

The Administrative Conference: Review of Research Projects

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Administrative Codes and Registers Section
2014 Annual Meeting



The Administrative Conference “is a public-private partnership designed to make government work better.”

President Barack Obama
July 8, 2010

ACUS at 50

- [Historical Timeline](#)
- [ACUS 50th Anniversary Video](#)

The screenshot shows the ACUS at 50 website's Historical Timeline page. The page features a navigation bar with links for Home, Conference, Committees, Research Projects, Meetings & Events, Documents, Newsroom, and Contacts. The main header includes the ACUS at 50 logo (1964 ★ 2014) and navigation links for Main, Historical Timeline, 50th News, and 50th Events. The page content is organized by year, with a sidebar for 2010-2014 and main sections for 2013, 2012, 2011, and 2010. Each year section includes a photograph and a list of key events with dates and descriptions.

1964 ★ 2014

Home Conference Committees Research Projects Meetings & Events Documents Newsroom Contacts

ACUS at 50
1964 ★ 2014

Main Historical Timeline 50th News 50th Events

Home > Historical Timeline

Historical Timeline

Scroll through our timeline for a look at the history of the Administrative Conference, from 1964 to present. This timeline tells the story of the Conference's creation, development and advancement over the past 50 years.

2010 - 2014

- 1990 - 1995
- 1980 - 1989
- 1970 - 1979
- 1964 - 1969

2013

- > **February 11, 2013.** The American Bar Association's (ABA) House of Delegates passes two resolutions based on Administrative Conference Recommendations. ABA Resolution 300, in accordance with ACUS Recommendation 2012-6, urges Congress to repeal and replace an outdated law that may unfairly bar certain court claims on procedural grounds. ABA Resolution 110A echoes ACUS Recommendation 2011-3 by urging federal government action to minimize government contractor personal conflicts of interest.
- > **June 13-14, 2013.** 58th Plenary Session.
- > **December 5-6, 2013.** 59th Plenary Session.

2012

- > **May 4, 2012.** President Barack Obama issued Executive Order 13609, Promoting International Regulatory Cooperation, based in part on Administrative Conference Recommendation 2011-6, which aims to enhance cooperation between United States agencies and foreign authorities.
- > **June 14-15, 2012.** 56th Plenary Session.
- > **December 2012.** The Administrative Conference publishes its first *Sourcebook of United States Executive Agencies*.
- > **December 6, 2012.** The Citizen Archivist Initiative at the National Archives wins the Walter Gellhorn Innovation Award.

2011

- > **June 16-17, 2011.** 54th Plenary Session.
- > **October 18, 2011.** The Conference launches its Model Agency Initiative, to identify federal agency best practices, celebrate success stories, and share lessons learned government-wide.
- > **December 8, 2011.** The Office of the Federal Register's federalregister.gov is the first recipient of the Walter Gellhorn Innovation Award.
- > **December 8-9, 2011.** 55th Plenary Session.

2010

- > **March 3, 2010.** After being reauthorized by Congress in 2004 and 2008, and funding approved in 2009, the Administrative Conference is officially reestablished after a 15-year hiatus when the Senate confirmed President Barack Obama's nominee Paul R. Verkuil as Chairman. On May 20, 2004, Supreme Court Associate Justices Antonin Scalia and Stephen Breyer appeared together before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law in support of reauthorization of the Administrative Conference.
- > **April 6, 2010.** Paul R. Verkuil is sworn in as the tenth Chairman of the Administrative Conference.
- > **July 8, 2010.** President Barack Obama names 10 members to serve with Chairman Verkuil on the Administrative Conference Council. In announcing these appointments, President Obama said, "ACUS is a public-private partnership designed to make government work better."
- > **December 9-10, 2010.** 53rd Plenary Session. Supreme Court Justice and former ACUS Chairman Antonin Scalia swears in the new Conference membership.

Statutory Mandate

- Arrange for federal agencies, assisted by outside experts, cooperatively [to] study mutual problems, exchange information, and develop recommendations for action [so that] private rights may be fully protected and federal responsibilities may be carried out expeditiously in the public interest (1964).
- Added in 2004:
 - Promote public participation and efficiency in rulemaking.
 - Reduce unnecessary litigation.
 - Improve the use of science.
 - Improve the effectiveness of applicable laws.
- See 5 U.S.C. 591.

