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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted three recommendations at its Sixty-first Plenary Session. The appended recommendations address: Retrospective Review of Agency Rules; Petitions for Rulemaking; and Best Practices for Using Video Teleconferencing for Hearings.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2014-5, Reeve Bull; for Recommendation 2014-6, Emily Bremer; and for Recommendation 2014-7, Amber Williams. For all three of these actions the address and telephone 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 to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Sixty-first Plenary Session, held December 4-5, 2014, the Assembly of the Conference adopted three recommendations.

Recommendation 2014-5, *Retrospective Review of Agency Rules*. This recommendation examines agencies' procedures for reanalyzing and amending existing regulations and offers

recommendations designed to promote a culture of retrospective review at agencies. Among other things, it urges agencies to plan for retrospective review when drafting new regulations; highlights considerations germane to selecting regulations for reevaluation; identifies factors relevant to ensuring robust review; and encourages agencies to coordinate with the Office of Management and Budget, other agencies, and outside entities (including stakeholders and foreign regulators) when designing and conducting retrospective reviews.

Recommendation 2014-6, *Petitions for Rulemaking*. This recommendation identifies agency procedures and best practices for accepting, processing, and responding to petitions for rulemaking. It seeks to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy. Building upon ACUS's previous work on the subject, it provides additional guidance that may make the petitioning process more useful for agencies, petitioners, and the public.

Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*. This recommendation offers practical guidance regarding how best to conduct video hearings, and addresses the following subjects: Equipment and environment, training, financial considerations, procedural practices, fairness and satisfaction, and collaboration among agencies. It also provides for the development of a video hearings handbook by ACUS's Office of the Chairman.

The Appendix below sets forth the full texts of these three recommendations. The Conference will transmit them to affected agencies, Congress, and the Judicial Conference of the United States. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at:

www.acus.gov/61st. A video of the Plenary Session is available at:
new.livestream.com/ACUS/61stPlenarySession, and a transcript of the Plenary Session will be posted when it is available.

Dated: December 12, 2014

Shawne C. McGibbon,

General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2014-5

Retrospective Review of Agency Rules

Adopted December 4, 2014

Executive Summary

The following recommendation is intended to provide a framework for cultivating a “culture of retrospective review” within regulatory agencies. It urges agencies to remain mindful of their existing body of regulations and the ever-present possibility that those regulations may need to be modified, strengthened, or eliminated in order to achieve statutory goals while minimizing regulatory burdens. It encourages agencies to make a plan for reassessing existing regulations and to design new regulations in a way that will make later retrospective review easier and more effective. It recognizes that input from stakeholders is a valuable resource that can facilitate and improve retrospective review. Finally, it urges agency officials to coordinate

with other agencies and the Office of Management and Budget to promote coherence in shared regulatory space.

Preamble

Traditionally, federal regulatory policymaking has been a forward-looking enterprise: Congress delegates power to administrative agencies to respond to new challenges, and agencies devise rules designed to address those challenges. Over time, however, regulations may become outdated, and the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies' enforcement efforts and impose a substantial burden on regulated entities. As a consequence, Presidents since Jimmy Carter have periodically undertaken a program of "retrospective review," urging agencies to reassess regulations currently on the books and eliminate, modify, or strengthen those regulations that have become outmoded in light of changed circumstances.¹ Agencies have also long been subject to more limited regulatory lookback requirements, including the Regulatory Flexibility Act, which requires agencies to review regulations having "a significant economic impact upon a substantial number of small entities"² within ten years of issuance, and program-specific retrospective review requirements erected by statute.³

¹ Joseph E. Aldy, *Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design & Implementation of Regulatory Policy* 4 (Nov. 17, 2014), available at <http://www.acus.gov/report/retrospective-review-report>.

² 5 U.S.C. 610.

³ Aldy, *supra* note 1, at 4.

Though historical retrospective review efforts have resulted in some notable successes,⁴ especially in those instances in which high-level leadership in the executive branch and individual agencies has strongly supported these endeavors,⁵ retrospective review of regulations has not been held to the same standard as prospective review, and the various statutory lookback requirements apply only to subsets of regulations. President Barack Obama has sought to build on these initiatives in several executive orders. On January 18, 2011, he issued Executive Order (EO) 13,563,⁶ which directed executive branch agencies regularly to reassess existing rules to identify opportunities for eliminating or altering regulations that have become “outmoded, ineffective, insufficient, or excessively burdensome.”⁷ Shortly thereafter, he issued another order encouraging independent regulatory agencies to pursue similar regulatory lookback efforts (EO 13,579⁸) and yet another order providing a more detailed framework for retrospective review in executive branch agencies (EO 13,610⁹).

The Administrative Conference has long endorsed agencies’ efforts to reevaluate and update existing regulations. In 1995, the Conference issued a recommendation stating that “[a]ll agencies (executive branch or ‘independent’) should develop processes for systematic review of existing regulations to determine whether such regulations should be retained, modified or

⁴ See generally MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985).

⁵ See generally John Kamensky, National Partnership for Reinventing Government: A Brief History (Jan. 1999), available at <http://govinfo.library.unt.edu/npr/whoweare/history2.html> (highlighting the successes of the Clinton Administration’s National Performance Review and emphasizing the importance of high-level executive branch and agency leadership).

⁶ 76 FR 3821 (Jan. 21, 2011).

⁷ *Id.* § 6.

⁸ 76 FR 41587 (July 14, 2011).

