



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Guide for Members

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This Guide provides information for members of the Administrative Conference of the United States. The Guide should assist members in understanding:

- The Administrative Conference, its mission, structure and activities
- The roles and responsibilities of members
- The plenary session of the Administrative Conference

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I. About the Administrative Conference

The Administrative Conference of the United States is an agency of the United States government. Its mission is to study administrative procedure and recommend improvements—in other words, to make the government work better. The Conference accomplishes this mission by conducting research, formulating recommendations, spreading agency best practices, promoting information exchange, and sponsoring events and publications.

The Administrative Conference is an independent agency within the Executive Branch. It is not part of any other government agency.

The Administrative Conference is made up of members drawn from other federal government agencies and from the general public. Thus, as President Obama stated on July 8, 2010, the Conference is “a public-private partnership designed to make government work better.”

Congress created the Administrative Conference by statute in 1964. Over the next 30 years, the Conference issued approximately 200 recommendations, most of which were implemented in whole or in part. The Conference lost its funding in 1995 and ceased operations, but it was revived in 2010 and is now back in business.

The Conference’s research and recommendations cover both general administrative law topics that cut across many federal agencies and specific ways in which particular agencies can improve particular procedures. The Conference has inspired federal legislation, changes to federal agency rules and practices, and changes to presidential practices. It has also influenced judicial decisions. A list of some of the Conference’s notable recommendations, achievements, and activities, which can help members better understand the nature of the Conference’s business, is provided in Part IV of this Guide.

A. Structure of the Administrative Conference

The Administrative Conference formally consists of its membership. There are several categories of members, and the Conference also has a small, full-time staff.

1. The Chairman

The Chairman of the Administrative Conference is appointed by the President by and with the advice and consent of the Senate. The Chairman is the only full-time member of the Conference. The Chairman serves a five-year term.

The Chairman provides overall management and direction for the Conference. He controls the Conference's day-to-day operations. He directs the activities of the Conference's full-time staff. He chairs the plenary meetings of the full Conference membership and the meetings of the Council of the Administrative Conference.

2. The Council

The Council of the Administrative Conference functions as the Conference's Board of Directors. In addition to the Chairman, the Council consists of ten members appointed by the President for three-year terms. Up to five of the Council members are current, senior officials at other government agencies, and the others are drawn from outside the federal government. One of the Council members is designated by the President as the Vice Chairman.

The powers and duties of the Council include:

- Determining the time, place, and agenda for plenary sessions of the Conference
- Approving topics for study by the Conference
- Approving the selection of public members of the Conference
- Approving the Conference's budget proposals
- Receiving the reports and recommendations of Conference committees and transmitting them to the full Conference membership.

3. The Assembly

The Assembly is the name given to the full Conference membership, which consists of the Chairman, the Council, and the other members. Meetings of the Assembly are called "plenary sessions" of the Administrative Conference. In addition to the Chairman and the Council, the members of the Assembly include:

a) Voting Members

There are two categories of voting Conference members other than the Chairman and the Council.

(1) Government Members

The government members of the Conference are current, senior officials at other government agencies. The Conference's organic act, 5 U.S.C. §§ 591 et seq., designates certain agencies to have government members of the Conference, and it authorizes the President and the Council to designate other such agencies.

The government members are appointed by their agencies and serve no fixed term. They participate in Conference activities in addition to their full-time work at their own agencies.

(2) Public Members

The public members of the Conference are drawn from the general public. They are typically leading authorities in administrative law, public administration, or other areas of interest to the Conference. Most public members are lawyers, but some are experts in other disciplines. The public members come primarily from academia, law firms, and public interest organizations.

Public members are appointed by the Chairman with the approval of the Council. They serve two-year terms (except that, of the initial public members appointed in 2010, half will be randomly selected to serve an initial one-year term, so that the terms can be staggered). Public members may be reappointed and may serve a total of three consecutive two-year terms.

b) Non-Voting Members

There are three additional categories of participants who have all the privileges of Conference members, except that they may not vote in plenary sessions of the Conference, and may vote in committee meetings only at the discretion of the committee chair. These additional participants include:

(1) Senior Fellows

Senior fellows have previously served as Chairman of the Conference or have served for six or more years as government or public members of, or liaison representatives to, the Conference. The senior fellows are appointed by the Chairman with the approval of the Council. Senior fellows serve for 2-year terms and may be reappointed.

