



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Improving Coordination of Related Agency Responsibilities

Committee on Collaborative Governance

Proposed Recommendation | June 14-15, 2012

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).

1 Many areas of government agency activities are characterized by fragmented and
2 overlapping delegations of power to administrative agencies. Congress often assigns more than
3 one agency the same or similar functions or divides responsibilities among multiple agencies,
4 giving each responsibility for part of a larger whole. Instances of overlap and fragmentation are
5 common. They can be found throughout the administrative state, in virtually every sphere of
6 social and economic regulation, in contexts ranging from border security to food safety to
7 financial regulation.¹ The following recommendation suggests some reforms aimed at
8 improving coordination of agency policymaking, including joint rulemaking, interagency
9 agreements, and agency consultation provisions.

¹ As the Comptroller General of the United States has noted, “[v]irtually all of the results that the federal government strives to achieve require the concerted and coordinated efforts of two or more agencies.” U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-00-95, MANAGING FOR RESULTS: USING GPRA TO HELP CONGRESSIONAL DECISIONMAKING AND STRENGTHEN OVERSIGHT 19 (2000), available at <http://www.gao.gov/assets/110/108330.pdf> (statement of David M. Walker, Comptroller General of the United States, before the Subcomm. on Rules & Org. of the H. Comm. on Rules). GAO is now required by statute to identify federal programs, agencies, offices, and initiatives, either within departments or government-wide, which have duplicative goals or activities, and to report annually (Pub. L. No. 111-139, § 21, 124 Stat. 29 (2010), 31 U.S.C. § 712 Note). See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-318SP, Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue (2011), at <http://www.gao.gov/new.items/d11318sp.pdf>

10 The study underlying this recommendation² provides a comprehensive picture of
11 overlapping and fragmented delegations, and makes some practical suggestions for addressing
12 the coordination problems they create.³ Because characterizing such delegations as redundant
13 might suggest literal duplication, the study adopts the more nuanced concept of “shared
14 regulatory space.” This term includes not only literally duplicative or overlapping
15 responsibilities, but also instances where cumulative statutory delegations create a situation in
16 which agencies share closely related responsibilities for different aspects of a larger regulatory,
17 programmatic, or management enterprise.

18 Such delegations may produce redundancy, inefficiency, and gaps, but they also create
19 underappreciated coordination challenges. A key advantage to such delegations may be the
20 potential to harness the expertise and competencies of specialized agencies. But that potential
21 can be wasted if the agencies work at cross-purposes or fail to capitalize on one another’s
22 unique strengths and perspectives. By improving efficiency, effectiveness, and accountability,
23 coordination can help to overcome potential dysfunctions created by shared regulatory space.
24 Greater coordination can reduce costs for both the government and regulated entities not only
25 by avoiding literal duplication of functions but also by increasing opportunities for agencies
26 exercising related responsibilities to manage and reconcile differences in approach.
27 Coordination that takes the form of interagency consultation can improve the overall quality of
28 decisionmaking by introducing multiple perspectives and specialized knowledge, and structuring
29 opportunities for agencies mutually to test their information and ideas. Coordination
30 instruments can also equip and incentivize agencies to monitor each other constructively, which
31 should help both the President and Congress to better manage agency policy choices and
32 compliance with statutes. It is plausible too, that greater coordination will make it harder for
33 interest groups to capture the administrative process or to play agencies against each other.

² Jody Freeman & Jim Rossi, *Improving Coordination of Related Agency Responsibilities* (Report to the Administrative Conference of the U.S., 2012). See also Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

³ The underlying study and this recommendation focus on federal government agencies only, and do not address the coordination problems presented more generally by federalism due to dispersed responsibilities between federal and state governments.