⁹ 77 FR 28469 (May 14, 2012).

revoked” and offering general guidance by which agencies might conduct that analysis.¹⁰ In addition, in early 2011, shortly after the promulgation of EO 13,563, the Conference hosted a workshop designed to highlight best practices for achieving the EO’s goals.¹¹

Administrative law scholars and other experts have debated the effectiveness of existing retrospective review efforts. EO 13,610 touts the elimination of “billions of dollars in regulatory costs and tens of millions of hours in annual paperwork burdens” achieved under the EO 13,563 framework and promises additional savings.¹² Cass Sunstein, the former Administrator of the Office of Information and Regulatory Affairs (OIRA), has suggested that these initiatives have yielded billions of dollars in savings.¹³ Nevertheless, many criticize the existing system of regulatory lookback as inadequate, especially insofar as it relies upon individual agencies to reassess their own regulations and provides few incentives for ensuring robust analysis of existing rules.¹⁴ From the opposite perspective, many criticize current retrospective review

¹⁰ Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 FR 43108, 43109 (Aug. 18, 1995).

¹¹ Administrative Conference of the United States, Retrospective Review of Existing Regulations, Workshop Summary (Mar. 10, 2011), <http://www.acus.gov/fact-sheet/retrospective-review-workshop-summary>.

¹² Exec. Order No. 13,610, § 1, 77 FR 28469, 28469 (May 14, 2012).

¹³ CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 180–84 (2013) (highlighting successful retrospective review efforts, including a Department of Health and Human Services reform to reporting requirements saving \$5 billion over five years and a Department of Labor rule to harmonize hazard warnings with the prevailing international practice saving \$2.5 billion over five years); *see also* Memorandum from President Ronald Reagan on the Review of Federal Regulatory Programs (Dec. 15, 1986) (describing the results of the Presidential Task Force on Regulatory Relief, which included “substantial changes to over 100 existing burdensome rules” that “sav[ed] businesses and consumers billions of dollars each year”).

¹⁴ *See, e.g.*, Reeve T. Bull, *Building a Framework for Governance: Retrospective Review & Rulemaking Petitions*, __ ADMIN. L. REV. __ (forthcoming 2015); Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57A, 60A (2013); Michael Mandel & Diana G. Carew, *Progressive Policy*

efforts as inherently deregulatory, possessing a strong bias in favor of eliminating or weakening regulations rather than strengthening regulations that may be insufficiently protective.¹⁵

Ultimately, a system of “self-review,” in which individual agencies are responsible for evaluating their own regulations and, to the extent permitted by law, modifying, strengthening, or eliminating those that are deemed to be outdated, can only succeed if agencies promote a “culture of retrospective review.”¹⁶ Without a high-level commitment, any regulatory lookback initiative runs the risk of devolving into an exercise of pro forma compliance. This might not be an inevitable outcome, however. If the relevant agency officials, including both those conducting retrospective reviews and those drafting new rules, come to view regulation as an ongoing process whereby agency officials recognize the uncertainty inherent in the policymaking exercise and continually reexamine their regulations in light of new information and evolving circumstances, a durable commitment can emerge.¹⁷ Regulatory review should not only be a backward-looking exercise; rather, it should be present from the beginning as part of an on-going culture of evaluation and iterative improvement. Planning for reevaluation and regulatory improvement (including defining how success will be measured and how the data necessary for this measurement will be collected) should be considered an integral part of the development

Institute Policy Memo, *Regulatory Improvement Commission: A Politically Viable Approach to U.S. Regulatory Reform* 13 (May 2013).

¹⁵ See, e.g., Michael A. Livermore & Jason A. Schwarz, *Unbalanced Retrospective Regulatory Review*, PENN PROGRAM ON REGULATION REG BLOG, July 12, 2012, <http://www.regblog.org/2012/07/12-livermore-schwartz-review.html>; Rena Steinzor, *The Real “Tsunami” in Federal Regulatory Policy*, CPR BLOG, May 22, 2014, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=2480725C-9CC8-717D-E8DE6C4C4A5FF6EB>.

¹⁶ Aldy, *supra* note 1, at 47–48; Coglianese, *supra* note 14, at 66A.

¹⁷ Aldy, *supra* note 1, at 47–48.

process for appropriate rules. This culture of evaluation and improvement is already part of many government programs, but not yet of most regulatory programs.

This recommendation aims to help agencies create such a culture of retrospective review. To promote robust retrospective analysis, agency officials must see it as critical to advancing their missions. To obtain this “buy-in,” these officials must have a framework for performing the required analysis and possess adequate resources for conducting the necessary reviews (such that doing so is wholly integrated into agencies’ other responsibilities rather than serving to displace those existing responsibilities). Given the costs of performing robust retrospective analysis, it is critical that agencies have adequate resources such that conducting retrospective review does not detract from other aspects of their regulatory missions. Thus, the recommendation sets forth considerations relevant both to identifying regulations that are strong candidates for review and for conducting retrospective analysis.¹⁸ In addition, the recommendation encourages agencies to integrate retrospective analysis into their policymaking framework more generally, urging them not only to reevaluate existing regulations but also to design new regulations with an eye towards later reexamination and to consider the cumulative regulatory burden. In doing so, agencies should identify data collection needs and consider other regulatory drafting strategies that can help them later determine whether the regulation achieved its purpose.¹⁹ Finally, the recommendation identifies opportunities for conserving agency

¹⁸ In 2011, the Conference recommended that agencies periodically review regulations that have incorporated by reference material published elsewhere in order to ensure that they are updated as appropriate and contain complete and accurate access information. Administrative Conference of the United States, Recommendation 2011-5, *Incorporation by Reference*, ¶¶ 6–10, 77 FR 2257, 2259 (Jan. 17, 2012).

