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**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

**Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure**

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted three recommendations at its Fifty-Ninth Plenary Session. The appended recommendations address the use of social media to support agency rulemaking activities, provide guidance to courts and agencies in connection with the judicial remedy of remanding an agency action without vacating that action, and offer best practices to facilitate cross-agency collaboration under the Government Performance and Results Act (GPRA) Modernization Act of 2010. The Conference also adopted one formal statement at the Plenary Session on improving the timeliness of regulatory review by the Office of Information and Regulatory Affairs.

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

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

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

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

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

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

The Appendix below sets forth the full texts of these three recommendations and the statement. The Conference will transmit them to affected agencies, relevant committees of Congress, and the Judicial

Conference of the United States, as appropriate. 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 and the statement on research reports that are posted at: [www.acus.gov/59th](http://www.acus.gov/59th). A video of the Plenary Session is available at the same web address and a transcript of the Plenary Session will be posted when it is available.

Dated: December 12, 2013

Shawne C. McGibbon,

*General Counsel.*

**APPENDIX--RECOMMENDATIONS AND STATEMENT OF THE ADMINISTRATIVE CONFERENCE OF  
THE UNITED STATES**

**Administrative Conference Recommendation 2013-5**

**Social Media in Rulemaking**

*Adopted December 5, 2013*

In the last decade, the notice-and-comment rulemaking process has changed from a paper process to an electronic one. Many anticipated that this transition to "e-Rulemaking"<sup>1</sup> would precipitate a "revolution," making rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic. But these grand hopes have not yet been realized. Although notice-and-comment rulemaking is now conducted electronically, the

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<sup>1</sup> The Conference has previously defined "e-Rulemaking" as "the use of digital technologies in the development and implementation of regulations before or during the informal process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA)." Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 FR 48,789, 48,789 (Aug. 9, 2011) (internal quotation marks and footnote omitted).

process remains otherwise recognizable and has undergone no fundamental transformation.

At the same time, the Internet has continued to evolve, moving from static, text-based websites to dynamic multi-media platforms that facilitate more participatory, dialogic activities and support large amounts of user-generated content. These "social media" broadly include any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public. Examples of social media tools currently in widespread use include Facebook, Twitter, Ideascale, blogs, and various crowdsourcing<sup>2</sup> platforms. But technology evolves quickly, continuously, and unpredictably. It is a near certainty that the tools so familiar to us today will evolve or fade into obsolescence, while new tools emerge.<sup>3</sup>

The accessible, dynamic, and dialogic character of social media makes it a promising set of tools to fulfill the promise of e-Rulemaking. Thus, for example, the e-Rulemaking Program Management Office, which operates the federal government's primary online rulemaking portal, Regulations.gov, has urged agencies to "[e]xplore the use of the latest technologies, to the extent feasible and permitted by law, to engage the public in improving federal decision-making and help illustrate the impact of emerging Internet

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<sup>2</sup> "Crowdsourcing" is an umbrella term that includes various techniques for distributed problem-solving or production, drawing on the cumulative knowledge or labor of a large number of people. Wikipedia, the development of the Linux operating system, Amazon.com's "Mechanical Turk" platform, and public and private challenges that award a prize to the best solution to a particular problem are all examples of crowdsourcing.

<sup>3</sup> One type of emerging technology includes structured argumentation tools. These tools may take the form of, for example, interactive feedback forms that ask direct and progressively more focused questions in sequence or in response to input, thereby generating more targeted and substantively useful input from users.

technologies on the federal regulatory process."<sup>4</sup> The Conference has similarly, albeit more modestly, recommended that "[a]gencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemakings."<sup>5</sup>

Federal agencies have embraced social media to serve a variety of non-rulemaking purposes,<sup>6</sup> but few have experimented with such tools in the rulemaking context. One explanation for this reluctance is uncertainty about how the Administrative Procedure Act (APA) and other requirements of administrative law apply to the use of social media, particularly during the process governed by the APA's informal rulemaking requirements, beginning when the Notice of Proposed Rulemaking (NPRM) has been issued, through the comment period, and until the agency issues a final rule.<sup>7</sup> In particular,

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<sup>4</sup> E-RULEMAKING PROGRAM MANAGEMENT OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (2010), available at [http://exchange.regulations.gov/exchange/sites/default/files/doc\\_files/20101130\\_eRule\\_Best\\_Practices\\_Document\\_rev.pdf](http://exchange.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf).

<sup>5</sup> Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 FR 2257, 2265 (Jan. 17, 2012). The Conference has consistently supported full and effective public participation in rulemaking, as well as the use of new technologies to enhance such participation. In Recommendation 95-3, *Review of Existing Agency Regulations*, the Conference encouraged agencies to "provide adequate opportunity for public involvement in both the priority-setting and review processes," including by "requesting comments through electronic bulletin boards or other means of electronic communication." 60 FR 43,108, 43,109 (Aug. 18, 1995).