(2) Liaison Representatives

The Chairman, with the approval of the Council, may designate federal agencies or other organizations that do not have voting members of the Conference to have a liaison representative. Agencies or organizations so designated appoint their liaison representative. Liaison representatives serve no fixed term.

(3) Special Counsels

Special Counsels are appointed by the Chairman, with the approval of the Council. They advise and assist the membership in the areas of their special expertise. They serve for 2-year terms and may be reappointed.

4. The Staff

The Conference has a small, full-time, career staff who serve under the Chairman. The staff conducts research, supports the work of Conference committees, organizes Conference events, works to implement Conference recommendations, provides information to Conference members and to the public, and otherwise carries forward the work of the Conference. Senior members of

the staff include the Executive Director, who oversees operations and strategy for the Conference; the General Counsel, who ensures the Conference's compliance with legal requirements; and the Director of Research and Policy, who oversees the Conference's research program and the development of its policy recommendations.

B. Conference Committees

The Conference's six standing committees are the most important component of the process that leads to the adoption of Conference recommendations, because it is at the committee level that researchers' reports are carefully analyzed and proposed recommendations are formulated. Although Conference researchers often provide the initial draft of proposed recommendations, the committees ultimately develop the recommendations that are considered by the Assembly. The committees typically meet several times each year, depending on the stage that their assigned projects have reached. Each Conference member is asked to participate actively in one of the committees.

Each committee has an area of interest and activity, which ordinarily guides the assignment of particular projects among the committees. However, these areas are defined broadly, to allow the Chairman flexibility in assigning projects. The Chairman may also, with Council approval, appoint special committees as needed.

The **Committee on Adjudication** examines procedural issues relating to how agencies handle cases that come before them, including issues arising in programs that handle very large caseloads.

The **Committee on Administration and Management** considers procedures that agencies use to operate assistance, procurement, service delivery and other administrative programs. It may also address issues of agency organization and management.

The **Committee on Collaborative Governance** is concerned with techniques that agencies use to implement their programs. This area includes activities that build on the Conference's extensive history of developing consensual processes such as negotiated rulemaking and alternative means of dispute resolution, as well as appropriate use of new communications media in federal programs.

The **Committee on Judicial Review** addresses statutory and case law concerning court review of administrative actions. It also may examine those aspects of administrative procedure that affect the effectiveness or availability of judicial review.

The **Committee on Regulation** studies procedures applicable to the control of private economic activity, including ways to reduce costs and increase effectiveness of agency programs.

The **Committee on Rulemaking** considers the procedures that agencies use to promulgate, modify or rescind regulations.

C. Activities of the Administrative Conference

The Conference conducts several different kinds of activities.

1. Research and Recommendations

One of the chief activities of the Administrative Conference is making formal recommendations. The Conference conducts an extensive research program under the direction of the Chairman and the Council, and the results of the research are embodied in Conference recommendations for improving administrative procedure. Depending on the topic, recommendations may be directed to Congress, the President, agencies, or the courts. All Conference recommendations must be approved by vote of the full Conference membership meeting in plenary session.

2. Implementation and Advisory Services

The Conference's recommendations are advisory only, as the Conference does not have the power to compel anyone to follow its recommendations. The Conference therefore undertakes activities designed to promote the implementation of its recommendations, such as testifying before Congress, providing comments in agency rulemakings, informing agencies of its recommendations, and developing and providing training programs for agencies and others interested in implementing its recommendations.

3. Events and Publications

The Conference sponsors events on topics of interest to administrative agencies. These events promote information exchange and the spread of agency best practices. The Conference has also published numerous guides on administrative law topics such as rulemaking, alternative dispute resolution, negotiated rulemaking, and general administrative law statutes.