¹⁹ Some scholars propose the use of experimental methods and data-driven evaluation techniques in order to identify the actual impacts caused by regulations and determine whether they are achieving their intended outcomes. John DiNardo & David S. Lee, *Program Evaluation & Research Designs*, in 4A

resources by taking advantage of internal and external sources of information and expertise. In many instances, stakeholders may be able to furnish information to which agency officials otherwise lack access.²⁰ In other cases, overseas regulators may have confronted similar regulatory problems, and incorporating these approaches would have the double benefit of avoiding duplication of effort and providing opportunities for eliminating unnecessary regulatory divergences.²¹ Further, the information generated from retrospective review has the potential to conserve resources during future regulatory development of similar rules by informing ex ante regulatory analysis, which in turn improves the quality of new regulations.²²

Though the recommendation identifies certain common principles and opportunities for promoting robust retrospective analysis, it accepts the fact that each agency must tailor its regulatory lookback procedures to its statutory mandates, the nature of its regulatory mission, its

HANDBOOK OF LABOR ECONOMICS 463–536 (2011); *see also generally* JOSEPH S. WHOLEY, HARRY P. HATRY, & KATHRYN E. NEWCOMER, HANDBOOK OF PRACTICAL PROGRAM EVALUATION (3d ed. 2010). This might include, among other things, taking the opportunity of pilot projects and regulatory phase-ins to test different regulatory approaches. Some scholars also propose the use of alternative regulatory mechanisms and other innovative approaches designed to lessen regulatory burdens while ensuring appropriate levels of regulatory protection.

²⁰ Aldy, *supra* note 1, at 25–26, 70–71; *see generally* Bull, *supra* note 14 (proposing a system whereby private entities would use petitions for rulemaking to urge agencies to adopt less burdensome alternatives to existing regulations while preserving existing levels of regulatory protection). Agencies should nevertheless recognize that private and non-governmental entities’ interests may not align with public interests and that established firms may actually defend regulations that create barriers to entry for newer, smaller competitors. SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 18–19 (2d ed. 2012) (describing the so-called “bootleggers and Baptists” phenomenon, whereby businesses that benefit from market interventions may make common cause with civil society groups that advocate such policies for other reasons).

²¹ Exec. Order No. 13,609, § 1, 77 FR 26413, 26413 (May 4, 2012); Administrative Conference of the United States, Recommendation 2011-6, *International Regulatory Cooperation*, ¶ 4, 77 FR 2259, 2260 (Jan. 17, 2012).

²² PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 57 (2014).

competing priorities, and its current budgetary resources. In short, retrospective review is not a “one-size-fits-all” enterprise. In addition, as optimal regulatory approaches may evolve over time, so too may retrospective review procedures. Therefore, the recommendation avoids an overly rigid framework. Rather, it identifies considerations and best practices that, over time, should help foster a regulatory approach that integrates retrospective analysis as a critical element of agency decisionmaking and that accounts for the uncertainty inherent in regulatory policymaking at all stages of the process. The overall goal is to move away from a model of retrospective analysis as an episodic, top-down reporting and compliance obligation to one where agencies internalize a culture of retrospective review as part of their general regulatory mission.

Recommendation

Value of Retrospective Review

1. The Conference endorses the objectives of Executive Orders 13,563, 13,579, and 13,610 with respect to retrospective review of existing regulations. Agencies should work with the Office of Management and Budget (OMB), as appropriate, to develop retrospective review into a robust feature of the regulatory system.

Integrating Retrospective Review into New Regulations

2. When formulating new regulations, agencies should, where appropriate, given available resources, priorities, authorizing statutes, nature of the regulation, and impact of the regulation, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule’s preamble. The rigor of analysis should be

tailored to the rule being reviewed. The agencies should consider including the following in the framework:

- (a) The methodology by which they intend to evaluate the efficacy of and the impacts caused by the regulation, including data-driven experimental or quasi-experimental designs where appropriate, taking into account the burdens to the public in supplying relevant data to agencies.
- (b) A clear statement of the rule's intended regulatory results with some measurable outcome(s) and a plan for gathering the data needed to measure the desired outcome(s). To the extent feasible, objectives should be outcome-based rather than output-based. Objectives may include measures of both benefits and costs (or cost-effectiveness), as appropriate.
- (c) Key assumptions underlying any regulatory impact analysis being performed on the regulation. This should include a description of the level of uncertainty associated with projected regulatory costs and benefits, consistent with OMB Circular A-4.
- (d) A target time frame or frequency with which they plan to reassess the proposed regulation.
- (e) A discussion of how the public and other governmental agencies (federal, state, tribal, and local) will be involved in the review.

Agencies that have systematic review plans available on the internet that set forth the process and a schedule for their review of existing rules may address the recommendations in subparagraphs (a) - (e), as appropriate, by reference to their plans.

3. When reviewing new regulations, the Office of Information and Regulatory Affairs (OIRA) should facilitate planning for subsequent retrospective review to the extent appropriate. Agencies should consider including a section in the preamble of their proposed and final rules that accounts separately for paperwork burdens associated with the collection of data to facilitate retrospective review and should note that data gaps can impede subsequent retrospective review (though the paperwork burden would still be included in the total cost of the instant rule).