<sup>6</sup> For example, agencies have enthusiastically embraced social media, including Facebook and Twitter, as an effective tool for pushing information out to the public, from general information about an agency and its mission to more specific notifications of services, benefits, or employment opportunities that are available from an agency. Agencies have also used social media in more interactive ways, such as when nearly three dozen agencies used Ideascale to engage the public in the process of developing the agencies' Open Government Plans, or to collect metadata, such as when the Consumer Financial Protection Bureau used "heat maps" generated from click-based online user reviews of prototype disclosure forms to illustrate which sections of the forms elicited the strongest reactions.

<sup>7</sup> The Conference recently addressed legal issues related to e-rulemaking in Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, see *supra* note

agencies are uncertain whether public contributions to a blog or Facebook discussion are "comments" for purposes of the APA, thus triggering the agencies' obligations to review and respond to the contributions and include them in the rulemaking record. Other concerns include how the Paperwork Reduction Act applies to agency inquiries through social media,<sup>8</sup> whether the First Amendment might limit an agency from moderating a social media discussion, and how individual agencies' "ex parte" communications policies might apply to the use of social media.

Apart from legal concerns are doubts as to whether, when, and how social media will benefit rulemaking. These doubts arise with respect to two distinct issues that often overlap. First, can social media be used to generate more useful public input in rulemaking? Second, is increased lay participation in rulemaking likely to be valuable? Experience suggests that both the quality of comments and the level of participation in social media discussions are often much lower than one might hope. A third-party facilitator may be able to help an agency address these issues by encouraging public participation, helping participants understand the rulemaking process and the agency's proposal, asking follow-up questions to produce more substantive input, and actively facilitating engagement among participants. Regardless of whether a third-party facilitator is used, however, creating the conditions necessary to foster a meaningful, productive dialogue among participants requires commitment, time, and thoughtful design. Since this

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1, but did not delve into the unique concerns that arise when agencies use social media to support rulemaking activities.

<sup>8</sup> The Office of Management and Budget has issued helpful guidance on these issues. See Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Independent Regulatory Agencies regarding 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/infomag/SocialMediaGuidance\\_04072010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/infomag/SocialMediaGuidance_04072010.pdf).

kind of innovation can be costly, agencies are understandably reluctant to expend scarce resources in pursuit of uncertain benefits. Agencies also face a variety of practical questions. One such question is whether to require participants to identify themselves in agency-sponsored social media discussions. Another concern is that the use of ranking or voting tools may mislead some to believe that rulemaking is a plebiscite or allow some participants to improperly manipulate the discussion.

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

Agencies may find, however, that it is both easier and more often valuable to use social media in connection with rulemaking activities, but outside the notice-and-comment process. For example, social media can be effective for public outreach, helping to increase public awareness of agency activities, including opportunities to contribute to policy setting, rule development, or the evaluation of existing regulatory regimes. The use of social media may also be particularly appropriate during the pre-rulemaking or policy-development phase. Here, the APA and other legal restrictions do

not apply, and agencies are often seeking dispersed knowledge or answers to more open-ended questions that lend themselves to productive discussion through social media. For the same reasons, social media may be an effective way for agencies to seek input on retrospective review of existing regulations. It also may be helpful in connection with a negotiated rulemaking,<sup>9</sup> where these tools may make it easier for the diverse interests to collaborate during and between meetings on a solution to the problem being addressed.

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

#### **Recommendation**

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

#### *Public Outreach*

2. Agencies should use social media to inform and educate the public about agency activities, their rulemaking process in general, and specific rulemakings. Agencies should take an expansive approach to alerting

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<sup>9</sup> See, e.g., Recommendation 85-5, *Procedures for Negotiating Proposed Regulations* (Dec. 13, 1985).

potential participants to upcoming rulemakings by posting to the agency website and sending notifications through multiple social media channels. Social media may provide an effective means to reach interested persons who have traditionally been underrepresented in the rulemaking process (including holders of affected interests that are highly diffused).

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

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

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

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

(d) Asking all interested organizations to spread the participation message to members or followers. Agencies should be prepared to explain why

individual participation can be beneficial, and to encourage organizations to solicit substantive, individualized comments from their members.

(e) Using multilingual social media outlets where appropriate.

4. The General Services Administration, the e-Rulemaking Program Management Office, and other federal agencies, either individually or (preferably) collaboratively, should use social media to create and distribute more robust educational programs about rulemaking. These efforts could include: producing videos about the rulemaking process and how to effectively participate through commenting and posting on an agency website or video-sharing website; hosting webinars in which agency personnel discuss how to draft useful and helpful comments; maintaining an online database of exemplary rulemaking comments; or conducting an online class or webinar or providing explanatory materials in which officials review a draft comment and suggest ways to improve it.

5. Agencies should explore ways to publicize, and allow members of the public to receive, regular, automated updates on developments in, at a minimum, significant rulemakings.

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

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

*Using Social Media in Notice-and-Comment Rulemaking*

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

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

*Effective Approaches for Using Social Media in Rulemaking*

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

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

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

using an application programming interface (API) or other appropriate technological tool to efficiently transfer content from social media to the rulemaking record.