4. Foreign Assistance

The Conference is authorized by statute to provide assistance in improving the administrative procedure of foreign countries. Such assistance must be provided on a reimbursable basis in partnership with, and with the concurrence of, the Department of State, the Agency for International Development, or the United States Information Agency.

D. How the Conference Makes Recommendations

The Conference activity in which the membership is most involved is the making of formal recommendations. Members participate in formulating recommendations through their work on Conference committees; they also vote on recommendations at the Conference's plenary sessions. While the path to such a vote is not always uniform, and recommendations might reach the membership in different ways, the typical process by which the Conference makes a recommendation is as follows:

1. Gather Ideas

The Conference gathers project ideas from many sources: from Congress, from other federal agencies, from public interest or other organizations, from academics and other experts, and from members of the public. The Conference staff also develops project ideas.

2. Select Ideas

The Chairman, the Director of Research and Policy, and other Conference staff select the best project ideas received.

3. Council Approval of Projects

For projects that will require funding for study by outside consultants, the Chairman seeks approval from the Council of the Conference.

4. Picking a Researcher

Having identified a project topic, the Conference typically engages an expert consultant to do research and prepare a report and proposed recommendations on the topic. Some research projects are done by the Conference staff. In other cases, the Conference might use a report already prepared by a respected outside researcher or organization.

5. Committee Consideration

The researcher's report is considered by a committee made up of members of the Administrative Conference. The committee debates the report and formulates a recommendation on the subject of the report, often using the researcher's proposed recommendations as a starting point.

Depending on the topic, the recommendation may be directed to Congress (recommending new legislation); it may recommend that agencies adopt new rules; it may recommend that agencies change their practices or procedures without the need for rulemaking; it may recommend an Executive Order or a change in presidential practices, or it may be directed to the courts. In all cases, Conference recommendations are limited to procedural matters, including agency organization or management, and do not address substantive issues.

6. Council Consideration of Recommendations

The committee's recommendation is received and considered by the Council of the Conference. The Council may add its own views and transmits the recommendation to the full Conference membership.

7. Consideration by the Assembly

Twice a year, the full membership of the Administrative Conference meets in plenary session and considers and debates the recommendations received from Conference committees. If approved by vote of the full membership, a recommendation becomes an official recommendation of the Administrative Conference.

8. Implementation

The Administrative Conference has no power to compel anyone to follow its recommendations. Accordingly, it relies on the power of persuasion to convince those to whom its recommendations are directed to adopt the recommendations. Members and staff of the Conference participate in attempting to get the Conference's recommendations implemented. Although the Conference has no formal power, historically it has had considerable influence and most of its recommendations have been adopted in whole or in part.

II. The Role and Responsibilities of Members

A. The Role of Members

With the exception of the Chairman, all members of the Administrative Conference serve the Conference in a part-time capacity. Most members have full-time jobs at other government agencies or at private firms or organizations. The bylaws of the Administrative Conference provide that “[e]ach member is expected to participate in all respects according to his or her own views and not necessarily as a representative of any agency or other group or organization, public or private.” Thus, while members’ actions on behalf of the Conference will be informed by the expertise that they have developed in their other work, members should, in their work for the Conference, ultimately be guided by their understanding of the public good.

B. Responsibilities of Members

The chief responsibilities of members of the Administrative Conference are serving on a Conference committee and attending the plenary sessions of the Conference.

1. Serving on a Conference Committee

Each member of the Conference (except Council members) is assigned to a Conference committee. As described above, the committees play an important role in the development of Conference recommendations. In their service on committees, members should apply their expertise to the recommendations that their committees are considering and work to improve the recommendations to the greatest possible extent.

2. Attending the Plenary Sessions

Twice a year (typically in June and December), the full Conference membership meets in plenary session. Members will receive information about the business of each plenary session in advance of the meeting. Members should review the items that will be considered at the plenary session and give these items appropriate thought so that they can be prepared for the consideration of the items at the plenary session.

