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Council on Governmental Relations Presentation

COGR Meeting : Thursday March 05, 2015

Chairman Paul R. Verkuil

Administrative Conference of the United States



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

President Barack Obama
July 8, 2010



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Statutory Purpose of ACUS

- (1) to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest;
- (2) to promote more effective public participation and efficiency in the rulemaking process;
- (3) to reduce unnecessary litigation in the regulatory process;
- (4) to improve the use of science in the regulatory process; and
- (5) to improve the effectiveness of laws applicable to the regulatory process.

--Administrative Conference Act, 5 U.S.C. § 591
(as amended in 2004 by P.L. 108-401 to add (2)•(5))



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ACUS at 50

- *In 2014, the Administrative Conference celebrated its 50th Anniversary*

1964 - 2014

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ACUS at 50

1964 • 2014

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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 ABA Resolution 300, in accordance with ACUS Recommendation 2012-6, urges Congress to repeal and replace an outdated law that may unfairly bar certain court claims on procedural grounds.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. 56th 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 federairegister.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 2006, 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.



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ACUS Overview

The Conference is an independent agency in the executive branch.

The Conference has 101 voting members, which include the following:

- Chairman: Appointed by the President and confirmed by the Senate
- Council: Includes 10 members, split between the public and private sectors, who are appointed by the President
- Government Members: Includes 50 high-ranking agency officials at cabinet departments, independent regulatory commissions, and other federal agencies (over 200 agencies and sub-agencies are represented)
- Public Members: Includes 40 individuals from the private sector, such as universities, law firms, and non-profit organizations
- Public members are politically balanced

The Conference also includes Liaison Representatives, who represent additional agencies and professional associations, such as the ABA, and Senior Fellows, among them three Supreme Court Justices who previously served as Conference Members.



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ACUS Research Process

- ACUS 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.



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Recent ACUS Recommendations

- [2014-1](#) Resolving FOIA Disputes Through Targeted ADR Strategies
- [2014-2](#) Government in the Sunshine Act
- [2014-3](#) Guidance in the Rulemaking Process
- [2014-4](#) "Ex Parte" Communications in Informal Rulemaking
- **[2014-5](#) Retrospective Review of Agency Rules**
- [2014-6](#) Petitions for Rulemaking
- [2014-7](#) Best Practices for Using Video Teleconferencing for Hearings
- [2013-1](#) Improving Consistency in Social Security Disability Adjudications
- [2013-2](#) Benefit-Cost Analysis
- [2013-3](#) Science in the Administrative Process
- [2013-4](#) Administrative Record in Informal Rulemaking
- [2013-5](#) Social Media in Rulemaking
- [2013-6](#) Remand Without Vacatur
- [2013-7](#) GPRA Modernization Act of 2010: Examining Constraints To, and Providing Tools For, Cross-Agency Collaboration
- **[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



Understanding the Issues: Higher Education Regulation

- Universities are subject to federal oversight of their research, and they must comply with a number of federal regulatory and reporting requirements.
- Regulating university research is necessary to ensure that federal funds are being used appropriately; however, compliance and reporting can add significant costs and burdens to the regulated parties.
- Nongovernmental organizations such as the Association of American Universities and the Council on Governmental Relations have expressed concerns about increasingly burdensome federal requirements faced by universities and the costly impact of such burdens.
- A Senate appointed Task Force on Federal Regulation of Higher Education issued a February 2015 report reviewing the many regulations universities must comply with and making recommendations to streamline and simplify regulatory policies and practices.



ACUS Work Relevant to Higher Education Regulation Reform

- The Administrative Conference's ongoing work is relevant to higher education regulation reform in 3 distinct ways:
 - **Retrospective Review**
 - **Interagency Coordination**
 - **Negotiated Rulemaking**



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Retrospective Review: Flaws in Existing System

- (1) **Low Priority**: Agencies' missions are generally prospective in focus, and OIRA focuses almost exclusively on analyzing new regulations.
- (2) **Resource Constraints**: Agencies lack sufficient resources to conduct robust retrospective reviews (especially in a tight budgetary climate).
- (3) **Tunnel Vision**: Agencies may not necessarily know how their regulations interact with those of sister agencies.
- (4) **Regulatory Inertia**: Interest groups will defend those rules from which they derive benefits.