4. Where it is legally permissible and appropriate, agencies should consider designing their regulations in ways that allow alternative approaches in the rule that could help the agency in a subsequent review of the rule to determine whether there are more effective approaches to implementing its regulatory objective. For example, agencies could allow for experimentation, innovation, competition, and experiential learning (calling upon the insights of internal statistical offices, as well as policy and program evaluation offices, in order to design plans for reassessing regulations, to the extent they have such resources). As recommended by OMB Circular A-4, agencies should consider allowing states and localities greater flexibility to tailor regulatory programs to their specific needs and circumstances and, in so doing, to serve as a natural experiment to be evaluated by subsequent retrospective review. Statutes that authorize shared responsibility among different levels of government may be amenable to such flexibility.

Prioritizing Regulations for Retrospective Analysis

5. In light of resource constraints and competing priorities, agencies should adopt and publicize a framework for prioritizing rules for retrospective analysis. Agency frameworks should be transparent and enable the public to understand why the agency prioritized certain rules for review in light of the articulated selection criteria. Though considerations will vary

from agency to agency and program to program, the following factors can help identify strong candidates for retrospective review that could inform regulatory revision:

- (a) Likelihood of improving attainment of statutory objective;
- (b) Likelihood of increasing net benefits and magnitude of those potential benefits;
- (c) Uncertainty about the accuracy of initial estimates of regulatory costs and benefits;
- (d) Changes in the statutory framework under which the regulation was issued;
- (e) Cumulative regulatory burden created by the regulation at issue and related regulations (including those issued by other agencies);
- (f) Changes in underlying market or economic conditions, technological advances, evolving social norms, public risk tolerance, and/or standards that have been incorporated by reference;
- (g) Internal agency administrative burden associated with the regulation;
- (h) Comments, petitions, complaints, or suggestions received from stakeholder groups and members of the public;
- (i) Differences between U.S. regulatory approaches and those of key international trading partners;
- (j) Complexity of the rule (as demonstrated by poor compliance rates, amount of guidance issued, remands from the courts, or other factors); and

- (k) Different treatment of similarly situated persons or entities (including both regulated parties and regulatory beneficiaries).

To the extent applicable, agencies should consider both the initial estimates of regulatory costs and benefits, and any additional evidence suggesting that those estimates are no longer accurate.

6. Though agencies will likely focus their retrospective analysis resources primarily on important regulations as identified by the foregoing factors, they should also take advantage of simple opportunities to improve regulations when the changes are relatively minor (e.g., allowing electronic filing of forms in lieu of traditional paper filing).

Performing Retrospective Analysis

7. When conducting retrospective analysis of existing regulations, agencies should consider whether the regulations are accomplishing their intended purpose or whether they might, to the extent permitted by law, be modified, strengthened, or eliminated in order to achieve statutory goals more faithfully, minimize compliance burdens on regulated entities, or more effectively confer regulatory benefits. The level of rigor of retrospective analysis will depend on a variety of factors and should be tailored to the circumstances. As appropriate and to the extent resources allow, agencies should employ statistical tools to identify the impacts caused by regulations, including their efficacy, benefits, and costs and should also consider the various factors articulated in recommendation 5 in determining how regulations might be modified to achieve their intended purpose more effectively.

8. Agencies should consider assigning the primary responsibility for conducting retrospective review to a set of officials other than those responsible for producing or enforcing

the regulation, if adequate resources are available. Reviewing officials should coordinate and collaborate with rule producers and enforcers.

9. Agencies should periodically evaluate the results of their retrospective reviews and determine whether they are identifying common problems with the effectiveness of their rule development and drafting practices that should be addressed.

Inter-Agency Coordination

10. Agencies should coordinate their retrospective reviews with other agencies that have issued related regulations in order to promote a coherent regulatory scheme that maximizes net benefits. Agencies and OMB should also consider creating a high-level organization responsible for promoting coordination between agencies in their retrospective review efforts (or assigning this function to an existing entity, such as the Regulatory Working Group).

11. In conducting retrospective review, agencies should consider regulations adopted by key trading partners and examine the possibility of either harmonizing regulatory approaches or recognizing foreign regulations as equivalent to their U.S. counterparts when doing so would advance the agency mission or remove an unnecessary regulatory difference without undermining that mission.

12. OIRA should consider formulating a guidance document that highlights any considerations common to agency retrospective analyses generally.

Promoting Outside Input

13. Regulated parties, non-governmental organizations, academics, and other outside entities or individuals may possess valuable information concerning both the impact of individual regulations and the cumulative impact of a body of regulations issued by multiple agencies to which individual agencies might not otherwise have access. Agencies should leverage outside expertise both in reassessing existing regulations and devising retrospective review plans for new regulations. In so doing, agencies should be mindful of the potential applicability of the Paperwork Reduction Act, and agencies and OMB should utilize flexibilities within the Act and OMB's implementing regulations (e.g., a streamlined comment period for collections associated with proposed rules) where permissible and appropriate. Agencies should also consider using social media, as appropriate, to learn about actual experience under the relevant regulation(s).

14. Agencies should disclose relevant data concerning their retrospective analyses of existing regulations on "regulations.gov," their Open Government webpages, and/or other publicly available websites. In so doing, to the extent appropriate, agencies should organize the data in ways that allow private parties to recreate the agency's work and to run additional analyses concerning existing rules' effectiveness. Agencies should encourage private parties to submit information and analyses and should integrate relevant information into their retrospective reviews.

