephonic status conference with the judge and ICE attorney in any situation where the respondent or his/her representative expresses a lack of understanding about the asylum filing and advisals;

(c) Notes that the immigration judge may renew, at the merits hearing, the advisal of the danger of filing a frivolous application and allow an opportunity for the respondent to withdraw the application; and

(d) Makes clear that the filing with immigration court personnel qualifies as

¹² The purpose of this recommendation, coupled with Recommendation ¶ 3b, is to allow EOIR to better refine its information about immigration court workload by expanding its data collection field to include a record of the sources for each NTA form filed in immigration court.

¹³ "Oral advisal" is a term used by immigration courts to mean warnings given by an immigration judge about the procedural and substantive consequences for various actions.

¹² Immigration and Nationality Act of 1952 (INA), sec. 240(b)(1), 8 U.S.C. 1229a(b)(1) (2006).

a filing with the court, satisfies the statutory one-year filing deadline in appropriate cases and for the purposes of commencing the 180-day work authorization waiting period.

25. EOIR should consider seeking enhanced facilitation of defensive asylum applications by amending its current procedure of having judges “adjourn” asylum cases involving unaccompanied juveniles while the case is adjudicated within the DHS Asylum Office and instead have the judge administratively close the case. If the Office subsequently cannot grant the asylum or other relief to the juvenile, the Office can refer the case to ICE counsel to initiate a motion to re-calendar the removal proceeding before the judge.

26. EOIR should give priority to the use of adjournment codes for the purpose of managing immigration judges’ dockets and stop using these codes to track the number of days an asylum application is pending.

E. Recommendation to DHS Regarding the Asylum Process

27. DHS should consider revising its regulations and procedures to allow asylum and withholding applicants to presumptively qualify for work authorization provided that at least 150 days have passed since the filing of an asylum application.¹⁵

F. Recommendations Regarding Further Study of BIA Jurisdiction, Immigration Adjudication, and/or the Asylum Process

28. With the active participation of DHS and EOIR and with input from all other relevant stakeholders, a comprehensive study of the feasibility and resource implications of the following issues related to proposed changes to the asylum process should be conducted:

(a) Whether DHS should direct some appeals currently in the BIA’s jurisdiction to more appropriate forums and subject to the availability of resources by:

(i) Seeking statutory and regulatory change to allow all appeals of denied I-130 petitions to be submitted to the United States Citizenship and Immigration Services’ Administrative Appeals Office (AAO);

(ii) Amending regulations to send all appeals from United States Customs and Border Protection (CBP) airline fines and penalties to AAO; or alternatively consider eliminating any form of

administrative appeal and have airlines and other carriers seek review in federal courts; and

(iii) Creating a special unit for adjudication within the AAO to ensure quality and timely adjudication of family-based petitions, which should:

(1) Formally segregate the unit from its other visa petition adjudications;

(2) Issue precedent decisions with greater regularity and increase the unit’s visibility; and

(3) Publicize clear processing time frames so that potential appellants can anticipate the length of time the agency will need to complete adjudication.

(b) Whether EOIR should seek enhanced facilitation of defensive asylum applications by amending its regulations to provide that where the respondent seeks asylum or withholding of removal as a defense to removal, the judge should administratively close the case to allow the respondent to file the asylum application and/or a withholding of removal application in the DHS Asylum Office; and if the Office does not subsequently grant the application for asylum or withholding, or if the respondent does not comply with the Office procedures, that office would refer the case to ICE counsel to prepare a motion to re-calendar the case before the immigration court.

(c) Whether the United States Citizenship and Immigration Services (USCIS) should expedite the asylum process by:

(i) Amending its regulations to provide an asylum officer with authority to approve qualified asylum applications in the expedited removal context;

(ii) Allocating additional resources to complete the asylum adjudication in the expedited removal context; as there may be significant net cost savings for other components of DHS and for EOIR;

(iii) Amending its regulations to clarify that an individual, who meets the credible fear standard, could be allowed to complete an asylum application with an asylum officer instead of at an immigration court; and

(iv) Allowing an asylum officer to grant an applicant parole into the U.S. where the officer believes the individual has a well-founded fear of persecution or fear of torture and permit the officer to recommend that DHS allow the individual to be released from detention on parole pending completion of the asylum process.