(b) That no part of the social media discussion will be included in the rulemaking docket, that the agency will not consider the discussion in developing the rule, and that the agency will not respond to the discussion. An agency that selects this option should communicate the restriction clearly to the public through conspicuous disclaimers on the social media site itself, provide instructions on how to submit an official comment to the rulemaking docket, and provide a convenient mechanism for doing so. It is especially important in these circumstances that the agency clearly explain the purpose of a social media discussion the agency does not intend to consider in the rulemaking.

12. When soliciting input through a social media platform, agencies should provide a version of the NPRM that is "friendly" and clear to lay users. This involves, for example, breaking preambles into smaller components by subject, summarizing those components in plain language, layering more complete versions of the preamble below the summaries, and providing hyperlinked definitions of key terms. In doing this, the agency should either:

(a) Publish both versions of the NPRM in the *Federal Register*; or

(b) Cross-reference the user-friendly version of the NPRM in the published NPRM and cross-reference the published NPRM in the user-friendly version of the NPRM.

13. Agencies should consider, in appropriate rulemakings, retaining facilitator services to manage rulemaking discussions conducted through social media. Appropriate rulemakings may include those in which:

(a) Targeted users are inexperienced commenters who may need help to prepare an effective comment (e.g., providing comments that give reasons rather than just reactions); or

(b) The issues will predictably produce sharply divided or highly emotional reactions.

14. Agencies should realize that not all rulemakings will be enhanced by a crowdsourcing approach. However, when the issue to be addressed is the public or user response itself (e.g., when the agency seeks to determine the best format for a consumer notice), direct submission to the public at large may lead to useful information. In addition, agencies should consider encouraging, and being receptive to, comments from lay stakeholders with "situated knowledge" arising out of their real world experience.

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

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

17. Agencies should use social media to notify and educate the public about the final agency action produced through a rulemaking.

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

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

#### *Direct Final Rulemaking*

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

#### *Key Legal Considerations*

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

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

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

## **Administrative Conference Recommendation 2013-6**

### **Remand Without Vacatur**

*Adopted December 5, 2013*

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

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

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<sup>1</sup> Stephanie J. Tatham, *The Unusual Remedy of Remand Without Vacatur*, Appendix A (Report to the Administrative Conference of the United States, Nov. 14, 2013) [hereinafter Tatham Report]. It has also been applied on review of agency action in the Courts of Appeals for the Federal, First, Third, Fifth, Eighth, Ninth, and Tenth Circuits. *Id.* at 26-28.

Finally, it offers advice to courts that are considering employing the remedy and to agencies responding to remands.

The remedy has generated academic and judicial debate over its advisability and legality. Those who support remand without vacatur point to the benefits that accrue in a variety of situations, such as when application of the device enhances stability in the regulatory regime or in regulated markets, protects reliance interests, prevents regulatory gaps, allows the government to continue collecting fees or processing reimbursements, and ensures continued provision of public benefits (including the benefits of regulation). Remand without vacatur has also been said to be appropriate because it defers to the institutional competence of agencies and may reduce agency burdens on remand.

Nonetheless, remand without vacatur is not without controversy. Some scholars argue that it can deprive litigants of relief from unlawful or inadequately reasoned agency decisions, reduce incentives to challenge improper or poorly reasoned agency behavior, promote judicial activism, and allow deviation from legislative directives. Critics have also suggested that it reduces pressure on agencies to comply with APA obligations and to respond to a judicial remand. Given the relative infrequency of application of the remedy, these prudential and theoretical concerns, while possible, do not appear to cause systemic problems.

Some judges argue that remand without vacatur contravenes the plain language of the judicial review provisions of the APA.<sup>2</sup> However, despite occasional dissents or other separate judicial opinions, no cases were

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<sup>2</sup> The APA provides that reviewing courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions" found to violate one of its standards of review. 5 U.S.C. § 706(2). *E.g.*, *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994) (Randolph, J., separate opinion).

identified in which a federal court of appeals held that remand without vacatur was unlawful under the APA or another statutory standard of review. Rather, courts generally accept the remedy as a lawful exercise of equitable remedial discretion.<sup>3</sup>

The Conference recommends that the remedy continue to be considered an authorized exercise of judicial authority on review of cases that arise under the Administrative Procedure Act, 5 U.S.C. § 706(2), as well as under other statutory review provisions, unless they contain an express legislative directive to the contrary. In employing remand without vacatur, courts are essentially finding that agency errors that are sufficient to require remand may not always justify immediately setting aside the challenged action. Since this conclusion deviates from customary remedial norms, when courts invoke the remedy, they should explain their reasons for doing so.

Equitable considerations that justify leaving the challenged agency action in place on remand may exist in a variety of circumstances. Longstanding judicial precedent in the D.C. Circuit supports application of the remedy after a finding that a challenged agency action, while invalid, is not seriously deficient or when vacatur would have disruptive consequences.<sup>4</sup> Courts also employ the remedy when vacatur would not serve the interests of the prevailing party that was harmed by the agency's error.<sup>5</sup> Remand without

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<sup>3</sup> Remand without vacatur has been described as fitting comfortably within a tradition of equitable judicial remedial discretion. Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 315-44 (2003).