34 Much coordination occurs against the backdrop of day-to-day, informal interactions
35 among agency staffs, including casual conversations, meetings, and working groups. However,
36 systematic efforts to institutionalize coordination (as opposed to relying exclusively on the ad
37 hoc coordination that occurs as a matter of course among agencies) will tend to be more stable,
38 visible, and durable than relying only on informal networks for promoting interagency
39 interactions. This recommendation does not purport to address all agency interactions, but
40 focuses on the processes and instruments agencies use to memorialize agency interactions and
41 agreements. In such instances, this recommendation endorses documented coordination
42 policies to help formalize ad hoc approaches and provide useful guidelines for agency staff.
43 Coordination policies can be top-down, through the President's leadership, as well as bottom-
44 up, beginning with agencies themselves.

45 Presidential leadership can be helpful in addressing the challenges posed by fragmented
46 and overlapping delegations, especially in instances where there is conflict among agencies,
47 inability of agency staffs to coordinate, or a reluctance of agency officials to work together.
48 Components of the Executive Office of the President (EOP) with relevant policy expertise may
49 be well positioned to promote coordination in their respective domains, and efforts in this
50 regard could be bolstered. The EOP can play a crucial role in fostering coordination by
51 establishing priorities, convening the relevant agencies, and managing a process that is
52 conducive to producing agreement. For example, the White House Office of Energy and Climate
53 Change Policy has been credited with facilitating the joint rulemaking effort of EPA and the
54 Department of Transportation, which produced new fuel efficiency and greenhouse gas
55 standards,⁴ and the EOP played a central role in convening and coordinating the nine-agency
56 memorandum of understanding on siting of transmission lines on federal lands.⁵ The President
57 recently established an interagency task force to coordinate federal regulation of natural gas

⁴ See Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343 (2011).

⁵ See Press Release, Advisory Council on Historic Preservation, Nine Federal Agencies Enter into a Memorandum of Understanding Regarding Transmission Siting on Federal Lands (Oct. 28, 2009), <http://www.achp.gov/docs/pressrelease10282009.pdf>.

58 production.⁶ There are many other examples from prior administrations, involving policy
59 initiatives large and small.

60 The President could seek to promote coordination through a comprehensive
61 management strategy that puts coordination at its core, which might be done via a new
62 executive order tasking one or more EOP offices with an oversight role. Promoting consistency
63 in agency rulemaking is already explicitly within the mandate of the Office of Information and
64 Regulatory Affairs under Executive Order 12,866 and was reiterated by President Obama in
65 Executive Order 13,563.⁷ While this is compatible with the larger goal of promoting greater
66 interagency coordination where agencies exercise overlapping and closely related
67 responsibilities, still more could be done. For example, the Office of Management and Budget
68 (OMB) could consider ways to achieve coordination as part of its implementation of the
69 Government Performance and Results Modernization Act (GPRMA),⁸ and propose cross-cutting
70 budget allocations (sometimes referred to as “portfolio budgeting”) to help incentivize the
71 agencies to work together on a variety of projects, some of which might involve rulemakings.
72 The White House might explore ways to strengthen existing interagency task forces or
73 encourage similar interagency efforts where their potential benefits have been overlooked.⁹

⁶ Exec. Order No. 13,605, Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources, 77 Fed. Reg. 23,107 (April 17, 2012),

⁷ See also OIRA’s March 20, 2012 memorandum to agencies on cumulative regulations, which seeks to promote harmonization and streamline agency regulations in an effort to reduce the cost of agency rules.

⁸ Pub. L. No. 111-352, 124 Stat. 3866 (2011). GPRMA amends the Government Performance and Results Act of 1993 (GPRA), Pub. L. No. 103-62, 107 Stat. 285 (1993).

⁹ The Conference recognizes the special concerns about presidential authority with respect to independent regulatory agencies. However, various presidential actions have sought to extend administration policies to the independent agencies. For example, section 4 of Executive Order 12,866 “Regulatory Planning and Review,” includes independent regulatory agencies in its requirements for the semiannual Unified Regulatory Agenda and the annual Regulatory Plan, “to the extent permitted by law.” Similarly, Executive Order 13,579, “Regulation and Independent Regulatory Agencies,” and the further guidance contained in the OIRA Administrator’s Memorandum for the Heads of Independent Regulatory Agencies, M-11-28, July 22, 2011 (<http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf>) ask independent regulatory agencies to comply with directives to Executive Branch agencies with respect to public participation, regulatory analyses, and retrospective review of existing regulations.