(d) Whether USCIS should clarify that an asylum officer may prepare an NTA and refer a case to immigration court where an officer determines that a non-citizen meets the credible fear standard but the officer believes that the case

cannot be adequately resolved based on the initial interview and the asylum application prepared in conjunction with that interview, or in cases where an officer believes there are statutory bars to full asylum eligibility.

(e) Whether DHS should facilitate the DHS Asylum Office’s adjudication of certain closely related claims by:

(i) Amending its regulations to authorize the Office to adjudicate eligibility for withholding of or restriction on removal providing also that if the Office grants such relief, there would be no automatic referral to the immigration court;

(ii) Amending its regulations to authorize the Office to grant “supervisory release,” identity documents, and work authorization to individuals who meet the legal standards for withholding or restriction on removal;

(iii) Developing a procedure in cases where withholding or supervisory release are offered requiring the Office to issue a Notice of Decision explaining the impediments to asylum, informing an applicant of his or her right to seek de novo review of the asylum eligibility before the immigration court, and explaining the significant differences between asylum and withholding protections; and

(iv) Developing a procedure to allow such applicants to request immigration court review, whereupon the Asylum Office would initiate a referral to the immigration court.

G. Recommendations to EOIR and DHS Regarding the Use of VTC and Other Technology

29. EOIR and DHS should provide and maintain the best video teleconferencing (VTC) equipment available within resources and the two agencies should coordinate, where feasible, to ensure that they have and utilize the appropriate amount of bandwidth necessary to properly conduct hearings by VTC.

30. EOIR should consider more systematic assessments of immigration removal hearings conducted by VTC in order to provide more insights on how to make its use more effective and to ensure fairness. Assessments should be periodically published and include:

(a) Consultation with the DHS Asylum Office regarding its use of VTC equipment and review of its best practices for possible adoption and integration into EOIR procedures;

(b) Random selection of hearings conducted by VTC for full observation by Assistant Chief Immigration Judges and/or other highly trained personnel;

¹⁵ See Benson & Wheeler, *Immigration Removal Adjudication*, *supra* note 4, at 54–55 (describing in detail how these revised regulations would work under this recommendation).

(c) Formal evaluation of immigration removal hearings conducted by VTC;

(d) Gathering information, comments and suggestions from parties and other various stakeholders about the use of VTC in immigration removal hearings; and

(e) A realistic assessment of the net monetary savings attributable to EOIR's use of VTC equipment for immigration removal hearings.

31. EOIR should:

(a) Encourage its judges, in writing and by best practices training, to (a) be alert to the possible privacy implications of off-screen third parties who may be able to see or hear proceedings conducted by VTC, and (b) take appropriate corrective action where procedural, statutory or regulatory rights may otherwise be compromised; and

(b) Consider amending the OCJI Practice Manual's § 4.9 ("Public Access") to remind respondents and their representatives that they may alert the judge if they believe unauthorized third parties are able to see or hear the proceedings.

32. EOIR should direct judges to inform parties in hearings conducted by VTC who request in-person hearings of the possible consequences if the judge grants such a request, including, but not limited to, delays caused by the need to re-calendar the hearing to such time and place that can accommodate an in-person hearing.

33. To facilitate more effective representation in removal proceedings where VTC equipment is used, EOIR should:

(a) Provide more guidance to respondents and their counsel about how to prepare for and conduct proceedings using VTC in the OCJI Practice Manual and other aids it may prepare for attorneys, and for pro se respondents;

(b) Encourage judges to permit counsel and respondents to use the courts' VTC technology, when available, to prepare for the hearing; and

(c) Encourage judges to use the VTC technology to allow witnesses to appear from remote locations when appropriate and when VTC equipment is available.

34. To improve the availability of legal consultation for detained respondents and help reduce continuances granted to allow attorney preparation, DHS should consider:

(a) Providing VTC equipment where feasible in all detention facilities used by DHS, allowing for private consultation and preparation visits between detained respondents and private attorneys and/or pro bono organizations;

(b) Requiring such access in all leased or privately controlled detention facilities where feasible;

(c) In those facilities where VTC equipment is not available, designating duty officers whom attorneys and accredited representatives can contact to schedule collect calls from the detained respondent where feasible; and

(d) Facilitating the ability of respondents to have private consultations with attorneys and accredited representatives.