<sup>4</sup> *E.g.*, *N. Air Cargo v. U.S. Postal Service*, 674 F.3d 852, 860-61 (D.C. Cir. 2012); *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

<sup>5</sup> *E.g.*, *Env'tl. Def. Fund v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990) ("no party to this litigation asks that the court vacate the EPA's regulations, and to do so would at least temporarily defeat petitioner's purpose, the enhanced protection of environmental values covered by the [statutory Prevention of Significant Deterioration] provisions"). This reasoning appears to be the basis for a substantial number of cases involving the remedy and that arise

vacatur may be appropriate in these circumstances as well as in others not considered here.

When a reviewing court has decided to remand an agency's action, it should consider asking the parties for their views on the appropriate remedy in light of this decision.<sup>6</sup> In its final decision, the court should specify whether or not it is vacating the remanded agency action. Research indicates that ambiguous remand orders that do not clearly identify whether an agency's action is also vacated occur with some regularity.<sup>7</sup> This is particularly problematic where an agency rule or order regulates conduct of, or permits enforcement actions against, individuals or entities not party to the litigation, and who cannot seek direct clarification of the court's remedial intention.

Remand without vacatur does not by itself provide relief for litigants after successful challenges to agency rules or orders. Thus, responsive agency action on remand is a matter of particular concern in such cases.<sup>8</sup>

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under the Clean Air Act, which comprise a sizeable portion of all cases in which it is employed. See also RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* 160-61 (2008) (describing how the remedy can provide pro-regulatory plaintiffs with the benefit of continuing a weak rule while the case is on remand, rather than having no rule in the interim in the event of a successful challenge).

<sup>6</sup> Courts have occasionally requested supplemental briefing on whether to vacate agency rules after they have announced an intention to remand the agency's decision. *E.g.*, *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1057 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Int'l Union, UAW v. OSHA*, 938 F.2d 1310, 1325-26 (D.C. Cir. 1991). Courts might also consider soliciting the views of the parties at oral argument.

<sup>7</sup> *E.g.*, *PSEG Energy Res. & Trade, LLC v. FERC*, 665 F.3d 203 (D.C. Cir. 2011); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

<sup>8</sup> Courts have occasionally retained jurisdiction over cases remanded without vacatur to ensure responsive agency action. *E.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE*, 680 F.3d 819, 820 (D.C. Cir. 2012) (directing compliance within six months and retaining jurisdiction "so that any further review would be expedited"). Courts may also ask agencies to report on their progress on remand. *E.g.*, *Chamber of Commerce v. SEC*, 443 F.3d 890, 909

Moreover, difficulties in identifying remanded decisions and agency responses can hinder oversight. Accordingly, agencies should identify or post final judicial opinions vacating, or remanding without vacatur, agency rules or orders in the applicable online public docket, if any exists, and on agency websites, where appropriate. Agencies should include a short statement identifying the judicial opinion and whether it vacates all or part of the challenged rule or order, together with any unique identifiers for the affected agency rule or order (such as a Regulation Identifier Number). Agencies should additionally work with the Office of the Federal Register to remove vacated regulations from the Code of Federal Regulations.<sup>9</sup>

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

## **Recommendation**

### *Judicial Authority to Use Remand Without Vacatur*

1. Remand without vacatur should continue to be recognized as within the court's equitable remedial authority on review of cases that arise under

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(D.C. Cir. 2006) (staying the court's mandate that would vacate the remanded agency action until further order of the court and requiring the SEC to file a status report within 90 days).

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

the Administrative Procedure Act (APA) and its judicial review provision, 5 U.S.C. § 706(2).

2. Absent an express legislative directive to the contrary in any other statute providing the basis for judicial review of challenges to agency action, remand without vacatur should be recognized as an authorized remedy in cases that arise under such a statute.

*Recommendations to Courts*

3. On review of agency action, reviewing courts should specify in their judicial opinions or orders whether or not they are vacating a remanded agency action.

4. When courts remand but do not vacate an agency action, they should explain the basis for their remedial choice.

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

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

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

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

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

*Recommendations to Agencies*

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

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

9. Agencies should provide information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding their plans with respect to rules that are remanded without vacatur.

10. In their response(s) to a judicial remand without vacatur of an agency action, agencies should identify the initial agency action as well as the remanding judicial opinion.

11. In conjunction with a notice of proposed rulemaking in response to remand without vacatur, agencies should clearly state whether public comments and other materials in the docket for the remanded rule will or will not be incorporated into the new rulemaking record, if any.

**Administrative Conference Recommendation 2013-7**

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

*Adopted December 6, 2013*

The Government Performance and Results Act (GPRA) Modernization Act of 2010 (GPRAMA) became law on January 4, 2011.<sup>1</sup> Among other things, the Act requires the Executive branch and federal agencies to develop cross-agency performance goals and specifies directives toward the advancement, use, review, and measurement of cross-agency collaboration.<sup>2</sup> Cross-agency collaboration is widely viewed as a powerful means for government reform and performance improvement. Under GPRAMA, greater coordination across agencies offers the potential for the federal government to address complex policy challenges that lie inherently across agency boundaries and jurisdictions. In sum, cross-agency collaboration—when used thoughtfully for well-selected initiatives—holds great promise as a means of improving government performance, efficiency, and accountability. The effective development of these management tools may have an important role to play during the environment of constrained funding that federal agencies may face in the years ahead.