Ensuring Adequate Resources

15. Agencies and OMB should consider agencies' retrospective review needs and activities when developing and evaluating agency budget requests. To the extent that agencies

require additional resources to conduct appropriately searching retrospective reviews, Congress should fund agencies as necessary.

Administrative Conference Recommendation 2014-6

Petitions for Rulemaking

Adopted December 5, 2014

Under the Administrative Procedure Act (APA), federal agencies are required to “give . . . interested person[s] the right to petition for the issuance, amendment, or repeal of a rule.”¹ The statute generally does not establish procedures agencies must observe in connection with petitions for rulemaking. It does, however, require agencies to respond to petitions for rulemaking “within a reasonable time,”² and to give petitioners “prompt notice” when a petition is denied in whole or in part, along with “a brief statement of the grounds for denial.”³ Beyond the APA’s general right to petition, Congress has occasionally granted more specific rights to petition under individual statutes, such as the Clean Air Act.⁴ Although agency denials of

¹ 5 U.S.C. § 553(e). This provision ensures that the people’s right to petition the government, which is protected by the First Amendment, *see* U.S. Const. amend. I, is also an important part of the rulemaking process. Although certain matters are exempt from the requirements of 5 U.S.C. 553, *see* U.S.C. 553(a), the Administrative Conference has previously taken the position that public participation in agency rulemaking on these matters, including through petitions for rulemaking, may be beneficial. *See* Administrative Conference of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 FR 46988 n.2 (Dec. 30, 1986).

² 5 U.S.C. 555(b).

³ 5 U.S.C. 555(e). The APA exempts agencies from the requirement of providing a “brief statement of the grounds for denial” when it is “affirming a prior denial or when the denial is self-explanatory.” *Id.*

⁴ *See, e.g.*, 42 U.S.C. 7671a(c)(3), 7671e(b), 7671j(e). Statutory petition provisions such as these may impose additional procedural requirements beyond those contained in the APA or identify substantive requirements that must be met before the agency can act.

petitions for rulemaking are subject to judicial review, the “courts have properly limited their scope of review in this context.”⁵

The Administrative Conference has previously recommended basic procedures to help agencies meet the APA’s minimum requirements and respond promptly to petitions for rulemaking.⁶ An Administrative Conference study of agency procedures and practices with respect to petitions for rulemaking has revealed, however, that further improvement is warranted.⁷ Nearly thirty years after the Administrative Conference first examined this issue, few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking.⁸ How petitions are received and treated varies across—and even

⁵ Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 FR 43,109 (Aug. 18, 1995). In general, courts do not require agencies to respond to every individual issue raised in a petition (let alone every issue raised in comments on petitions), so long as the administrative record demonstrates a reasoned response on the whole. *Cf. Nader v. FAA*, 440 F.2d 292, 294 (D.C. Cir. 1971); *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 104 n.21 (D.D.C. 2012). In *Connecticut v. Daley*, a district court raised the “question whether the [agency] must respond in detail to each and every comment received, or if [it] is only required to respond to what was raised in the actual petition for rule making.” 53 F. Supp. 2d 147, 170 (D. Conn. 1999). Although the court did not resolve that question, it noted that 5 U.S.C. § 555(e) requires agencies to briefly explain only why a “petition” was denied, impliedly not extending the required response to comments on petitions (citing *WWHT, Inc. v. FCC*, 656 F.2d 807, 813 (D.C. Cir. 1981) (emphasis added by D. Conn.)).

⁶ See Administrative Conference of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 FR 46988 (Dec. 30, 1986); see also Administrative Conference of the United States, Recommendation 95-3, ¶ VI(B) (“Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time.”).

⁷ See Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, Final Report to the Administrative Conference of the United States (Nov. 5, 2014), available at <http://www.acus.gov/report/petitions-rulemaking-final-report>.

⁸ See *id.* at 46; see also William V. Luneburg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS 493, 510 (1986) (observing that, with respect to agency procedures governing petitions for rulemaking, “[s]ome have none; others largely mirror, without

within—agencies. In some cases, agency personnel do not even know what their agency’s procedures are for handling petitions. Although the petitioning process can be a tool for enhancing public engagement in rulemaking, in practice most petitions for rulemaking are filed by sophisticated stakeholders and not by other interested members of the public. Some petitioners report that it can be difficult to learn the status of a previously filed petition, agency communication throughout the process can be poor, response times can be slow, and agency explanations for denials can be minimal and predominantly non-substantive.⁹

Although the right to petition can be important and valuable, making the process work well requires a difficult balancing of competing interests. On the one hand, the APA grants to the public the right to petition for rulemaking and requires agencies to provide a decision on the merits within a reasonable period of time. To be sure, agencies often receive suggestions for new regulations and feedback regarding needed changes to existing regulations via informal channels, such as through meetings with regulated parties and stakeholders or interactions during inspections or other enforcement activities. Petitions provide another important avenue for such input—one that in theory is more broadly accessible to interested persons who do not regularly interact with agency personnel. Nonetheless, petitions for rulemaking may adversely affect an agency’s ability to control its agenda and make considered, holistic judgments about regulatory priorities, particularly in the face of limited resources. And thoughtfully evaluating petitions and defending denials on judicial review may consume already scarce agency resources.

elaborating much on, statutory procedures; and still others have adopted rather detailed requirements . . . going considerably beyond the procedures expressly mandated by statute”).