74 Beyond OMB, other councils and offices within the EOP may also play important roles
75 facilitating coordination.

76 However, centralized supervision is not the only means of improving agency
77 coordination. Congress could prescribe specific reforms via statute. Yet even absent direction
78 from the President or Congress, agencies could voluntarily adopt certain targeted reforms. This
79 recommendation suggests some initial and relatively modest measures that agencies could
80 adopt to help conduct, track and evaluate existing coordination initiatives, subject, of course, to
81 budget constraints. These include development of agency policies on coordination, sharing of
82 best practices, adopting protocols for joint rulemaking and memoranda of understanding, ex
83 post evaluation of at least a subset of coordination processes, tracking of outcomes and costs,
84 and making coordination tools more transparent. These measures are not intended to impose
85 substantial additional burdens on agencies, but to the extent they do, the recommendation
86 urges OMB to recognize the need to devote sufficient resources to allow agencies to participate
87 effectively in interagency processes.

88 Nor, of course, does this recommendation seek to preclude other measures that might
89 promote interagency collaboration, consultation and coordination, either at the federal level, or
90 between federal and state and local agencies. It is not meant to displace or preclude any
91 additional effort, whether under the GPRCA amendments or otherwise, to develop national
92 strategies. In addition, in many instances, informal agency consultation and negotiation work
93 effectively to resolve inconsistencies and conflict. This recommendation is meant to augment
94 rather than displace such efforts.

RECOMMENDATION

95 1. *Developing Agency Coordination Policies.*

96 (a) Federal agencies should identify any areas of shared, overlapping or closely related
97 jurisdiction or operation that might require, or benefit from, interagency coordination.¹⁰

¹⁰ A recent GAO report on the implementation of the Dodd-Frank Act faulted the financial regulatory agencies for not pursuing coordination more systematically and noted that the majority of agencies reviewed had not

98 Federal agencies that share overlapping or closely related responsibilities should adopt
99 policies and/or procedures, as appropriate, for facilitating coordination with other agencies to
100 document ongoing coordination efforts, or to facilitate additional coordination with other
101 agencies.¹¹

102 (b) Concurrently, the Executive Office of the President (EOP) should work with the agencies
103 to develop a policy to promote coordination where agencies share overlapping or closely
104 related responsibilities. The policy, while maintaining the need for flexibility,¹² should
105 address how agencies will, among other things:

- 106 (i) resolve disagreements over jurisdiction;
- 107 (ii) share or divide information-production responsibilities;
- 108 (iii) solicit and address potentially conflicting views on executing shared responsibilities;
- 109 (iv) minimize duplication of effort;
- 110 (v) identify and resolve differences over the application of analytic requirements
111 imposed by statute or executive order;¹³ and

Comment [CMA1]: DHS Amendment:

We offer two related amendments for clarification, consistent with references to these issues throughout the Recommendation preamble.

First, we propose amended text (“policies or procedures, as appropriate”) to clarify that the Conference acknowledges an appropriate role for informal policies and undocumented procedures, in certain circumstances (e.g., when coordination practices are relatively “young,” or are not sufficiently complex to warrant formal documentation). We believe that as currently drafted, the meaning of the word “and” in Recommendation 1(a) is unclear.

Second, we propose edits (from “to document” to the end of the sentence), to clarify that the Conference views the practice of documenting ongoing coordination as valuable in itself. In cases where there is successful ongoing coordination that the agency has not documented at all, there may still be independent value to developing documentation. Such value includes (1) the internal efficiency that results from having clear operating procedures, and (2) the opportunities for identifying areas for improvement during the documentation process. We believe that as currently drafted, Recommendation 1(a) does not signal to agencies the full potential value of this process.

developed internal policies on coordination. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-151, DODD FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM BETTER ANALYSIS AND COORDINATION 25 (2011) (noting that seven of nine regulators reviewed “did not have written policies and procedures to facilitate coordination on rulemaking”).