GPRAMA specifically requires the Office of Management and Budget (OMB) to develop long-term, outcome-oriented goals for a limited number of cross-cutting management improvement areas (known as Cross-Agency Priority (CAP) Goals), on such topics as: finances, human capital, information technology, procurement and acquisition and real property. CAP goals generally fall into two categories—mission-support goals, which focus on achieving consolidation of standard business functions and systems across agencies; and mission-oriented goals, which focus on coordinating authorities to pursue shared policy goals that cross-cut agencies. These goals are to be developed in

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<sup>1</sup> Pub. L. No. 111-352, 124 Stat. 3866 (2011) (codified as amended in scattered sections of 5 and 31 U.S.C.). The GPRA Modernization Act of 2010 amends the GPRA Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993).

<sup>2</sup> See, e.g., 5 U.S.C. § 306; 31 U.S.C. §§ 1115 - 16, 1120 - 25 (setting forth the requirements under GPRAMA).

coordination with agencies and in consultation with the Congress. Accordingly, agencies must proactively engage members of Congress and their staffs to inform them about cross-agency collaborative efforts and successfully navigate congressional concerns. Similarly, when reviewing and commenting on pending legislation, officials at OMB should consider identifying areas that necessitate or allow for cross-agency collaboration, communicating with Congress regarding those areas, and seeking statutory direction for such collaboration where appropriate.

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

Within OMB, the Office of Performance and Personnel Management (OPPM) leads the effort to drive mission-focused performance gains across the federal government. In addition, the Performance Improvement Council (PIC), located within the U.S. General Services Administration (GSA) and composed of the designated Performance Improvement Officers (PIOs) of Federal agencies and departments, as well as senior OMB officials, collaborates to improve the performance of Federal programs and facilitates information exchange among agencies. The PIC also provides support to agency officials by aiding the coordination of cross-agency collaboration under GPRAMA.

As designated agency officials work to implement GPRAMA, they may face certain institutional constraints to effective collaboration and thus need tools to aid them in their efforts.<sup>3</sup> Some agencies and federal officials have developed strategies to address the legal and other institutional challenges posed by such collaborative efforts. For others, obstacles to the kinds of cross-agency collaboration demanded by GPRAMA have proven frustrating and difficult to overcome. While a large body of research addresses interagency coordination or cross-agency collaboration generally,<sup>4</sup> little attention has been given to exploring the legal barriers and other constraints to implementation of GPRAMA—whether real or perceived—and providing tools that agency officials may use to address such constraints.

Accordingly, the Conference commissioned the study underlying this recommendation to provide attention to the key challenges to cross-agency collaboration under GPRAMA, as well as suggesting tools for federal officials to implement the Act's collaboration and other mandates.<sup>5</sup> This study examines the use of tools by officials at OMB, the PIC, senior agency officials, legal

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<sup>3</sup> See, e.g., JANE FOUNTAIN, IBM CENTER FOR THE BUSINESS OF GOVERNMENT, IMPLEMENTING CROSS AGENCY COLLABORATION: A GUIDE FOR FEDERAL MANAGERS (2013), available at <http://www.businessofgovernment.org/sites/default/files/Implementing%20Cross%20Agency%20Collaboration.pdf> (setting forth institutional constraints to cross-agency collaboration and recommending additional guidance from OMB); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-518, MANAGING FOR RESULTS: EXECUTIVE BRANCH SHOULD MORE FULLY IMPLEMENT THE GPRA MODERNIZATION ACT TO ADDRESS PRESSING GOVERNANCE CHALLENGES (2013), available at <http://www.gao.gov/assets/660/655541.pdf> (discussing some early challenges to the implementation of GPRAMA and making recommendations for improvement).

<sup>4</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-1022, MANAGING FOR RESULTS: KEY CONSIDERATIONS FOR IMPLEMENTING INTERAGENCY COLLABORATION MECHANISMS (2012), available at <http://www.gao.gov/assets/650/648934.pdf> (setting forth a number of constraints to cross-agency collaboration).

<sup>5</sup> See JANE FOUNTAIN, THE GPRA MODERNIZATION ACT OF 2010: EXAMINING CONSTRAINTS TO, AND PROVIDING TOOLS FOR, CROSS-AGENCY COLLABORATION (SEPTEMBER 17, 2012) (draft report to the Administrative Conference of the U.S.), available at <http://www.acus.gov/sites/default/files/documents/Preliminary%20Draft%20GPRAM%20Report%20Fountain%209%2020%2013.pdf>.

counsel, managers and others to overcome and work within institutional challenges to cross-agency collaboration. Such tools include the use of interagency agreements, memoranda of understanding, forms, documents, and other information useful in facilitating cross-agency collaboration efforts; the use of shared information systems and the sharing of data.