⁹ See Schwartz & Revesz, *supra* note 7, at 40-64.

Greater transparency, improved communication between agencies and petitioners, and more prompt and explanatory petition responses may help to balance these competing interests.¹⁰ Agencies should educate the public about how petitions fit with the other (often more informal) mechanisms through which agencies receive feedback from regulated and other interested persons on regulatory priorities and related issues. Petitioners and agency personnel alike would also benefit from greater clarity as to how petitions can be filed, what information should be included to make a petition more useful and easier for the agency to evaluate,¹¹ whether or when public comment will be invited, and how long it may take to resolve a petition. Better internal coordination may reduce the possibility that a petition will be forgotten or will not reach the appropriate agency office for decision. Encouraging communication between prospective or current petitioners and the agency can provide an efficient way to improve the quality of petitions and the overall experience for all participants in the process. Readily available information on the status of pending petitions and more prompt disposition of petitions may improve understanding between the agency and the public and reduce the likelihood of litigation.

This recommendation seeks to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy. Building upon the Administrative Conference's previous work, it provides more guidance to agencies, identifying best practices that may make the petitioning process more useful for agencies, petitioners, and other members of the public. Moreover, electronic rulemaking dockets and agency websites provide new opportunities for agencies to achieve these goals in a cost-effective

¹⁰ *See generally id.*

¹¹ This could be similar to the information some agencies provide on their websites to help the public understand the characteristics of an effective rulemaking comment.

manner.¹² This recommendation should help agencies reevaluate and revise their existing policies and procedures to make the petitioning process work better for all.

Recommendation

Agency Policy on Petitions for Rulemaking

1. Each agency that has rulemaking authority should have procedures, embodied in a written and publicly available policy statement or procedural rule, explaining how the agency receives, processes, and responds to petitions for rulemaking filed under the Administrative Procedure Act.

(a) If an agency also has more specific regulations that govern petitions filed under other statutes or that apply to specific sub-agencies, the agency's procedures should cross-reference those regulations.

(b) If an agency rarely receives petitions for rulemaking, its procedures may simply designate an agency contact who can provide guidance to prospective petitioners.

(c) The procedures should explain how petitions relate to the various other options available to members of the public for informally engaging with agency personnel on the need to issue, amend, or repeal rules.

2. The procedures should indicate how the agency will coordinate the consideration of petitions with other processes and activities used to determine agency priorities, such as the Unified Agenda and retrospective review of existing rules.

¹² See, e.g., Administrative Conference of the United States, Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 FR 2257, 2264-65 (Jan. 17, 2012).

3. The procedures should explain what type of data, argumentation, and other information make a petition more useful and easier for the agency to evaluate. The procedures should also identify any information that is statutorily required for the agency to act on a petition.

Receiving and Processing Petitions

4. Agencies should accept the electronic submission of petitions, via email or through Regulations.gov (such as by maintaining an open docket for the submission of petitions for rulemaking) or their existing online docketing system.

5. Agencies should designate a particular person or office to receive and distribute all petitions for rulemaking to ensure that each petition for rulemaking is expeditiously directed to the appropriate agency personnel for consideration and disposition. This designation may be especially important for agencies that have multiple regions or offices.

Communicating with Petitioners

6. Agencies should encourage and facilitate communication between agency personnel and petitioners, both prior to submission and while petitions are pending disposition. For example, agencies should consider asking petitioners to clarify requests or submit additional information that will make the petition easier to evaluate. Agencies should consider also alerting petitioners to recent developments that may warrant a petition's modification or withdrawal.

7. Agencies should provide a way for petitioners and other interested persons to learn the status of previously filed petitions. Agencies should:

- (a) Use online dockets to allow the public to monitor the status of petitions; and

- (b) Designate a single point of contact authorized to provide information about the status of petitions.

Soliciting Public Comment on Petitions

8. Agencies should consider inviting public comment on petitions for rulemaking by either:

- (a) Soliciting public comment on all petitions for rulemaking; or
- (b) Deciding, on a case-by-case basis, whether to solicit public comment on petitions for rulemaking. Inviting public comment may be particularly appropriate when:
 - (i) A petition addresses a question of policy or of general interest; or
 - (ii) Evaluating a petition's merits may require the agency to consider information the agency does not have, or the agency believes that the information provided by the petitioner may be in dispute or is incomplete.

9. If an agency anticipates that it will consider but not respond to all comments on a petition for rulemaking, it should say so in its request for comments.

Responding to Petitions for Rulemaking

10. Agencies should docket each decision with the petition to which it responds.

11. If an agency denies a petition, where feasible and appropriate, it should provide a reasoned explanation beyond a brief statement of the grounds for denial. Agencies should not reflexively cite only resource constraints or competing priorities.

12. Agencies must respond to petitions within a reasonable time. To that end, each agency should:

- (a) Adopt in its procedures an expectation that it will respond to all petitions for rulemaking within a stated period (e.g., within 6, 12, or 18 months of submission); and/or
- (b) Establish and make publicly available an individual target timeline for responding to that petition.

13. If an agency is unable to respond to a petition by the target timeline it has established, it should provide the petitioner and the public with a brief explanation for the delay, along with a reasonable new target timeline. The explanation may include a request for new or additional information if the agency believes it would benefit from that or the facts or circumstances relevant to the petition may have changed while the petition was pending.