ACUS Overview

- The Conference is an independent agency in the executive branch.
- 101 voting members, including:
 - Chairman: Appointed by the President and confirmed by the Senate.
 - Council: 10 members, split between public and private; appointed by President.
 - Government Members: 50 high-ranking agency officials
 - Public Members: 40 individuals from the private sector, including academics, private practitioners, and experts working for non-profit organizations; politically balanced.
- Non-voting members include:
 - Liaison Representatives: other agencies and professional associations (e.g., ABA).
 - Senior Fellows: previous members, including three Supreme Court Justices.

The Research Process

- Members are divided into six committees.
 - Each has a different subject matter focus:
 - Adjudication, Administration & Management, Collaborative Governance, Judicial Review, Regulation, and Rulemaking.
- Independent research conducted by consultants or in-house researchers.
- Recommendations crafted in open committee meetings and adopted by vote of the full Assembly of the Conference at semi-annual plenary sessions held in June and December.

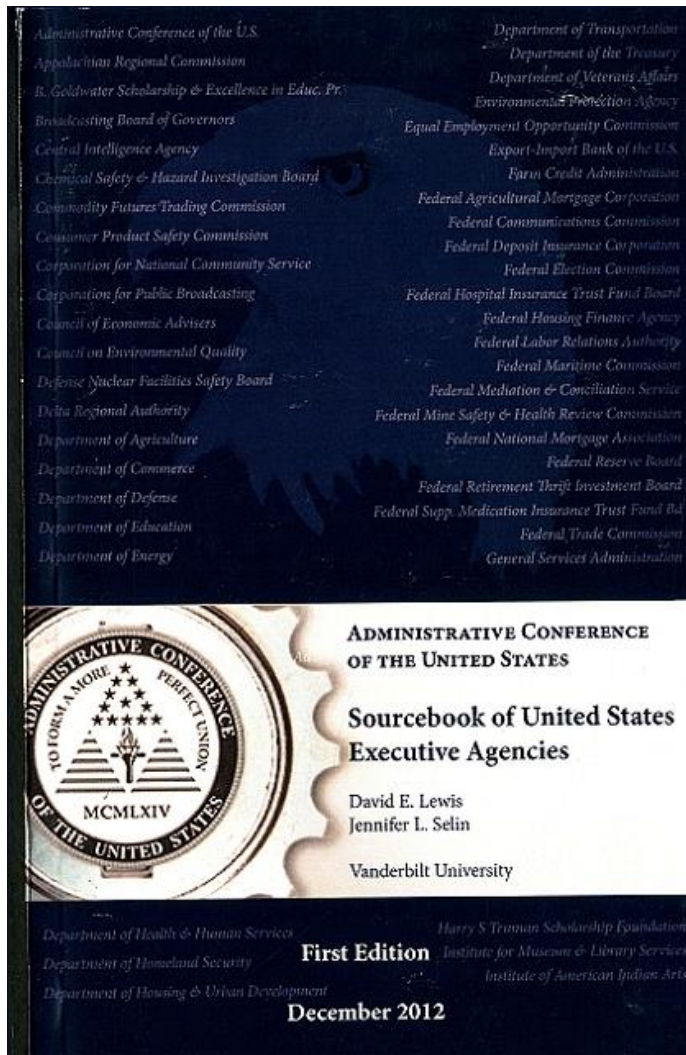
Recommendations

- The Conference typically issues 8-10 recommendations per year.
- Conference recommendations can be directed to:
 - Congress, urging it to create, amend, or repeal statutes;
 - The Executive Branch, including agencies and the White House; and
 - The Judiciary, through the Judicial Conference.

Other Conference Activities

- The Conference engages in many activities outside the recommendation process:
 - Office of the Chairman Reports.
 - ACUS Publications (e.g., Sourcebook of United States Executive Agencies).
 - Workshops.
 - EAJA Reporting.
 - Serving as a resource for Congress and other agencies on administrative law issues.