ACUS Work: Retrospective Review

- **“If nobody weeds the garden, it gets to be a big mess”**

– Sen. Lamar Alexander

Wash. Post, Feb. 24, 2015

- In 2014, the Administrative Conference began a project on Retrospective Review, examining how agencies reassess and change existing regulations.
- The Assembly adopted [Recommendation 2014-5](#) on Retrospective Review at its December 2014 Plenary Session.



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ACUS Recommendation 2014-5 on Retrospective Review

- The ACUS Recommendation seeks to overcome these issues. Specifically, it promotes the following reforms:
 - Culture of Retrospective Review**: Recommendations seek to make retrospective review part of day-to-day planning at agencies.
 - Planning for Future Retrospective Review**: New regulations should contain a plan for later retrospective review (as EU laws currently do).
 - Regulatory Experimentation**: Agencies should, to the extent possible, design regulations to facilitate testing alternative approaches.
 - Regulatory Triage**: Agencies should focus their retrospective review efforts on regulations that are especially burdensome or outdated.
 - Inter-agency Coordination**: OIRA should facilitate coordination among agencies to ensure they consider the cumulative burden of their separate regulations.
 - Leveraging Outside Input**: Agencies should identify information that stakeholders might provide that would facilitate reassessment of rules.



Interagency Coordination : Why It Matters

- Many government agency activities are characterized by fragmented and overlapping delegations of power to administrative agencies.
- Congress often assigns more than one agency the same or similar functions or divides responsibilities among multiple agencies, giving each responsibility for part of a larger whole.
- Instances of overlap and fragmentation are common. They can be found throughout the administrative state, in contexts ranging from border security to food safety to financial regulation to higher education regulation.
- Overlap and fragmentation can produce redundancy, inefficiency, and unnecessary or burdensome costs.



ACUS Work: Interagency Coordination

- In 2012, the Administrative Conference began a project on Interagency Coordination, examining how to address the problem of overlapping and fragmented procedures associated with assigning multiple agencies similar or related functions, or dividing authority among agencies.
- The Assembly adopted [Recommendation 2012-5](#) on Improving Coordination of Related Agency Responsibilities at its June 2012 Plenary Session.



ACUS Work: Negotiated Rulemaking

- ACUS issued Recommendation 82-4 and Recommendation 85-5 on Procedures for Negotiating Proposed Regulations.
 - These two recommendations set forth the criteria for choosing proceedings suitable for negotiation and proposed procedures that agencies should follow when conducting negotiated rulemaking.
- ACUS work in this area led to enactment of the Negotiated Rulemaking Act in 1990.
- The Conference published a Negotiated Rulemaking Sourcebook, a comprehensive guide to help agencies and the public, in 1990 and 1995 (2nd edition).
- ACUS issued a 1995 report to Congress on *Agency Implementation of the Negotiated Rulemaking Act*.



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ACUS Work: Negotiated Rulemaking (cont.)

- ACUS is planning a workshop examining the use of Negotiated Rulemaking at agencies to be held in Spring 2015.
- ACUS is currently considering a research project on *Collaborative Rulemaking: Reg Neg Revisited*.
- In an appendix to the 2015 Report by a Senate appointed Task Force on Federal Regulation of Higher Education, ACUS Special Counsel (and former Research Director) Professor Jeff Lubbers, contributed a white paper on *Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education*.



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ACUS Work: Interagency Coordination and Retrospective Review in Higher Education Regulation

- ACUS staff is currently reviewing pre-existing research on higher education regulatory reform, including the 2015 Senate appointed Task Force report.
- ACUS staff is monitoring relevant legislation on the subject, such as the Research and Development Efficiency Act, H.R. 5056, 113th Cong. (2014), which passed the House and was referred to the Senate in July 2014.
- ACUS is integrating higher education regulation into its on-going projects on interagency coordination and retrospective review.
- ACUS will also work with agency officials and nongovernmental organizations such as AAU and COGR to organize a roundtable discussion to bring together key players, identify the key issues, and discuss possible solutions.



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Thank You!

- If you are interested in more information on the ACUS Interagency Coordination and Retrospective Review in Higher Education Regulation Project, please contact Attorney Advisor Funmi Olorunnipa (olorunnipa@acus.gov).
- To learn more about ACUS, see recommendations, consultant reports, and other documents associated with ACUS projects, visit www.acus.gov.

Questions?



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