35. To improve the availability of legal reference materials for detained respondents:

(a) DHS should make available video versions of the KYR presentations on demand in detention facility law libraries; and where feasible, to be played on a regular basis in appropriate areas within detention facilities; and

(b) EOIR should assist in or promote the transcription of the text of relevant videos into additional languages or provide audio translations in the major languages of the detained populations.

36. EOIR should encourage judges to permit pro bono attorneys to use immigration courts' video facilities when available to transmit KYR presentations into detention centers and subject to DHS policies on KYR presentations.

37. EOIR should move to full electronic docketing as soon as possible.

(a) Prior to full electronic docketing, EOIR should explore interim steps to provide limited electronic access to registered private attorneys, accredited representatives, and ICE trial attorneys; and

(b) EOIR should consider the interim use of document cameras in video proceedings prior to the agency's full implementation of electronic docketing and electric case files.

*Administrative Conference
Recommendation 2012-4*

Paperwork Reduction Act

Adopted June 15, 2012

The Paperwork Reduction Act (PRA), enacted in 1980 and revised upon its reauthorization in 1986 and 1995, created the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to oversee information policy within the executive branch. The Act requires, among other things, that agencies secure OMB approval before collecting information from the public. Since 1995, this has meant that agencies must put a proposed information collection request out for public comment for 60 days before finalizing it

and submitting it for OIRA's approval.¹ An additional 30-day comment period is opened while OMB reviews the request.² One of the statute's goals is to reduce the burden on the public of agency information requests. The burden of such requests on small businesses was of particular concern to Congress in drafting and revising the Act. OMB review also ensures that agencies employ solid methodologies in designing information collections, particularly those seeking to gather statistical data. Another, broader goal of the PRA was to encourage agencies to implement a life-cycle approach to information management. This means that, from the initial stage in which information is collected from the public, agencies must give thought to how the information will be used, disseminated, stored, and disposed of throughout the entire process.³

Experience has shown that, in practice, parts of the PRA have not operated as its drafters intended. For example, the 60-day comment period was originally intended to facilitate an interactive dialogue between an agency and the public, enabling the agency to better craft its information collection plan. In practice, however, agencies tend to view information collection plans as final before this first comment period begins, and members of the public infrequently submit comments. These realities undermine the promise of the comment periods as a means for facilitating a meaningful dialogue between agencies and the public.

A related problem is that the PRA was last amended in 1995, and has not been updated to account for evolved technologies. Although OMB has provided some helpful guidance regarding the application of the PRA to social media,⁴ there is concern that provisions of the law adopted during the era of the hard-copy information collection paradigm may inadvertently create disincentives to agencies' use of modern technologies capable of facilitating faster, easier, and more effective communication with the public. Finally, over time, the PRA's regulation of information collections has

¹ See 44 U.S.C. 3506(c)(2).

² See *id.* sec. 3507(b).

³ See Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-130, Management of Federal Information Resources §§ 6(i), (j), (o) (1996).

⁴ See Memorandum from Cass R. Sunstein, Admin., Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/info/reg/SocialMediaGuidance_04072010.pdf.

come to be viewed as its primary component and has overshadowed the law's broader information management goals.

Some current and former agency officials have expressed concern that the PRA may be unduly restrictive, imposing delays and costs on the agencies that are disproportionate to the benefits to the public. This is not a new concern, and it appears that much of the delay occurs within agencies and is not a product of OMB review. Indeed, OMB has recently taken steps to make the process easier for agencies, including by offering a process for approving generic clearances.⁵ Nonetheless, there seem to be occasions in which the PRA impedes agencies from undertaking information collections that would not be burdensome to the public and would provide information necessary to craft better, less burdensome policies. For example, some agency officials have complained that the PRA prevents them from using focus groups or related methods to collect the information necessary to complete a full, nuanced regulatory analysis. Also, if an agency's approach shifts as a regulatory action moves forward, so too may its information collection needs. In such cases, agencies must initiate the entire PRA process again, even if they have already spent significant time and resources securing approval for an earlier, slightly different information collection request.