Sourcebook of United States Executive Agencies



Early History

- Early historical antecedents:
 - 1936 Brownlow Commission.
 - 1946 (Proposed) Office of Federal Administrative Procedure.
 - 1947 Hoover Commission.
 - Eisenhower Temporary Admin. Conference 1953-54.
 - Kennedy Temporary Admin. Conference 1961-62.
- Both temporary Conferences recommended a permanent Conference.
- 1962-64 Office of Administrative Procedure in Dept. of Justice.
 - Administrative Conference Act enacted in 1964, 5 U.S.C §§ 591-596.
 - LBJ appoints first Chair in 1967; operations begin in 1968.
 - De-funded in 1995.



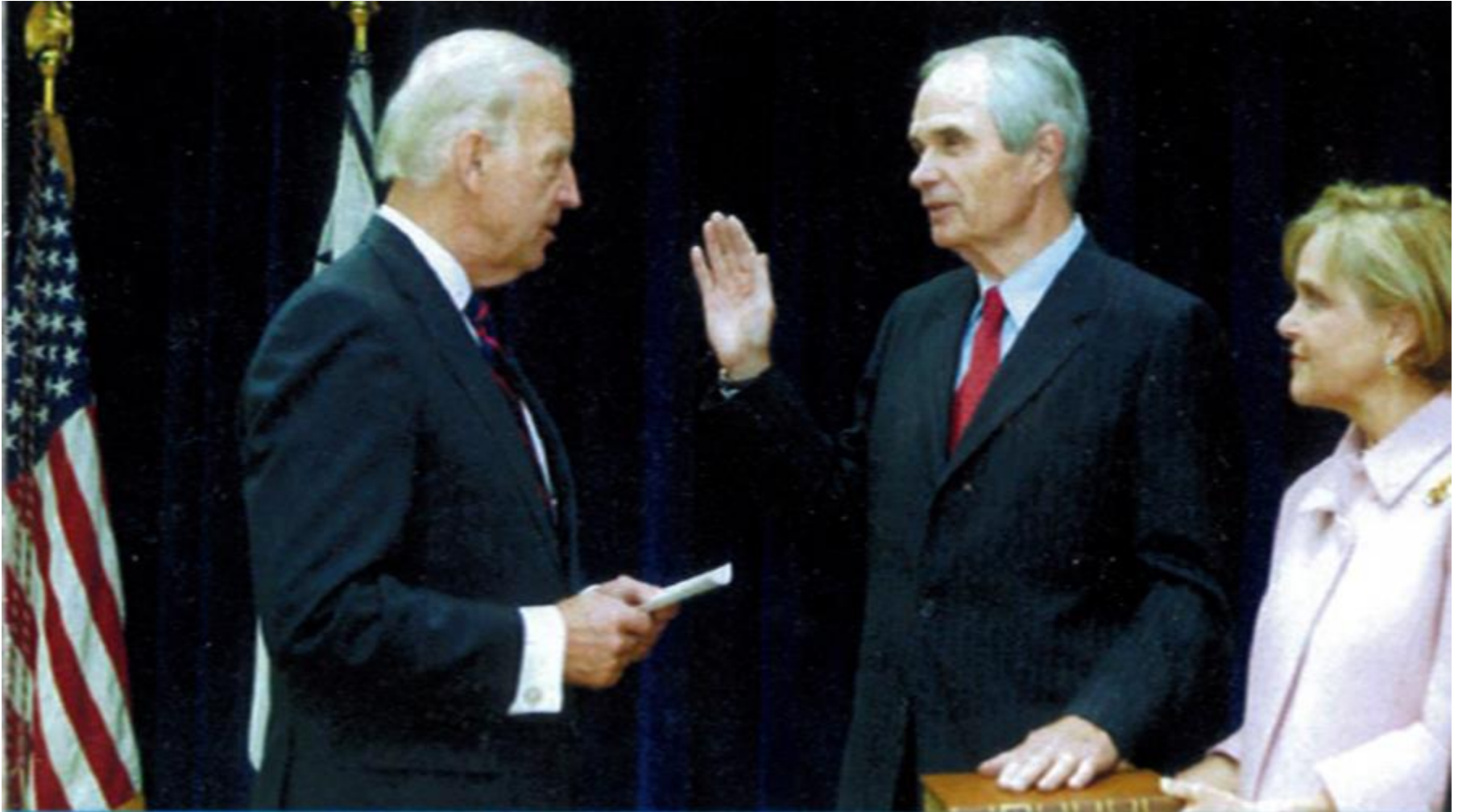
When President Kennedy established the predecessor to the Administrative Conference by Executive Order on April 13, 1961, he stated:

“[I]t is essential to the protection of private and public interests and to the sustained development of the national economy that Federal administrative procedures ensure maximum efficiency and fairness in the performance of . . . governmental functions.”