3. Serving Conscientiously; Use of Alternates

The bylaws of the Conference state that “[e]ach member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and

committee meetings regularly.” Thus, personal participation in Conference activities is established as the expected norm. However, the Conference also recognizes that members will sometimes have unavoidable conflicts that prevent them from attending Conference activities.

The use of suitably informed alternates in meetings of Conference committees, while not encouraged, is permitted where circumstances justify. In such circumstances, alternates may, with the approval of a committee, attend a committee meeting and participate in committee deliberations. Alternates are not, however, entitled to vote in committee.

The use of alternates is not permitted at the plenary sessions of the Conference. Alternates may not vote at the plenary session and will not have the privilege of debate. However, inasmuch as the plenary sessions are open to the public, anyone, including someone representing an absent member, may attend.

III. The Plenary Session

The full Conference membership (the “Assembly”) meets in plenary session at times and places determined by the Council. Plenary sessions typically occur twice a year, in June and December, in Washington, DC. There are several important details to understand about the conduct of the plenary session.

A. Public Access

The Assembly of the Conference is an “advisory committee” subject to the Federal Advisory Committee Act. Accordingly, the meetings of the Assembly are open to the public and documents provided to the Assembly are available to the public. In addition to permitting members of the public to attend the meeting in person, the Conference plans to stream the plenary session live over the Internet, to have video of the plenary session available for viewing on the Internet after the session is over, and to post relevant documents on the Conference website. Conference members speaking at the plenary session should bear in mind that their remarks will be publicly available.

B. Meeting Procedure

The plenary session may be likened to the proceedings of a legislative body. Although it operates with less formality than a House of Congress, the session is conducted in accordance with Robert’s Rules of Order to the extent appropriate. An item requiring a vote of the membership is introduced by a motion. Members may debate the motion and may offer amendments. Debate concludes with a vote of the membership.

At the start of the plenary session, a “Resolution Governing the Order of Business” will be proposed. The proposed resolution, if adopted, will control the time allotted for agenda items and for individual remarks, and will provide that priority be given to amendments and substitutes submitted in writing to the Conference’s General Counsel prior to the meeting. Therefore, members desiring to propose amendments to items requiring a vote of the membership should

consider submitting those amendments to the General Counsel in writing prior to the meeting. The General Counsel can be reached at SMcGibbon@acus.gov.

C. Voting Rights

The Chairman, the Council members, the government members, and the public members of the Conference may vote at the plenary session. Senior fellows, liaison representatives, and special counsels have the privilege of debate but may not vote.

The use of alternates is not permitted at the plenary sessions. Alternates may not vote in the plenary session and do not have the privilege of debate.

D. Separate Statements

A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record and have it set forth with the official publication of the recommendation. This procedure is rarely invoked, and a member's failure to file a separate statement does not imply that the member endorses the Conference's recommendation.

A member wishing to file a separate statement must notify the Executive Director of the Conference not later than the last day of the plenary session at which the recommendation is adopted, although a member may, without giving such notification, join in another member's separate statement for which timely notification was given. A member must file the separate statement within 10 days after the close of the session (but the Chairman may extend this deadline for good cause).

E. Reception

A reception is traditionally held on the evening of the first day of the plenary session. The reception is a good opportunity to meet your fellow members of the Conference informally. The reception is traditionally put on by the members, for the members (and their guests), without the use of taxpayer funds. That is why members have been asked to pay to attend the reception.

IV. Notable Conference Achievements

The past achievements of the Administrative Conference may provide members with the best understanding of the nature of the Conference's business. In the Conference's prior incarnation, its projects and activities resulted in a number of significant recommendations which were implemented by Congress, the President, and federal agencies, and which led to increased efficiency, fairness, openness and flexibility in federal agency procedures.

A. Cross-Cutting Recommendations

The Conference has issued numerous recommendations on general administrative law topics that cut across all or many federal agencies. Among the Conference's most notable achievements were Recommendations 82-4 and 85-5 on negotiated rulemaking and Recommendation 86-3 on alternative dispute resolution (ADR), which directly led to the 1990 enactment of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act. The Conference also played a key role in providing assistance to federal agencies in the implementation of these acts, and, as a result, the use of ADR by federal agencies has saved the government and taxpayers millions of dollars in litigation costs.