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

One key challenge faced by agencies and the public is access to information regarding agency planning required by GPRAMA. A recommended practice to address this challenge should be aimed at increasing transparency on Performance.gov. Another challenge agency officials face when attempting to determine which tools to use for cross-agency collaboration efforts made pursuant to CAP goals under GPRAMA is distinguishing between mission-support CAP goals (which are designed to achieve consolidation of standard business functions and systems across agencies) and mission-oriented CAP goals (which are designed to coordinate authorities to pursue policy goals that are shared by multiple agencies). A recommended practice to address this challenge should provide clarification to allow agency officials to distinguish between the two types of goals so they can determine which tools to use.

Another challenge is the varied and incomplete agency response to the GPRAMA requirement that in setting APGs, agencies include a description of the agencies, programs, activities and other organizations that are related to a particular agency goal. A recommended practice to address this challenge should focus on encouraging agencies to comply with their responsibilities under GPRAMA in this regard. Agency general counsels and other agency attorneys play a critical role in helping to foster cross-agency collaboration. Accordingly, recommended practices that promote the dissemination of information helpful to cross-agency collaboration efforts among agency attorneys are needed to address challenges presented by the lack of information sharing. Practices focused on encouraging agency attorneys to foster expertise and experience in building and sustaining cross-agency collaboration are also recommended. In addition, other agency officials who lead cross-agency collaboration efforts face a host of challenges as they try to move initiatives forward. A number of recommended best practices are offered to these officials to ensure that collaborative efforts are maximized and the goals for such initiatives are reached.

#### **Recommendation**

1. *Increasing Transparency.* To increase transparency, the Office of Management and Budget (OMB), working with the Performance Improvement Council (PIC), should consider making all past and current quarterly status update reports, including those that show progress on cross-agency priority (CAP) goals, publicly available and searchable on the Performance.gov website.

2. *Improving Agency Reporting Under GPRAMA.* The PIC should work with other relevant agency officials to facilitate greater compliance with the GPRAMA requirement that agencies identify all organizations (including other agencies, programs, or activities) that contribute to the achievement of an

agency priority goal (APG). OMB should continue to encourage agencies to properly report their involvement with other agencies that have made contributions to progress on their priority goals, including situations in which two agencies coordinate on their respective APGs or a particular APG is related to a CAP goal.

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

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

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

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

5. *Enhancing the Role of Agency Legal Counsel.* To improve cross-agency collaboration, when directed and to the extent legally permissible:

(a) agency attorneys should work with agency officials to develop interagency agreements, memoranda forms, and other documents that would facilitate the process of sharing data and information between agencies and protect personally identifiable information; and

(b) agency officials who are leading cross-agency collaborative initiatives should engage agency attorneys as early as practicable and work with them to determine the best way to coordinate authority, information, operations, personnel and resources among agencies within the confines of relevant legal and statutory requirements.

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

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

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

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

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

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

(f) build shared evaluation, analytical and measurement tools to enable the tracking, monitoring, and improvement of output and outcomes across agencies and programs engaged in collaborative efforts.

7. *Improving Training for Agency Officials.* The PIC should work with the Office of Personnel Management (OPM) and with relevant agency officials to continue to identify and refine training tools that build capacity for cross-agency collaboration among agency attorneys and other officials.

#### **Administrative Conference Statement # 18**

#### **Improving the Timeliness of OIRA Regulatory Review**

*Adopted December 6, 2013*

For more than three decades, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has conducted centralized review of federal agencies' draft proposed and final regulations. The fundamental structures and principles governing the regulatory review process are currently set forth in Executive Order (EO) 12,866,<sup>1</sup> and subsequent EOs have reaffirmed this system of regulatory review.<sup>2</sup> Among other things, Executive Order 12,866 requires covered agencies to submit all "significant regulatory actions" to OIRA for review.<sup>3</sup> The purposes underlying the centralized OIRA regulatory review process include: ensuring consistency with applicable laws and presidential priorities; enhancing coordination of regulatory policy among federal agencies; examining economic analyses

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<sup>1</sup> Exec. Order No. 12,866, 58 FR 51,735 (Oct. 4, 1993). These basic structures were carried over from Executive Order 12,291, issued during the Reagan Administration. Exec. Order No. 12,291, 46 FR 13,193 (Feb. 19, 1981).

<sup>2</sup> See, e.g., Exec. Order No. 13,563, 76 FR 3821 (Jan. 21, 2011).

<sup>3</sup> Exec. Order No. 12,866 § 6(a)(3)(B)-(C); see also *id.* §§ 3(b) (generally defining covered "[a]genc[ies]" as federal departments and other executive branch establishments, but not independent regulatory agencies), 3(f) (defining "[s]ignificant regulatory action").

accompanying the rule; and making the regulatory process more efficient.<sup>4</sup> OIRA regulatory review serves to monitor agency rulemaking activity to ensure adherence with administration policy<sup>5</sup> while also seeking to provide a "dispassionate and analytical 'second opinion' on agency actions."<sup>6</sup>

In order to ensure that OIRA review proceeds in a timely manner, EO 12,866 generally requires OIRA to "waive review or notify the agency in writing of the results of its review" within 90 calendar days following submission.<sup>7</sup> The executive order also provides that the review process may be extended "(1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head."<sup>8</sup>

Executive review of agency rulemaking, and, more precisely, OIRA's role in the review process—though not without controversy<sup>9</sup>—are now firmly

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<sup>4</sup> *Id.* §§ 2(a)–(b), 6(a)(3)(B)–(C), 6(b); see also Exec. Order No. 13,563 § 1.

