

To: Assembly of the Administrative Conference
From: Patti Goldman (Public Member)
Re: Comments on the Proposed International Regulatory Cooperation Recommendation
Date: December 2, 2011

During the Committee deliberations on an earlier version of this proposal, we discussed how far the Committee felt the recommendation should go. The original language recognized that an agency could pursue an option mandated by its authorizing statute without regard to different international approaches or a desire to promote international trade or cooperation. The Committee discussion focused on the situation in which an agency has the authority to regulate to protect, for example, public health, safety or the environment, but can, within that authority, choose from an array of options. The question was posed whether the Committee intended this proposal to suggest that an agency should, for the sake of promoting trade or international cooperation, pursue an option that would afford the public weaker protections from health, safety or environmental threats. An agreement seemed to emerge in the discussion that an agency should not weaken health, safety or environmental protections for the sake of promoting international cooperation, trade, or other economic goals. The Committee then edited the draft by inserting qualifying language to make it clear that agencies should pursue international regulatory cooperation only “when appropriate to further the agencies’ regulatory missions and, where consistent with advancing that mission” and when “that cooperation would further their mission.” See, e.g., Recommendation 1, page 5, lines 111-112; Recommendation 3, page 6, line 125. We softened other mandates in order to make it clear that the proposal would not elevate trade promotion goals over the agencies’ primary missions and delegated authority to take actions to promote non-economic goals like public health and environmental protection.

I recommend one additional edit in keeping with the revisions made by the drafters. The change would be in the penultimate sentence of the third paragraph of the preamble where there is a suggestion that removing nontariff barriers is a goal. Page 2, line 42. In the Committee discussion, there seemed to an emerging sense that the recommendation should endorse removing nontariff barriers only where the barrier does not promote a legitimate objective. In keeping with this principle, I suggest that, after “nontariff barriers to trade and exports” on page 2, line 41, the following be added: “that do not further the agency’s regulatory mission and promote legitimate goals.”

I would also like to offer an amendment to delete Recommendation 10. The 1991 ACUS recommendation contained a similar provision. Compared to 1991, there are more trade promotion coordinating bodies throughout the federal agencies, including in the Executive Office of the President. No assessment has been presented the Committee of where those coordinating bodies have fallen short of meeting any assumed needs for coordination or of what type of role a new body would play. Moreover, the operations and impact of some coordinating bodies in the Executive Office of the President that review regulatory measures for their economic impacts have spurred much controversy. It would be prudent to have a full assessment of what bodies currently exist, the roles they play, and what types of unmet coordinating functions would warrant establishment of a new body. For this reason, I propose that Recommendation 10 be deleted.