Revival: ACUS 2.0

- In 2004, Congress held hearings on ACUS reauthorization during which all six witnesses—including Supreme Court Justices Stephen Breyer and Antonin Scalia—praised the work and cost-effectiveness of the agency. (The statements of Justices Breyer and Scalia are available online at http://www.abanet.org/poladv/documents/acusfunding_resources.pdf.)
- Following those hearings, Congress overwhelmingly approved bipartisan legislation to reauthorize and resurrect the agency, which President Bush signed into law.
- In 2009, Congress appropriated funds for the Conference. It resumed operations in 2010 upon the appointment of Chairman Paul Verkuil.

Chairman Verkuil was sworn in by Vice President Joe Biden as Chairman of the Administrative Conference on April 6, 2010.



ACUS Recommendations (2010-2013)

- [2013-1](#) Social Security Disability Adjudication
- [2013-2](#) Benefit-Cost Analysis at Independent Regulatory Agencies
- [2013-3](#) Science in the Administrative Process
- [2013-4](#) Administrative Record in Informal Rulemaking
- [2013-5](#) GPRA Modernization Act of 2010: Examining Constraints To, and Providing Tools For, Cross-Agency Collaboration
- [2013-6](#) Remand Without Vacatur
- [2013-7](#) Social Media in Rulemaking
- [Statement #18](#) Improving the Timeliness of OIRA Regulatory Review
- [2012-1](#) Regulatory Analysis Requirements
- [2012-2](#) Midnight Rules
- [2012-3](#) Immigration Removal Adjudication
- [2012-4](#) Paperwork Reduction Act
- [2012-5](#) Improving Coordination of Related Agency Responsibility
- [2012-6](#) Reform of 28 U.S.C. § 1500
- [2012-7](#) Third-Party Programs to Assess Regulatory Compliance
- [2012-8](#) Inflation Adjustment Act
- [2011-1](#) Legal Considerations in e-Rulemaking
- [2011-2](#) Rulemaking Comments
- [2011-3](#) Compliance Standards for Government Contractor Employees
- [2011-4](#) Agency Use of Video Hearings
- [2011-5](#) Incorporation by Reference
- [2011-6](#) International Regulatory Cooperation
- [2011-7](#) The Federal Advisory Committee Act
- [2011-8](#) Agency Innovations in e-Rulemaking
- [2010-1](#) Agency Procedures for Considering Preemption of State Law

Current ACUS Projects (Selected)

- Ex Parte Communications in Informal Rulemaking.
- Examining the Guidance Function of Agency Preambles.
- Government in the Sunshine Act.
- Reducing FOIA Litigation Through Targeted ADR Strategies.
- Retrospective Review of Agency Rules.
- Federal Administrative Adjudication.
- Petitions for Rulemaking.

Ex Parte Communications

- This project will study procedures and best practices for managing ex parte communications in the informal rulemaking process.
- “Ex parte communications” are non-public oral or written communications received by agency personnel regarding a proceeding during the course of that proceeding.
- The concept is rooted in notions of fairness and ethical conduct in judicial proceedings.
- ABA and House Judiciary Committee suggested Conference study this topic.
- Consultant for this project is Esa Sferra-Bonistalli.

The APA on Ex Parte Communications

- The Administrative Procedure Act, as amended by the Sunshine Act, generally prohibits ex parte communications in formal adjudication and rulemaking.
 - See 5 U.S.C. § § 556, 557(d)(1)(A), (B).
 - Reflecting of judicial norms of conduct in quasi-judicial proceedings.
- But the APA is silent on ex parte communications in *informal* rulemaking.
- Must consider: is the term “ex parte” accurate or appropriate in the informal rulemaking context?

Judicial Precedent

- Despite the APA's silence, the courts have identified some minimum procedural requirements for ex parte communications in informal rulemaking.
- The seminal decision is *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), which held that:
 - Ex parte communications prohibited post-NPRM.
 - If prohibited communications nonetheless occur, the agency must disclose their nature and substance to the public and provide opportunity to respond.
- The decision was swiftly criticized and narrowed in *Action for Children's Television v. FCC*, 564 F.2d 458, 474 (D.C. Cir. 1977).