Other notable, cross-cutting recommendations by the Conference include:

- Recommendation 68-7, that Congress eliminate the jurisdictional amount-in-controversy requirement for suits seeking judicial review of agency action. Congress implemented this recommendation in 1976.
- Recommendation 69-1, that Congress amend the Administrative Procedure Act to waive sovereign immunity for suits seeking other than monetary relief. Congress implemented this recommendation in 1976, thereby greatly simplifying the procedures for seeking judicial review of agency action.
- Recommendation 69-8, that agencies submit proposed rules to notice and comment notwithstanding the APA's exception for rules pertaining to public property, loans, grants, benefits, or contracts. Agencies have followed this recommendation.
- Recommendation 72-6, that Congress add civil penalties to the enforcement provisions for many agency programs and that such penalty statutes provide for procedures by which alleged violators would have their formal hearing at the agency with judicial review in the courts. Congress subsequently implemented these recommendations in more than 200 statutes. As a result, the enforcement of important health, safety and environmental laws improved and millions of additional dollars were collected for the Federal Treasury.
- Recommendation 80-5, that Congress eliminate the "race to the courthouse" in appeals from agency action by providing for random venue selection in cases in which multiple petitions for review were filed in different circuits. Congress implemented this recommendation in 1988.
- Recommendation 88-9, which provided principles and guidance for presidential review of agency rulemaking. This recommendation was influential in validating this presidential practice and removing controversy surrounding the Office of Management and Budget's review of rulemaking. The Clinton Administration adopted this recommendation and it has been used by subsequent administrations.
- Recommendation 92-2, which laid out principles and guidance for the use of agency policy statements. The recommendation focused on ensuring that before an agency promulgates substantive policies which bind affected persons, it provides appropriate

notice and opportunity for comment on such policies. This recommendation later became the basis for the Office of Management and Budget's Good Guidance Bulletin, which was issued to agencies in 2007.

B. Specific Agency Recommendations

In addition, the Conference has also studied individual federal agencies and made recommendations for improvements to their procedures. Such recommendations have included:

- Recommendations 75-5 to 75-10. The Conference conducted a comprehensive study of procedures of the Internal Revenue Service ("IRS") and produced 72 recommendations, which covered such matters as the confidentiality of taxpayer information, IRS settlement procedures, the handling of citizen complaints, selection of returns for audit, and the availability of information to the public. The IRS adopted 58 of the Conference's proposals entirely and five partially.
- Recommendation 78-2. The Conference recommended a number of improvements to the Social Security Administration ("SSA") disability adjudication system, including enhancing procedures for determining Social Security disability claims, experimenting with face-to-face procedures in state-level determination of disability claims, encouraging the increased development of evidentiary hearing records in cases, and augmenting the organization and function of the Appeals Council. Through the years, SSA has adopted many of the Conference's recommendations.
- Recommendation 87-2. The Conference recommended consolidating the adjudication of disputes involving whistleblower protection statutes for private sector health and safety workers in the Department of Labor. Congress adopted this recommendation and the Conference helped congressional staff draft the procedural portions of various acts which protect private sector health and safety whistleblowers.

C. Events and Publications

In addition to making recommendations, the Conference has also conducted other influential activities which aided federal agencies in improving their procedures. For example, the Conference:

- Issued a number of sourcebooks and guides to assist agencies in their administrative processes, which have been cited in numerous judicial opinions, law review articles, and other legal publications.
- Held a colloquy series which facilitated scholarly debate on critical administrative law issues, and which often led to the publication of law review articles on a wide range of administrative law topics.
- Provided a number of low-cost training programs for independent agency commissioners and agency general counsels on a variety of administrative law issues.

- Fulfilled statutory responsibilities given by Congress, including studying various aspects of important legislation such as the Government in the Sunshine Act, the Equal Access to Justice Act and the Magnuson-Moss Warranty Act of 1974. In each instance, the Conference reported its findings back to Congress.