



**Homeland
Security**

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VIA ELECTRONIC MAIL

Administrative Conference of the United States
Committee on Collaborative Governance

Chair Nisbet and Committee Members:

Thank you for the opportunity to review and comment on the draft recommendation, *Improving Agency Coordination in Shared Regulatory Space*. We agree with the preamble of the draft recommendation that by “improving efficiency, effectiveness, and accountability, [agency] coordination can help overcome potential dysfunctions created by shared regulatory space.” We also appreciate that the Conference is dedicated to improving the administrative process and federal agency procedures.

At the Department of Homeland Security (DHS)—which Congress created to enhance coordination throughout the homeland security enterprise—we fully recognize and acknowledge the essential role that interagency coordination plays. Indeed, the importance of robust interagency coordination is not the issue. Rather, the key challenge is to identify the most efficient and effective measures to achieve such coordination and then to find ways to implement those measures. To that end, we believe the way for the Administrative Conference of the United States (ACUS) to truly contribute to this area is to identify concrete, specific steps that agencies can take to further the universally acknowledged goal of improving agency coordination.

With this background in mind, DHS offers the following brief comments on the draft recommendation. We provide comment on the related draft report in a separate letter.

1. **Draft Recommendation 1 (“Developing Agency Coordination Policies”)** should **apply to regulatory issues only, and should include, or refer agencies to, model coordination policies**. As the draft report and recommendation demonstrate, literally hundreds of federal entities share jurisdictional space with their sibling agencies in one way or another. The report also shows that although many of these entities share, for

instance, one or more common missions, areas of expertise, or priorities, and may have similar organizational structures and business practices, this is not always the case. Interagency coordination therefore requires agency employees to overcome a great variety of complex challenges, ranging in type from the logistical to the legal, and from the bureaucratic to the social-psychological.

Our commitment to overcoming these challenges compels us to support the development of guidance explaining when and how to coordinate across agency lines. At the same time, however, we are hesitant to support a one-size-fits-all solution to a problem that we and our colleagues confront so frequently, at every level of government, and in contexts ranging from the regulatory to the legal to the operational. We are particularly concerned that the brief discussion of agency coordination policies in the draft report and recommendation would leave agencies with little to no information on how to develop policies that provide adequate and uniform guidance that simultaneously allow alternative modes of communication and negotiation.¹

However, we recognize, in both the draft report and the Department's experience, many examples of successful coordination in the regulatory context. Accordingly, if the Committee wishes to move forward with Recommendation 1, we strongly urge the Committee to (1) narrow the Recommendation's scope to regulatory issues only², perhaps as a starting point, and (2) develop or identify model coordination policies and provisions that are appropriate to multiple levels of government and multiple types of coordination challenges (e.g., regulatory, legal, operational). In the absence of such guidance, agencies are likely to expend significant resources developing inconsistent policies that might have negative consequences on a significant part of our daily work. Without well-researched and considered guidance, agencies are unlikely to promulgate "[c]ompatible policies [that] help to simplify and sustain interagency coordination over time."³

2. **Draft Recommendations 2 ("Improving Joint Rulemaking") and 3 ("Improving Interagency Agreements") are too broad to provide useful, actionable guidance for agencies, and we recommend they be removed and used instead for the basis of a future Conference project.** Recommendations 2 and 3 suggests that agency coordination policies and procedures should include best practices for joint rulemaking,

¹ See, e.g., Draft Report at 68 (providing general guidelines for the issues that an agency coordination policy should address, but not (1) identifying any coordination policies currently in place, (2) describing potential substantive provisions of such policies, or (3) assessing the potential effect of such policies on current (perhaps successful) practices).

² Perhaps this was the intention of the report's drafters, as most of the draft report's discussion deals with regulatory coordination, and the drafters framed their discussion about the need for coordination in terms of "shared regulatory space."

³ Draft Report at 68.

considerations for when to use joint rulemaking, and best practices for agency agreements such as memoranda of understanding. Such best practices may be difficult for a single agency to gather from its own experiences or comprehensively investigate. The Conference is in the best position to comprehensively gather and/or investigate such best practices and considerations because the Conference includes many government members and liaison representatives that collectively could provide their expertise and experiences for assembly and analysis by the Conference. A Conference project producing such guidance for agencies would directly assist agencies in improving the administrative process and agencies' own procedures. We note that although the underlying draft report offers numerous examples of joint rulemaking and developing memoranda of agreement, it does not offer a straightforward account of best practices for either tool.⁴

3. **Draft Recommendation 5 (“Tracking Total Resources”), which promotes increased use of metrics and ex post evaluations, may be premature in light of a forthcoming Conference project, *Review of Regulatory Analysis Requirements*.** This forthcoming project “will examine whether there is any duplication in the required analyses for rulemaking that could be eliminated in a way that would produce costs savings and whether or not the requirements could otherwise be rationalized or streamlined while continuing to serve their valuable goals.”⁵ The use of additional metrics or ex post evaluations in the agency coordination context would benefit from the outcome and recommendations of this forthcoming conference project, which will hopefully provide recommendations on how to maximize the use of metrics and ex post evaluations in the regulatory context, and perhaps provide specific guidance on best practices for the use of such metrics and evaluations. We note that the draft report underlying the subject recommendations did not provide examples of good uses of metrics and evaluations in the agency coordination context or support for how these methods could help improve the current state of agency coordination. The forthcoming project may be able to provide such examples and support, and better guidance for useful and actionable recommendations for agencies.

4. **The draft preamble’s discussion of consolidation is unsupported by the draft report.** In our related comment letter to the draft report, we object to the draft report’s treatment of consolidation as a coordination tool. We incorporate those objections by reference here. We also note that the draft report does not provide any empirical support for the

⁴ See, e.g., Draft Report at 68 (suggesting three practices for agencies to include in their joint rulemaking policies), 70 (providing a brief discussion of MOUs, and arguing that agencies are often not positioned to learn best practices from other agencies in this context). We also note that footnote 23 to Draft Recommendation 3 incorrectly refers to an “outdated” border security MOU referenced in the draft report. Please see our discussion of this assertion in our separate letter on the draft report.

⁵ ACUS Committee on Regulation, *Review of Regulatory Analysis Requirements*, <http://www.acus.gov/research/the-conference-current-projects/review-of-regulatory-analysis-requirements/>.

proposition that consolidation “runs a greater risk of resulting in a net loss of expertise and accountability or simply relocating interagency conflicts without meaningfully addressing them.”⁶ We believe that neither consolidation, nor the coordination tools outlined in the draft report and recommendation, are sufficient on their own to protect agency expertise and foster accountability. We therefore recommend that the Committee strike this reference.

Thank you again for the opportunity to comment on these important issues. We look forward to working together on this in the future.

Sincerely,

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⁶ Draft Recommendation at 2.