Agencies that rarely undertake information collections also may find the process challenging because they are unfamiliar with the PRA and find it difficult to obtain reliable guidance or sufficient assistance to navigate the process smoothly.

This recommendation is intended to address these concerns. It seeks to serve the congressional purpose of allowing OMB and the agencies to better focus on those collections that impose the greatest burden on the public and those that can benefit most from OMB review. It focuses on the areas where modest reforms can make substantial improvements, seeking to maintain the benefits of the current OMB review process while reducing the costs.

⁵ See Memorandum from Cass R. Sunstein, Admin., Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, Paperwork Reduction Act—Generic Clearances (May 28, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf.

Recommendation

Improving Public Engagement

1. Agencies and OMB should take measures to revitalize the information collection request process, including the 60-day comment period and the 30-day comment period,⁶ to better serve the statutory goal of facilitating an interactive dialogue between the public and agencies sponsoring information collections and to enable agencies to design better information collection requests before submitting them to OMB for approval.

(a) Agencies should avoid viewing an information collection request as final prior to the 60-day comment period. Instead, agencies should use public engagement as a way of improving their preliminary information collection plans. The preliminary information collection plan should provide sufficient detail, including drafts of any collection instruments (e.g., the survey or form), for the public to comment meaningfully.

(b) For new collections or collections with significant changes, agencies should make affirmative efforts to engage the public in efforts to design information collection requests and consider using alternative means to engage the public (in addition to a formal **Federal Register** notice), such as identifying and reaching out to interested parties.

(c) OMB, in consultation with the Office of the Federal Register, should develop best practices for **Federal Register** notices, including the use of plain language, to improve public understanding of requests and the information collections they cover. Such best practices should include guidance on 60-day notices, 30-day notices, and the PRA components of notices of proposed and final rulemakings. It should also include guidance on how to clearly and consistently identify various types of PRA notices in the “action” line of **Federal Register** notices.

(d) Agencies should post information collection requests on a centralized Web site to create a one-stop location for the public to view such requests and comments received. The eRulemaking Program Management Office (PMO) should consider creating a dedicated page on Regulations.gov to facilitate implementation of this recommendation.

(e) Agencies should, as soon as feasible, post to Regulations.gov or the centralized Web site identified in paragraph 1(c) above any comments received during the 60-day and 30-day

comment periods and provide links thereto on their own Web sites.⁷ OMB should also, as soon as feasible, post upon receipt on its Web site or on RegInfo.gov any comments received during the 30-day comment period.⁸

(f) Congress and OMB should look at ways to streamline the public participation requirements when agencies seek renewal of approval from OMB for collections with no significant change in the collection or the circumstances surrounding it so long as the issuing agency demonstrates that the information collection has been used.

Using Available Resources To Make the Process Easier

2. Each agency Chief Information Officer (CIO) should take a greater role in assisting and training agency staff to increase awareness of the PRA within each agency and better customize training to each agency's unique organizational challenges. The CIO Council, in consultation with OMB, should develop and disseminate training best practices.

3. Agencies should use all available processes for OMB approval for information gathering via voluntary collections (e.g., focus groups), including OMB's available generic clearances and fast track procedures. OMB is encouraged to continue using its generic clearance authority for this and other purposes, as appropriate and permitted by law.

4. OMB should evaluate existing delegations of information collection request review authority to determine how they are working and what is required to make them work well.⁹ OMB

⁷ See Administrative Conference of the United States, Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 FR 2257, 2264 (Jan. 17, 2012).

⁸ See Memorandum from Cass R. Sunstein, Admin., Office of Info. & Regulatory Affairs, to the President's Management Council, Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf (“OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.”).

⁹ OMB has authority under the PRA to delegate authority to approve information collections if it “finds that a senior official of an agency * * * is sufficiently independent of program responsibility to evaluate fairly whether proposed collections of information should be approved and has sufficient resources to carry out this responsibility effectively.” 44 U.S.C. 3507(i)(1). Such a delegation is not an exemption, but rather is a shifting of responsibility from OMB to the agency for reviewing proposed information collections. Currently, OMB has long-standing delegations to

Continued

⁶ See 44 U.S.C. 3506(c)(2).

should use the information drawn from this evaluation to consider whether time-limited delegations would be useful for other agencies. Such time-limited delegations could be set at a particular total or per respondent burden-hour threshold and be limited to those collections that do not raise novel legal, policy, or methodological issues. OMB should evaluate the results of such delegations, including compliance with the statutory factors,¹⁰ and, if the delegations have worked well, OMB should consider extending them and determining if other similar delegations would be appropriate. Delegations should include a requirement to consult with OMB on burden estimates (for delegations based on burden) and provide a clear opportunity for OMB and the public to request OMB review. Regular evaluations of agency review processes should then follow.