<sup>5</sup> *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) ("The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.").

<sup>6</sup> President Barack H. Obama, Memorandum on Regulatory Review, 74 FR 5977 (Jan. 30, 2009).

<sup>7</sup> Exec. Order 12,866 § 6(b)(2). Indeed, this Executive Order specifically underscores the importance of timeliness in the regulatory review when stating: "An efficient regulatory planning and review process is vital to ensure the Federal Government's regulatory system best serves the American people." *Id.* § 2.

<sup>8</sup> *Id.* § 6(b)(2)(C).

<sup>9</sup> See, e.g., Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097 (2006); Alan Morrison, *Commentary, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083 (2007); cf. Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

entrenched fixtures of the administrative landscape,<sup>10</sup> and each administration since at least that of President Ronald Reagan has endorsed them.<sup>11</sup> For such reviews to be effective, however, they must be timely. All stakeholders in the regulatory process—including the submitting agency, potentially regulated entities, other interested participants, and the general public—have an interest in seeing the OIRA review process operate as efficiently as possible for several reasons: agency regulatory or scientific assessments may become out of date when reviews are overlong; likewise, regulated markets or industries might experience uncertainty when proposed or final rules remain stalled in the review process; and, for rules related to health or safety, delay in the OIRA review process could well have serious social consequences.<sup>12</sup> In addition, the timing of review process should be made as transparent as possible.

Historically, OIRA has completed most of its reviews of agency rules well within the 90-day review period.<sup>13</sup> For example, from 1994 - 2011, the

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<sup>10</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Cass R. Sunstein, *Commentary, The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

<sup>11</sup> See Special Edition, OIRA Thirtieth Anniversary Conference, 63 ADMIN. L. REV. 1 (2011). Jim Tozzi, who served at the Office of Management and Budget for over 10 years and was instrumental in the creation of OIRA, suggests that executive rulemaking review began during the Nixon Administration. *Id.* at 37.

<sup>12</sup> Institute for Policy Integrity, Public Comment 1-2 (Oct. 28, 2013) (noting that delays can postpone realization of benefits associated with proposed rules, create uncertainty amongst regulated parties, and damage public perception of OIRA). For example, at an FDA public meeting on September 19-20, 2013, Sandra Eskin, director of food safety at the Pew Charitable Trusts, noted several food safety rules that were required by the Food Safety Modernization Act in January 2011 had not been issued, and said the “longer it takes these rules to be put in place, the more people will needlessly be put at risk and the less confidence consumers will have in the safety of the food supply.”

<sup>13</sup> CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 25 (Nov. 1, 2013), available at

average time for OIRA review was 50 days for all rules.<sup>14</sup> Since 2011, however, average OIRA review times have trended significantly upward. In 2012, the average time for OIRA review for all rules rose to 79 days, and in the first half of 2013, the average review time increased even further to 140 days.<sup>15</sup> It is important to note that, as OIRA completes review for rules that have been in the backlog for some time, the average review times will likely increase, which evidences an improving situation. Approximately four dozen reviews completed in 2013 have taken more than a year.<sup>16</sup>

However, average review times and the length of completed reviews are lagging indicators of OIRA performance, and the recent increases in average review times reflect the significant headway that OIRA has made during the past year in reducing the backlog of rules and improving review timeliness. The number of ongoing reviews lasting more than one year has been cut from 51 reviews in mid-May 2013 to 27 reviews in mid-September 2013. Of the 38 reviews that, as of June 30, 2013, had been ongoing for more than a year, 14 of them were completed by mid-September 2013. Rules submitted more recently were also being reviewed more quickly. Only 10 percent of the reviews of rules submitted between September 2012 and February 2013 took more than six

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<http://acus.gov/sites/default/files/documents/Revised%20Draft%20OIRA%20Report%20110113%20CIRCULATED.pdf>.

<sup>14</sup> See Off. Info. & Reg. Aff., Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Nov. 14, 2013) (allowing searches of OIRA review counts and average review times by date range).

<sup>15</sup> *Id.*

<sup>16</sup> Off. Info. & Reg. Aff., Executive Order Review Search Results, <http://www.reginfo.gov/public/do/eoAdvancedSearch> (last visited Nov. 14, 2013) (allowing identification of the number and length of OIRA reviews completed within a date range). The time periods cited herein are for formal review after a complete rulemaking package is received by OIRA and do not reflect any informal review that may have occurred prior to receipt.

months to complete, compared to nearly 30 percent for reviews completed during the first six months of 2013 (regardless of when they were submitted).