Recommendation 77-3

- Administrative Conference adopted Recommendation 77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*:
 - Discouraged a blanket prohibition on ex parte communications in informal rulemaking (§ 1).
 - But acknowledged that it might be appropriate to restrict such communications in particular proceedings (§ 5).
 - Urged agencies to promptly make available for public inspection any written, substantive ex parte communication received after an NPRM has issued (§ 2).
 - Recommended that agencies experiment with procedures designed to make oral ex parte communications available to the public (§ 3).

Related Conference Recommendations

- Recommendation 77-3 gave effect to principles embraced in Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability*, and Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*.
- Two subsequent recommendations addressed related issues:
 - Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*.
 - Recommendation 88-9, *Presidential Review of Agency Rulemaking*.
- The issues examined in Recommendations 80-6 and 88-9 will not be reexamined in the current project.

Agencies Respond

- In response to *Home Box Office* and *Action for Children's Television*, the FCC adopted procedures for ex parte communications in rulemaking.
 - Has revised rules on more than one occasion. Most recent revision was in 2011.
- Other agencies adopted ex parte policies in response to Recommendation 77-3, including:
 - The Department of Justice (DOJ)
 - The Federal Emergency Management Agency (FEMA)

Development of Legal Doctrine

- The law was still in flux when the Conference adopted Recommendation 77-3, and important developments soon followed.
- In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), the Supreme Court held that courts may not impose rulemaking procedures beyond those required by the APA.
- After *Vermont Yankee*, the D.C. Circuit issued several additional decisions on ex parte communications in informal rulemaking.
 - Perhaps the most important was *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), holding no procedural violation EPA's post-comment period "ex parte" communications that were docketed and not central to the outcome of the rule.

Issues for Study

- The study will examine:
 - Legal parameters for ex parte communications in informal rulemaking.
 - Issues and challenges—actual and potential—that arise when agencies engage in ex parte communications.
 - Agency policies and procedures for managing ex parte communications.
 - New issues presented by use of social media.
- The goal is to identify guiding principles and best practices.

Where We Are in the Process

- Our consultant is currently working on her draft report, which will be posted at www.acus.gov in the next week or so.
- The Committee on Rulemaking has scheduled two meetings on this project:
 - Thursday, February 27, from 9:30 am to 12:30 pm.
 - Thursday, April 3, from 1 pm to 4 pm.
- The Committee may schedule a third meeting, if necessary.
- Draft recommendation likely available 1-2 weeks before April 3 meeting.

E-Rulemaking Recommendations

- The Conference was de-funded in 1995, just as electronic communications were coming into use.
- Since 2010 re-birth, many of our projects have focused on the new realities agencies face as a result of these technologies.
- Several recent recommendations have contributed incrementally to a body of work addressing these new realities:
 - Recommendation 2011-1, *Legal Considerations in e-Rulemaking*
 - Recommendation 2011-2, *Rulemaking Comments*
 - Recommendation 2011-8, *Agency Innovations in e-Rulemaking*
 - Recommendation 2013-5, *Social Media in Rulemaking*

Legal Considerations in e-Rulemaking

- Defines “e-Rulemaking” as “the use of digital technologies in the development and implementation of regulations before or during the informal rulemaking process.”
- By 2010, most agencies had transitioned from a paper-based rulemaking process to e-Rulemaking. E-Government Act of 2002 was significant statutory prompt for the transition.
- Most agencies use the portal provided by www.regulations.gov. Independent agencies may have their own electronic docketing systems.
- Agencies face legal uncertainty as to how the APA’s framework (from 1946) applies to new, rapidly evolving technological landscape.

Legal Considerations in e-Rulemaking

- Recommendation 2011-1 examined the following issues:
 - Processing large numbers of similar or identical comments.
 - Preventing the publication of inappropriate or protected information.
 - Efficiently compiling and maintaining a complete rulemaking docket.
 - Preparing an electronic administrative record for judicial review.
- Primary goals were to dispel some of the legal uncertainty that agencies face, as well as to provide guidance as to how best to navigate some of the unique issues raised by e-Rulemaking.