Reforms To Improve Efficient Use of Resources

5. Congress should consider amending the PRA to permit OMB to define a subset of collections that could be approved for up to five years in order to enable OMB to shift its focus to those information collections that require the most scrutiny consistent with the condition set forth in 1(f).¹¹

6. Because much of the information reported in the Information Collection Budget is now available to the public online, currently through Reginfo.gov, Congress should change the annual reporting requirement for OMB to require only a discussion of developments and trends in government management and collection of information.

7. OIRA should, in collaboration with individual agencies, provide guidance to agencies on communicating effectively with the public regarding estimated burdens, including the burdens of alternative methods of collection, with the goal of standardizing the estimation of respondent burden.

8. The CIO Council, in consultation with OMB, should develop guidance to help agencies better use available technologies to improve and streamline the collection of information from the public.

the Federal Reserve Board and the Managing Director of the Federal Communications Commission. 5 CFR pt. 1320 App. A. (2010).

¹⁰ See 44 U.S.C. 3507(i).

¹¹ The PRA currently permits OMB to approve information collections for up to three years. See 44 U.S.C. 3507(g).

Information Resource Management

9. To the extent feasible, OMB should emphasize the integration of the life-cycle management of information¹² into the existing information collection process. Agencies, with OMB's support, should redo their Strategic Information Resources Management plans¹³ to make clear how they are complying with the PRA and implementing a life-cycle approach.

Administrative Conference Recommendation 2012-5

Improving Coordination of Related Agency Responsibilities

Adopted June 15, 2012

Many areas of government agency activities are characterized by fragmented and overlapping delegations of power to administrative agencies. Congress often assigns more than one agency the same or similar functions or divides responsibilities among multiple agencies, giving each responsibility for part of a larger whole. Instances of overlap and fragmentation are common. They can be found throughout the administrative state, in virtually every sphere of social and economic regulation, in contexts ranging from border security to food safety to financial regulation.¹⁴ The following recommendation suggests some reforms aimed at improving coordination of agency policymaking, including joint

¹² See Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-130, Management of Federal Information Resources §§ 6(i), (j) (1996).

¹³ The PRA requires that agencies, "in accordance with guidance by the Director, develop and maintain a strategic information resources management plan that shall describe how information resources management activities help accomplish agency missions." 44 U.S.C. 3506(b)(2). See also Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-130, Management of Federal Information Resources § 8(b) (1996) (providing such guidance).

¹⁴ As the Comptroller General of the United States has noted, "[v]irtually all of the results that the federal government strives to achieve require the concerted and coordinated efforts of two or more agencies." U.S. Gen. Accounting Office, GAO/T-GGD-00-95, Managing for Results: Using GPRA to Help Congressional Decisionmaking and Strengthen Oversight 19 (2000), available at <http://www.gao.gov/assets/110/108330.pdf> (statement of David M. Walker, Comptroller General of the United States, before the Subcomm. on Rules & Org. of the H. Comm. on Rules). GAO is now required by statute to identify federal programs, agencies, offices, and initiatives, either within departments or government-wide, which have duplicative goals or activities, and to report annually (Pub. L. No. 111-139, sec. 21, 124 Stat. 29 (2010), 31 U.S.C. 712 Note). See U.S. Gov't Accountability Office, GAO-11-318SP, Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue (2011), available at <http://www.gao.gov/new.items/d11318sp.pdf>.

rulemaking, interagency agreements, and agency consultation provisions.

The study underlying this recommendation¹⁵ provides a comprehensive picture of overlapping and fragmented delegations, and makes some practical suggestions for addressing the coordination problems they create.¹⁶ Because characterizing such delegations as redundant might suggest literal duplication, the study adopts the more nuanced concept of "shared regulatory space." This term includes not only literally duplicative or overlapping responsibilities, but also instances where cumulative statutory delegations create a situation in which agencies share closely related responsibilities for different aspects of a larger regulatory, programmatic, or management enterprise.

