



## **Recommendation 88-9**

### **Presidential Review of Agency Rulemaking**

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(Adopted December 8, 1988)

Federal regulation has grown in both scope and complexity in recent decades. Among its wide variety of national goals are: Ensuring competitive markets, spurring economic growth, checking inflation, reducing unemployment, protecting national security, assuring equal opportunity, increasing social security, protecting the environment, ensuring safety, and improving energy sufficiency. Policies implementing these goals compete for scarce resources and sometimes conflict with one another. Thus, a central task of modern democratic government is to make wise choices among the courses of action that pursue one or more of these goals.

While Congress establishes the goals, it seldom legislates the details of every action taken in pursuit of these goals or makes the balancing choices that these decisions require. It has assigned this task to the regulatory agencies. Each regulatory agency, however, usually is given a set of primary goals, without specific regard for whether proposed actions in pursuit of those goals might conflict with the pursuit of other goals by other agencies. An effective mechanism is needed to coordinate agency decisions with the judgments of officials having a broader perspective, such as the President and Congress.<sup>1</sup>

Some form of presidential review of agency rulemaking has been the practice since at least 1971. Like its predecessors, the current program is established by presidential executive order.<sup>2</sup> The responsible officer (the Administrator, Office of Information and Regulatory Affairs, in the Office of Management and Budget) is appointed by the President, subject to Senate confirmation.

The Conference believes that there is sufficient experience under these executive orders to warrant continuing such review with certain guidelines as to its implementation. The

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<sup>1</sup> The need for greater coordination of federal regulation was recognized in 1979 by the American Bar Association's Commission on Law and the Economy.

<sup>2</sup> Exec. Orders Nos. 11,821, 11,949 (President Ford), Exec. Order 12,044 (President Carter), Exec. Orders Nos. 12,291, 12,498 (President Reagan). For a thorough analysis of the experience under the executive orders, see National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies* (Jan. 1987).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recommendation below sets forth standards that should be followed whether review is governed by executive order or by a general statute. It also assumes that the President has the authority to enunciate principles to guide agency rulemaking, even though the programmatic responsibilities are by statute delegated to agencies. In addressing the presidential review process, the Conference recognizes that some of the issues are analogous to congressional involvement in agency rulemaking, but it does not address this latter subject at this time.

### **Recommendation**

The Conference recommends that the following principles should guide any program of presidential review<sup>3</sup> of agency rulemaking.

#### *1. General Applicability*

Presidential review should apply generally to federal rulemaking. Such review can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities. However, not all agency rules or categories of rules may be appropriate for such presidential review. Exempt categories include formal rulemaking, ratemaking, and rulemaking that resolve conflicting private claims to a valuable privilege.

#### *2. Applicability to Independent Regulatory Agencies*

As a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies.

#### *3. Timeliness of Review*

The process of presidential review of rulemaking, including agency participation, should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to applicable administrative, executive, judicial and statutory deadlines.

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<sup>3</sup> Presidential review, as used in this Recommendation, refers to a program of systematic executive oversight and dialogue that involves coordinating agency actions where conflicts exist, and in all cases probing the agency's fact and policy judgments, with the purpose of ensuring that the agency considers factors of importance to the President's policies to the extent permitted by law. Such review does not displace responsibilities placed in the agency by law nor authorize the use of factors not otherwise permitted by law. Other review of an ad hoc nature by the President (or the President's delegates) of agency rulemaking pursuant to the President's constitutional authority is not within the scope of this Recommendation.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### 4. *Public Disclosure of Documents*

(a) *Proposed or Final Rules.* Where an agency submits a draft proposed or final rule for presidential review, the agency submission and any additional formal analyses<sup>4</sup> submitted for presidential review should be made available to the public when the proposed or final rule to which they pertain is published. If a decision is made to terminate a rulemaking after a notice of proposed rulemaking has been published, agency submissions to the office responsible for presidential review and any additional formal analyses submitted for review should be made available to the public when the decision to terminate is announced.

(b) *Review of Agendas or Other Summaries or Schedules of Agency Rulemaking Actions.* Where an agency submits agendas or other summaries or schedules of pending or planned rulemakings for presidential review, the agency submission and any supporting documents submitted for presidential review should be made available to the public once the agenda or other summary or schedule is made known to the public in an official publication.

### 5. *Executive Branch Communications Relating to Presidential Review of Rulemaking*

(a) *Policy Guidance.* An agency engaged in informal rulemaking should be free to receive guidance concerning that rulemaking at any time from the President, members of the Executive Office of the President, and other members of the Executive Branch, without having a duty to place these communications in the public file of the rulemaking unless otherwise required by law. However, official written policy guidance from the officer responsible for presidential review of rulemaking should be included in the public file of the rulemaking once a notice of proposed rulemaking or final rule to which it pertains is issued or when the rulemaking is terminated without issuance of a final rule.<sup>5</sup>

(b) *Factual Information.* When an agency engaged in rulemaking receives a communication from the office responsible for presidential review which contains factual information relating

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<sup>4</sup> See ACUS Recommendation 85-2, Agency Procedures for Performing Regulatory Analysis of Rules, 1 CFR 305.85-2.

<sup>5</sup> The Conference's position on the public availability of official written policy guidance stated in this Recommendation modifies its earlier position in Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 1 CFR 305.80-6, ¶1.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

to the substance of the rulemaking that is not already in the public file, the agency should promptly place the communication (or if oral, a summary) in the public file of the rulemaking.<sup>6</sup>

(c) *Communications Transmitting Outside Comments.* When an agency receives a communication from the office responsible for presidential review which transmits any factual submissions or the views or positions of persons outside the government, the agency should promptly place the communication (or if oral, a summary) in the public file of the rulemaking.<sup>7</sup>

### 6. *Responsibility of the Reviewing Office Regarding Outside Comments*

The officer responsible for presidential review of rulemaking should not allow the process of review to serve as a conduit to the rulemaking agency for unrecorded communications from persons outside the government. To guard against such occurrence, the responsible officer should take appropriate steps—and the following should be considered:

(a) Identifying any communications to the rulemaking agency that transmit the views or positions of persons outside the government;

(b) Promptly transmitting written communications received by the office responsible for presidential review from persons outside the government relating to the substance of a proposed agency rule to the rulemaking agency for inclusion in the public file of the rulemaking;

(c) Maintaining a list identifying the time and general topic of oral communications that pertain to the substance of an agency rule under review with persons outside the government and making such list available to the rulemaking agency for inclusion in the public file; and

(d) Inviting a representative of the rulemaking agency to attend any meetings between the reviewing office and persons outside the government which pertain to any agency rulemaking under review by that office. The agency representative attending any such meeting should prepare an appropriate summary of the discussion and promptly place it in the public file of the rulemaking.

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<sup>6</sup> Agencies also should place factual information received from other sources in the public file of the rulemaking, see Recommendation 80-6, ¶12.

<sup>7</sup> This reaffirms the Conference's position on the handling of comments by persons outside the government stated in Recommendation 80-6, ¶12.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### *7. Not Judicially Reviewable*

The presidential review process should be designed to improve the internal management of the federal government and should not create any substantive or procedural rights enforceable by judicial review.

#### **Citations:**

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