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

The Administrative Conference has long supported effective executive review of agency rulemaking, and has emphasized the importance of timeliness and transparency in this process. In Recommendation 88-9, the Conference stated that "[t]he process of presidential review of rulemaking, including agency participation, should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to

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<sup>17</sup> Notwithstanding these concerns about increased review times in the period from 2012-13, the Administrative Conference reaffirms the importance of the interagency review process to ensuring that rulemaking agencies consider input from sister agencies and the EOP. See Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Rulemaking*, ¶ 1, 54 FR 5207 (Feb. 2, 1989) ("[Presidential review] can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities.").

applicable administrative, executive, judicial and statutory deadlines."<sup>18</sup> Similarly, in Recommendation 93-4, the Conference asserted that "the reviewing or oversight entity should avoid, to the extent possible, extensive delays in the rulemaking process."<sup>19</sup> The Conference has also issued several recommendations advocating a transparent OIRA review process.<sup>20</sup>

Building upon these prior Conference initiatives addressing executive review, the Conference now offers a discrete set of principles for improving the timeliness of review and the transparency concerning the causes for delay. The OIRA review process involves many components and participants. Delays may not be attributable to any single cause but rather can arise from multiple factors (and complex interactions amongst them) involving numerous players, including OIRA, agencies submitting rules for review, and other agencies and offices in the interagency review process (including other parts of the EOP). As a result, the Conference wishes to highlight a number of

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<sup>18</sup> Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, ¶ 3, 54 FR 5207 (Feb. 2, 1989).

<sup>19</sup> Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 FR 4670 (Feb. 22, 1994).

<sup>20</sup> Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Rulemaking*, ¶ 5, 54 FR 5207 (Feb. 2, 1989) ("An agency engaged in informal rulemaking should be free to receive guidance concerning that rulemaking at any time from the President, members of the Executive Office of the President, and other members of the Executive Branch, without having a duty to place these communications in the public file of the rulemaking unless otherwise required by law. However, official written policy guidance from the officer responsible for presidential review of rulemaking should be included in the public file of the rulemaking once a notice of proposed rulemaking or final rule to which it pertains is issued or when the rulemaking is terminated without issuance of a final rule."); Administrative Conference of the United States. Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, ¶ 2, 45 FR 86,407 (Dec. 31, 1980) ("When the rulemaking agency receives communications from the President, advisers to the President, the Executive Office of the President, or other administrative bodies which contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule, the agency should promptly place copies of the documents, or summaries of any oral communications, in the public file of the rulemaking proceeding.").

principles that OIRA and agencies should consider to improve review times and enhance transparency concerning the timing of the review process.

The Conference reaffirms its long-term support of the basic presidential regulatory review process<sup>21</sup> and seeks to ensure that it functions as effectively and efficiently as practicable. The values of transparency, credibility, management effectiveness, and the rule of law apply to the executive review process, even if it is not subject to judicial oversight.

The following principles suggest ways that both OIRA and the agencies can promote timely and transparent OIRA review:

1. The Office of Information and Regulatory Affairs (OIRA) should, whenever possible, adhere to the timeliness provisions of Executive Order (EO) 12,866. The Administrator of OIRA should continue to focus on improving OIRA review times. In so doing, the Administrator should consider preparing a publicly available document that identifies any specific policies that OIRA, regulatory agencies, and other agencies participating in interagency review should undertake in order to ensure that the measures of timeliness return to historical averages under this executive order.

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<sup>21</sup> See, e.g., Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 FR 4670 (Feb. 1, 1994) ("We continue to support presidential coordination of agency policymaking as beneficial and necessary."); Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 FR 5207 (Feb. 2, 1989) ("Presidential review should apply generally to federal rulemaking. Such review can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities."); Administrative Conference of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 FR 86,407 (Dec. 31, 1980) ("Because the President, as the nation's Chief Executive, may be deemed accountable for what agencies do, efforts to achieve policy coordination through Presidential channels have become increasingly significant.").

2. Agencies and OIRA should coordinate prior to the submission of a completed rulemaking package. To the extent possible, OIRA should use the regulatory planning process created by section 4 of EO 12,866 to identify all of the relevant entities, establish lines of communication among them, and create workplans with timelines and responsibilities for action. The section 4 process should be used to identify the principal factual and policy issues likely to be raised by a proposed rulemaking and to convey any presidential priorities respecting them. OIRA should hold itself available to mediate such disputes among the identified agencies as may arise, and to assure that all participating agencies place a high priority on the resulting processes, so as not to cause undue delays.

3. Though OIRA has the final authority for determining which rules will be classified as "significant," the agency should decide the point at which it will submit a draft rule to OIRA for review under EO 12,866. Once an agency has submitted a completed rulemaking package with approval from the appropriate senior agency official(s) within the meaning of EO 12,866, the clock for the review period should commence.

4. In connection with interagency review, OIRA should promptly send the draft rule to all of the relevant entities and, to the extent feasible, establish a timeline by which these entities should submit comments. All participating entities should place a high priority on the review process so as to avoid undue delays.

5. If OIRA concludes that it will be unable to complete the review of an agency's draft rule within a reasonable period of time after submission, recognizing the timeframes established in section 6(b)(2) of EO 12,866 and the nature of the matter—but in no event beyond 180 days after submission—

OIRA should inform the public as to the reasons for the delay or return the rule to the submitting agency.

6. OIRA's staffing authorization should be increased to a level adequate to ensure that OIRA can conduct its regulatory reviews under EO 12,866 in a timely and effective manner. In addition, or as an alternative, staff from rulemaking agencies could be detailed to OIRA.

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