Providing Information on Petitions for Rulemaking

14. Agencies should maintain a summary log or report listing all petitions, the date each was received, and the date of disposition or target timeline for disposition (where necessary, this should include the brief explanation for any delay in disposition and the reasonable new target timeline). The log or report should be described in the agency's procedures (*see* paragraph 1) and made publicly available on the agency's website. It should be updated at least semi-annually. Agencies should create and maintain the summary log or report beginning on the date of this recommendation and should also include or otherwise publicly provide, to the extent feasible, historic information about petitions for rulemaking that have been resolved.

15. The Office of Information and Regulatory Affairs should request that agencies include in their annual regulatory plan information on petitions for rulemaking that have been resolved during that year or are still pending.

Using Electronic Tools to Improve the Petitioning Process

16. Agencies should use available online platforms, including their websites and Regulations.gov, to implement this recommendation as effectively and efficiently as possible, including by informing the public about the petitioning process, facilitating the submission of petitions, inviting public comment, providing status updates, improving the accessibility of agency decisions on petitions, and annually providing information on petitions for rulemaking that have been resolved or are still pending.

Administrative Conference Recommendation 2014-7

Best Practices for Using Video Teleconferencing for Hearings

Adopted December 5, 2014

Agencies conduct thousands of adjudicative hearings every day, but the format of the hearing, whether face-to-face or by video, has not been analyzed in any systematic way. Some agencies have provided hearings by video teleconferencing technology (VTC) for decades and have robust VTC programs. These programs strive consistently to provide the best hearing experience, even as technology changes. Other agencies have been reluctant to depart from traditional formats. Some are skeptical that hearings may be conducted as effectively via VTC

as they are in person. Others are uncertain about how to implement VTC hearings. But all could benefit from an impartial look at the available technologies for conducting adjudications.

The varied agency experiences and concerns reflect the tension between long-established values and technological innovations. Adjudicative hearings must be conducted in a manner consistent with due process and the core values of fairness, efficiency, and participant satisfaction reflected in cases like *Goldberg v. Kelly*¹ and *Mathews v. Eldridge*.² At the same time, agencies that have explored the use of technological alternatives have achieved benefits in the effective use of decisionmaking resources and reduction in travel expenses.³ Upholding core values and making the best use of technology—both in hearings and related proceedings such as initial appearances, pre-hearing conferences, and meetings—is the challenge this recommendation seeks to meet.⁴

In 2011, the Administrative Conference adopted Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*.⁵ Recommendation 2011-4 had two main purposes. First, it identified factors for agencies—especially agencies with high

¹ 397 U.S. 254 (1970).

² 424 U.S. 319 (1976); *see also infra* note 9.

³ In fact, agencies have been directed to increase efficiency through their use of technology. *See* Exec. Order No. 13,589, 76 FR 70861 (Nov. 15, 2011) (directing agencies to “devise strategic alternatives to Government travel, including . . . technological alternatives, such as . . . video conferencing” and to “assess current device inventories and usage, and establish controls, to ensure that they are not paying for unused or underutilized information technology (IT) equipment, installed software, or services”).

⁴ While this recommendation refers primarily to adjudication, it may apply to other proceedings as well.

⁵ *See* 76 FR 48795 (Aug. 9, 2011), *available at* <http://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>.

volume caseloads—to consider as they determined whether to conduct VTC hearings.⁶ Second, it offered several best practices agencies should employ when using VTC hearings.⁷ The recommendation concluded by encouraging agencies that have decided to conduct VTC hearings to “[c]onsult the staff of the Administrative Conference of the United States . . . for best practices, guidance, advice, and the possibilities for shared resources and collaboration.”⁸

This recommendation builds on Recommendation 2011-4 by providing practical guidance regarding how best to conduct VTC hearings. The Administrative Conference is committed to the principles of fairness, efficiency, and participant satisfaction in the conduct of hearings. When VTC is used, it should be used in a manner that promotes these principles, which form the cornerstones of adjudicative legitimacy.⁹ The Conference recognizes that VTC is not suitable for every kind of hearing, but believes greater familiarity with existing agency practices and awareness of the improvements in technology will encourage broader use of such

⁶ Such factors include whether (1) the agency’s statute permits use of VTC; (2) the agency’s proceedings are conducive to VTC; (3) VTC may be used without affecting case outcomes; (4) the agency’s budget allows adequate investment in VTC; (5) the use of VTC would result in cost savings; (6) the use of VTC would result in a reduction in wait time; (7) the participants (e.g., judges, parties, representatives, witnesses) would find VTC beneficial; (8) the agencies’ facilities and administration would be able to support VTC hearings; and (9) the use of VTC would not adversely affect either representation or communication. *See id.*

⁷ Best practices include (1) offering VTC on a voluntary basis; (2) ensuring that the use of VTC is outcome-neutral and meets the needs of users; (3) soliciting feedback from participants; (4) implementing VTC via a pilot program and evaluating that program before establishing it more broadly; and (5) providing structured training and ensuring available IT support staff. *Id.*

⁸ *Id.*

⁹ *See* EF Int’l Language Schools, Inc., 2014 N.L.R.B. 708 (2014) (admin. law judge recommended decision) (finding “that the safeguards utilized at hearing [to take witness testimony by VTC] amply ensured that due process was not denied to” the party).

technology.¹⁰ This recommendation aims to ensure that, when agencies choose to offer VTC hearings, they are able to provide a participant experience that meets or even exceeds the in-person hearing experience.¹¹