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

¹⁵ Jody Freeman & Jim Rossi, *Improving Coordination of Related Agency Responsibilities* (May 30, 2012) (report to the Administrative Conference of the U.S.). See also Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131 (2012).

¹⁶ The underlying study and this recommendation focus on federal government agencies only, and do not address the coordination problems presented more generally by federalism due to dispersed responsibilities between federal and state governments.

coordination will make it harder for interest groups to capture the administrative process or to play agencies against each other.

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

Presidential leadership can be helpful in addressing the challenges posed by fragmented and overlapping delegations, especially in instances where there is conflict among agencies, inability of agency staffs to coordinate, or a reluctance of agency officials to work together. Components of the Executive Office of the President (EOP) with relevant policy expertise may be well positioned to promote coordination in their respective domains, and efforts in this regard could be bolstered. The EOP can play a crucial role in fostering coordination by establishing priorities, convening the relevant agencies, and managing a process that is conducive to producing agreement. For example, the White House Office of Energy and Climate Change Policy has been credited with facilitating the joint rulemaking effort of EPA and the Department of Transportation, which produced new fuel efficiency and greenhouse gas standards,¹⁷ and the EOP played a central role in convening and coordinating the nine-agency memorandum of understanding on siting of transmission lines on federal lands.¹⁸ The President recently

¹⁷ See Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 Harv. Envtl. L. Rev. 343 (2011).

¹⁸ See Press Release, Advisory Council on Historic Preservation, Nine Federal Agencies Enter into a Memorandum of Understanding Regarding Transmission Siting on Federal Lands (Oct. 28,

established an interagency task force to coordinate federal regulation of natural gas production.¹⁹ There are many other examples from prior administrations, involving policy initiatives large and small.

The President could seek to promote coordination through a comprehensive management strategy that puts coordination at its core, which might be done via a new executive order tasking one or more EOP offices with an oversight role. Promoting consistency in agency rulemaking is already explicitly within the mandate of the Office of Information and Regulatory Affairs under Executive Order 12,866 and was reiterated by President Obama in Executive Order 13,563.²⁰ While this is compatible with the larger goal of promoting greater interagency coordination where agencies exercise overlapping and closely related responsibilities, still more could be done. For example, the Office of Management and Budget (OMB) could consider ways to achieve coordination as part of its implementation of the Government Performance and Results Modernization Act (GPRMA),²¹ and propose cross-cutting budget allocations (sometimes referred to as "portfolio budgeting") to help incentivize the agencies to work together on a variety of projects, some of which might involve rulemakings. The White House might explore ways to strengthen existing interagency task forces or encourage similar interagency efforts where their potential benefits have been overlooked.²² Beyond OMB, other

2009), available at <http://www.achp.gov/docs/pressrelease10282009.pdf>.

¹⁹ Exec. Order No. 13,605, Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources, 77 FR 23107 (Apr. 17, 2012).

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

²¹ Public Law 111-352, 124 Stat. 3866 (2011). GPRMA amends the Government Performance and Results Act of 1993 (GPRA), Public Law 103-62, 107 Stat. 285 (1993).

²² The Conference recognizes the special concerns about presidential authority with respect to independent regulatory agencies. However, various presidential actions have sought to extend administration policies to the independent agencies. For example, sec. 4 of Executive Order 12,866 "Regulatory Planning and Review," includes independent regulatory agencies in its requirements for the semiannual Unified Regulatory Agenda and the annual Regulatory Plan, "to the extent permitted by law." Similarly, Executive Order 13,579, "Regulation and Independent Regulatory Agencies," and the further guidance contained in

councils and offices within the EOP may also play important roles facilitating coordination.