Legal Considerations in e-Rulemaking

- APA provides sufficient flexibility to accommodate e-Rulemaking.
- Agencies may use reliable comment analysis software to review comments.
- Urges agencies to work eRulemaking PMO and its interagency components to explore more efficient ways to handle protected information.
- Agencies can use electronic records in lieu of paper records.
- Agencies should docket descriptive entry or photo of physical objects.
- Work with other parties and courts to provide electronic record in lieu of paper record.

Rulemaking Comments

Impetus for Project

- Congress asked ACUS to study the rulemaking comment process.
- Largely as a result of e-rulemaking, the number of comments received has steadily increased (hundreds of thousands in some cases).
- Agency practice varies widely—for instance, there is no minimum comment period.
- The extent to which agencies exploit the opportunities created by new technologies also varies.

Rulemaking Comments

Recommendation 2011-2 (adopted at June 2011 Plenary Session)

- The Project Management Office (which operates regulations.gov) should issue a document explaining characteristics of effective comments.
- Agencies should generally use a comment period of 60 days for “significant” rules and 30 days for others.
- Agencies should post all comments received on the Internet (and scan paper comments).
- The Project Management Office and individual agencies should establish policies on anonymous comments.

Rulemaking Comments

Recommendation 2011-2 (continued)

- Agencies should publish policies on late comments and apply those policies consistently (no position on what the policy should be).
- Agency should consider reply comment periods where appropriate (can be additional comment period, oral hearing, etc.).
- If rulemaking languishes, comments may become “stale,” and agency may wish to issue a supplemental notice of rulemaking to refresh the record.

Rulemaking Comments

Implementation of Recommendation 2011-2

- As with many ACUS recommendations, implementation occurs agency-by-agency.
- Here, some agencies already implement many of these recommendations. Others are moving in this direction, particularly in terms of their practices related to e-rulemaking.
- We have consolidated the implementation efforts for the four e-rulemaking recommendations, and we continue to work with agencies to promote these useful innovations.
- We also explore innovations outside the formal commenting process. For instance, our project on Social Media in Rulemaking (Recommendation 2013-5) examines input in non-traditional fora. I also recently published an article examining citizen input via advisory committees (65 Admin. L. Rev. 611).

Agency Innovations in e-Rulemaking

- All agencies have websites used to provide information to the public, but there are many competing demands for communication.
- In making decisions about the design and functionality of their websites, agencies often give prominence to “top tasks” sought by the public.
- Exclusive focus on current web site use and demand may lead agencies to give insufficient attention to rulemaking activities and opportunities for public participation.
- Conference studied websites and e-rulemaking initiatives of 90 agencies, each of which had reported completing an average of two or more rulemakings during each six-month period in 2009-10.

Agency Innovations in e-Rulemaking

- Found that agency innovations can be cost-efficient way to improve availability of information and public engagement in rulemaking.
 - Example: leveraging available centralized data sources.
- Can also help broaden access by groups that have historically faced barriers to participating effectively in rulemaking.
- Address discrete deficiencies in the availability of critical rulemaking information.
- Identifies best practices, but also encourages further experimentation and innovation.

Agency Innovations in e-Rulemaking

- Urges agencies to design and manage Web presence with rulemaking participation in mind.
- Recommends providing one-stop location for pending rulemakings, considering use of social media, and making comment policies available in prominent or multiple locations.
- Suggests agencies take steps to improve accessibility of websites and develop systematic protocols to ensure access to archived material.
- Encourages periodic evaluation and continued experimentation and innovation.

Social Media in Rulemaking

- Issues related to the use of social media in rulemaking were raised in Committee on Rulemaking's deliberations on previous e-Rulemaking recommendations.
- But these issues were beyond the scope of those projects and deserved careful study.
- Federal government use of social media is significant, but largely related to non-rulemaking activities.
- Expected “revolution” in rulemaking—hope for a more dialogic process—but process has remained largely recognizable, even as it has moved from a paper process to an electronic process.

Social Media in Rulemaking

- Project examined both legal and policy issues raised by the use of social media in informal rulemaking.
- Research included workshop co-sponsored with the George Washington University Regulatory Studies Center.
- Recommendation takes a tone of cautious optimism.
- Recognizes that social media may bring benefits, but not in all rulemakings.
- Goal is to establish a framework for experimentation, with the understanding that further examination will likely be required.