Recommendation

Foundational Factors

1. Agencies should consider the various physical and logistical characteristics of their hearings, including the layout of the hearing room(s) and the number and location(s) of hearing participants (i.e., judge, parties, representatives, and witnesses) and other attendees, in order to determine the kind of video conferencing (VTC) system to use. These general principles should guide agencies' consideration:

- (a) Video screens should be large enough to ensure adequate viewing of all participants;
- (b) Camera images should replicate the in-person hearing experience, including participants' ability to make eye contact with other participants and see the entire hearing room(s). If interpreters are involved, they should be able to see and hear the participants clearly;

¹⁰ For greater detail about how to implement VTC hearings, see Center for Legal and Court Technology, *Best Practices for Using Video for Hearings and Related Proceedings* (Nov. 6, 2014), available at <http://www.acus.gov/report/best-practices-using-video-teleconferencing-final-report>.

¹¹ This recommendation does not take a position on when parties should be entitled to, or may request, an in-person hearing.

(c) Microphones should be provided for each participant who will be speaking during the hearing;

(d) The speaker system should be sufficient to allow all participants to hear the person speaking. If a participant has a hearing impairment, a system that complies with the Americans with Disabilities Act and other applicable laws should be used to connect to the VTC system;

(e) The record should be adequately captured, either by ensuring that the audio system connects with a recording system, or by ensuring that the court reporter can clearly see and hear the proceeding;

(f) Sufficient bandwidth should be provided so that the video image and sound are clear and uninterrupted; and

(g) Each piece of equipment should be installed, mounted, and secured so that it is protected and does not create a hazardous environment for participants or staff.

2. Agencies should ensure that the hearing room conditions allow participants to see, be seen by, and hear other participants, and to see written documents and screens, as well as, or better than, if all of the participants were together in person. These general principles should guide agencies' consideration in creating the best hearing room conditions:

(a) Lighting should be placed in a way to create well-dispersed, horizontal, ambient light throughout all rooms used in the proceeding;

(b) Noise transference should be kept to a minimum by:

- (i) Locating hearing rooms in the inner area of the office and away from any noise or vibration-producing elements (e.g., elevator shafts, mechanical rooms, plumbing, and high-traffic corridors); and
 - (ii) Installing solid doors with door sweeps, walls that run from floor to ceiling, and sound absorption panels on the walls.
- (c) Room décor, including colors and finishes of walls and furniture, should allow for the camera(s) to easily capture the image(s).

3. Agencies should retain technical staff to support VTC operators and maintain equipment.

Training

4. Agencies should provide training for agency staff, especially judges, who will operate the VTC equipment during the hearing. Agencies should also provide a reference chart or “cheat sheet” to keep with each VTC system that provides basic system operation directions that operators can easily reference, as well as a phone number (or other rapid contact information) for reaching technical staff.

5. Agencies should provide advanced training for technical support staff to ensure they are equipped to maintain the VTC equipment and provide support to operators, including during a proceeding if a problem arises.

Financial Considerations

6. The capabilities and costs of VTC systems vary widely. Before purchasing or updating their VTC systems, agencies should first consider their hearing needs (e.g., the needs of hearings conducted by judges at their desks with a single party will be different than the needs of hearings conducted in full-sized federal courtrooms with multiple participants and attendees present at several locations) both now and in the future (e.g., the bandwidth needed today may be different than the bandwidth needed tomorrow).

7. Once agencies have identified their hearing needs, they should consider the costs and benefits of implementing, maintaining, and updating their VTC systems to suit those needs.

(a) Costs to be considered include those associated with purchasing, installing, and maintaining the VTC system; creating and maintaining the conditions necessary to allow participants to see and hear each other clearly; and providing training to staff.

(b) Benefits to be considered include better access to justice by increased accessibility to hearings, more efficient use of time for judges and staff, reduced travel costs and delays, and backlog reductions.

Procedural Practices

8. Judges should consider how to establish and maintain control of the hearing room, such as by wearing robes as a symbol of authority, appearing on the screen before the other participants enter the room(s), requiring parties and representatives to use hand signals to indicate that they would like to speak, and reminding representatives that they are officers of the court.

9. Agencies should install VTC equipment so that judges can control the camera at the other location(s), if possible.

10. Agency staff should ensure that the hearing will run as smoothly as possible by removing any obstacles blocking lines-of-sight between the camera and participants and testing the audio on a regular basis.

Fairness and Satisfaction

11. Agencies should periodically assess their VTC hearings program to ensure that the use of VTC produces outcomes that are comparable to those achieved during in-person hearings.

12. Agencies should maintain open lines of communication with representatives in order to receive feedback about the use of VTC. Post-hearing surveys or other appropriate methods should be used to collect information about the experience and satisfaction of participants.

Collaboration Among Agencies

13. Agencies should consider sharing VTC facilities and expertise with each other in order to reduce costs and increase efficiency, while maintaining a fair and satisfying hearing experience.

14. Agencies that conduct hearings should work with the General Services Administration (GSA) in procuring and planning facilities that will best accommodate the needs of VTC hearings.

Development of a Video Teleconferencing Hearings Handbook

15. The Office of the Chairman of the Administrative Conference of the United States should create a handbook on the use of VTC in hearings and related proceedings that will be updated from time to time as technology changes. The handbook should reflect consultation with GSA and other agencies with VTC hearings expertise. It should be made publicly accessible online to agencies, and include specific guidance regarding equipment, conditions, training that meets industry standards, and methods for collecting feedback from participants.

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