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

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

Recommendation

1. Developing Agency Coordination Policies

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

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

interagency coordination.²³ Federal agencies that share overlapping or closely related responsibilities should adopt policies or procedures, as appropriate, to document ongoing coordination efforts, and to facilitate additional coordination with other agencies.²⁴

(b) Concurrently, the Executive Office of the President (EOP) should work with the agencies to develop a policy to promote coordination where agencies share overlapping or closely related responsibilities. The policy, while maintaining the need for flexibility,²⁵ should require agencies to address, among other things, how they will:

- (i) Resolve disagreements over jurisdiction;
- (ii) Share or divide information-production responsibilities;
- (iii) Solicit and address potentially conflicting views on executing shared responsibilities;
- (iv) Minimize duplication of effort;
- (v) Identify and resolve differences over the application of analytic requirements imposed by statute or executive order;²⁶ and
- (vi) Formalize agreements allocating respective responsibilities or develop standards or policies jointly, where appropriate.

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

(c) The EOP should effectively utilize the Regulatory Working Group,

²³ A recent GAO report on the implementation of the Dodd-Frank Act faulted the financial regulatory agencies for not pursuing coordination more systematically and noted that the majority of agencies reviewed had not developed internal policies on coordination. See U.S. Gov't Accountability Office, GAO-12-151, Dodd-Frank Act Regulations: Implementation Could Benefit From Better Analysis and Coordination 25 (2011) (noting that seven of nine regulators reviewed "did not have written policies and procedures to facilitate coordination on rulemaking").

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

²⁵ See Exec. Order No. 13,609, Promoting International Regulatory Cooperation, 77 FR 26413 (May 4, 2012), for an approach that combines a government-wide policy with individual agency responsibilities, coordinated by the Regulatory Working Group. See *infra* note 14.

²⁶ See generally Curtis W. Copeland, *Regulatory Analysis Requirements, A Review and Recommendations for Reform* (2012) (report to the Administrative Conference of the U.S.), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/04/COR-Final-Reg-Analysis-Report-for-5-3-12-Mtg.pdf>; and Administrative Conference Recommendation 2012-1, Regulatory Analysis Requirements.

established by Executive Order 12,866, or establish or utilize other comparable bodies to assist agencies in identifying opportunities for coordination.²⁷

2. Improving Joint Rulemaking

The coordination policies and procedures adopted by the EOP and the agencies should include best practices for joint rulemaking and recommend when agencies should consider using it even when not statutorily required to do so. Best practices might include establishing joint technical teams for developing the rule and requiring early consultation, where appropriate, (a) with the Office of Information and Regulatory Affairs (OIRA) regarding joint production of cost-benefit analyses and other analyses required by statute or executive order, and (b) among agency legal staff and lawyers at the Department of Justice who may need ultimately to defend the rule in litigation.

3. Improving Interagency Agreements

(a) The coordination policies and procedures adopted by the EOP and the agencies should include best practices for agency agreements such as memoranda of understanding (MOUs). Such best practices might include specification of progress metrics that will enable agencies to assess the effectiveness of their agreement and sunset provisions that would require signatory agencies to review MOUs regularly to determine whether they continue to be of value.²⁸

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

4. Supporting and Funding Interagency Consultation

(a) The EOP should encourage agencies to conduct interagency consultations early in a decisionmaking process, before initial positions are locked in, and to conduct such consultations in a continuing and integrated, rather than periodic and reactive, way. To this end, when appropriate, the EOP should encourage coordinating agencies to establish an

²⁷ Exec. Order No. 12866, sec. 4(d) (announcing the establishment of a Regulatory Working Group as "a forum to assist agencies in identifying and analyzing important regulatory issues").

²⁸ In several of the examples reviewed in the Freeman/Rossi report, *supra* note 2, the agencies were negotiating new MOUs to replace outdated ones (often negotiated by previous administrations)—a clear sign that ineffective MOUs can be left to languish for too long.

interagency team to produce and analyze data together over the course of the decisionmaking process, and ensure such teams have adequate funding and support.

(b) The Office of Management and Budget and agencies involved in coordinated interagency activities should take into account, in the budgetary process, the need for sufficient resources to participate effectively in interagency processes, and the need to provide specifically for such cross-cutting activities. Further, an action agency, on which a duty to consult with other agencies falls, should contribute a share of its resources, as appropriate, to the extent it possesses the discretion to do so, to support joint technical and analytic teams, even if those resources will be consumed in part by other agencies.

5. Tracking Total Resources

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

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DEPARTMENT OF AGRICULTURE

Forest Service

Yakutat Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Yakutat Resource Advisory Committee will meet in Yakutat, Alaska. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 112-141) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II