Government in the Sunshine Act

Background

- The Government in the Sunshine Act (5 U.S.C. § 552b) governs the meetings of multi-member boards and commissions.
- The Act requires that all such meetings be announced in advance in the Federal Register and permit public attendance.
- The goal of the Act was to promote greater transparency. Nevertheless, it has arguably had the effect of encouraging workarounds, diminishing collegiality, and incentivizing pro forma meetings characterized by prepared statements.
- A great deal of agency business is conducted via *notational voting* or *staff-level discussion*, rather than open meetings subject to the Act.

Lukewarm Advocacy for Sunshine Act Reform

- The Sunshine Act has created frustration for agencies, but statutory reform is unlikely.
- Agencies have effectively “learned to live with” the Act—though it creates certain frustrations, agencies rely closely on notational voting and other modes of conducting business that do not trigger the Act.
- For their part, transparency advocates have largely capitulated in attempting to advocate narrowing or elimination of the various exceptions.
- Shortly before ACUS 1.0 closed its doors in 1995, a special committee recommended reforms to the Act: allow more private meetings in exchange for curtailed use of notational voting.
- In our research, few agency officials advocated statutory reforms, including those along the lines of the 1995 recommendation.

ACUS 2.0 Sunshine Act Project

I serve as the researcher on our current Sunshine Act project. The goal is to promote greater transparency without placing an onerous compliance burden on agencies or requiring any reforms to the statute. My recommendations include:

- Agencies should develop a document describing meeting policies
- Agencies should post relevant documents in advance of meetings, to the extent possible
- Agencies should create listservs for parties interested in attending meetings
- To the extent practicable, agencies should webcast open meetings
- Agencies should issue summaries of any matters concluded by notational voting, delegated staff decisionmaking, etc.
- Agencies should avoid real-time email exchanges that might trigger the Act

The project is currently slated for consideration at the June 2015 Plenary Session.

Incorporation by Reference

- Provides guidance on issues agencies face when incorporating by reference, including:
 - Ensuring incorporated materials are reasonably available;
 - Updating regulations when new versions of incorporated standards become available; and
 - Navigating procedural requirements and avoiding drafting pitfalls.
- Difficult because the issues has several dimensions, implicating: (1) open government; (2) federal standards policy; and (3) copyright.

Incorporation by Reference

- Project precipitated Petition for Rulemaking filed with the Office of the Federal Register.
- Office of Management and Budget recently released proposed revisions to Circular A-119 that adopt some of the Conference's recommendations.
- Congress has expressed interest in these issues.
 - Section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011.
- Ongoing copyright litigation and standards development community response to need for improved public access to incorporated standards.

International Regulatory Cooperation

- ACUS has long recognized the importance of cross-border regulatory coordination: ACUS Recommendation 91-1 (*Federal Agency Cooperation with Foreign Government Regulators*)
- ACUS Recommendation 2011-6 (*International Regulatory Cooperation*) revisits the issue and recommends that agencies do the following:
 - Coordinate with foreign authorities to remove unnecessary trade barriers
 - Divide responsibility for tests, inspections, etc. with trusted foreign authorities
 - Promote the principles underlying US regulatory system (e.g., cost-benefit analysis)

IRC Implementation Successes

- Executive Order 13,609: Adopts much of Recommendation 2011-6 (announced by Cass Sunstein at workshop co-hosted by ACUS)
- Transatlantic Trade and Investment Partnership (TTIP): Reeve Bull has worked closely with EU, US, and UK officials on promoting IRC in the TTIP; Emily Bremer has also worked with such officials on promoting international cooperation on standards policy
- Workshop on Collaborative Governance/Negotiated Rulemaking: Will host a workshop in March 2014 that will seek to promote enhanced involvement of international stakeholders in agency decisionmaking

Current ACUS Projects (Selected)

- Ex Parte Communications in Informal Rulemaking.
- Examining the Guidance Function of Agency Preambles.
- Government in the Sunshine Act.
- Reducing FOIA Litigation Through Targeted ADR Strategies.
- Retrospective Review of Agency Rules.
- Federal Administrative Adjudication.
- Petitions for Rulemaking.

Thank you!

- Information on these and all our other projects available at www.acus.gov.
- Please contact us at:
 - Emily Bremer: ebremer@acus.gov or 202.480.2086.
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