¹¹ 31 U.S.C. § 1115(b)(5) (D) of GPRA, as amended by sec. 3 of GPRMA, *supra* note 8, requires each agency to have an annual performance plan providing a description of how its performance goals are to be achieved, including how the agency is working with other agencies to achieve those goals.

¹² See Exec. Order No. 13,609, Promoting International Regulatory Cooperation, 77 Fed. Reg. 26,413 (May 4, 2012), for an approach that combines a government-wide policy with individual agency responsibilities, coordinated by the Regulatory Working Group (see *infra* note 14).

¹³ See generally Curtis W. Copeland, *Regulatory Analysis Requirements, A Review and Recommendations for Reform* (Report to the Administrative Conference of the U.S., 2012), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/04/COR-Final-Reg-Analysis-Report-for-5-3-12-Mtg.pdf>; and Administrative Conference Recommendation 2012-__, Regulatory Analysis Requirements.

112 (vi) formalize agreements allocating respective responsibilities or develop standards or
113 policies jointly, where appropriate.

114 In addition, the policy should establish a mechanism by which agencies can share best
115 practices and evaluate their coordination initiatives ex post, and assist them in doing so
116 effectively and efficiently.

117 (c) The EOP should effectively utilize the Regulatory Working Group, established by Executive
118 Order 12,866, or establish or utilize other comparable bodies to assist agencies in identifying
119 opportunities for coordination.¹⁴

120 2. *Improving Joint Rulemaking*

121 The coordination policies and procedures adopted by the EOP and the agencies should
122 include best practices for joint rulemaking and recommend when agencies should consider
123 using it even when not statutorily required to do so. Best practices might include
124 establishing joint technical teams for developing the rule, and requiring early consultation,
125 where appropriate, (a) with the Office of Information and Regulatory Affairs (OIRA) regarding
126 joint production of cost-benefit analyses and other analyses required by statute or executive
127 order, and (b) among agency legal staff and lawyers at the Department of Justice who may
128 need ultimately to defend the rule in litigation.

129 3. *Improving Interagency Agreements*

130 (a) The coordination policies and procedures adopted by the EOP and the agencies should
131 include best practices for agency agreements such as memoranda of understanding (MOUs).
132 Such best practices might include specification of progress metrics that will enable agencies
133 to assess the effectiveness of their agreement and sunset provisions that would require

¹⁴ Exec. Order No. 12,866, § 4(d) (announcing the establishment of a Regulatory Working Group as “a forum to assist agencies in identifying and analyzing important regulatory issues”).

134 signatory agencies to review MOUs regularly to determine whether they continue to be of
135 value.¹⁵

136 (b) Agencies should make available to the public, ~~consistent with statutory disclosure~~
137 ~~requirements unless precluded by law~~, in an accessible manner, interagency agreements that
138 have broad policy implications or that may affect the rights and interests of the general
139 public.

140 *4. Supporting and Funding Interagency Consultation.*

141 (a) The EOP should encourage agencies to conduct interagency consultations early in a
142 decisionmaking process, before initial positions are locked in, and to conduct such
143 consultations in a continuing and integrated, rather than periodic and reactive, way. To this
144 end, when appropriate, the EOP should encourage coordinating agencies to establish an
145 interagency team to produce and analyze data together over the course of the
146 decisionmaking process, and ensure such teams have adequate funding and support.

147 (b) The Office of Management and Budget and agencies involved in coordinated interagency
148 activities should take into account, in the budgetary process, the need for sufficient
149 resources to participate effectively in interagency processes, and the need to provide
150 specifically for such cross-cutting activities. Further, an action agency, on ~~whom which~~ a
151 duty to consult with other agencies falls, ~~should commit to contribute~~ consider contributing a
152 share of its resources, as appropriate and to the extent it possesses the discretion to do so,
153 to support joint technical and analytic teams, even if those resources will be consumed in
154 part by other agencies.

155 *5. Tracking Total Resources.*

156 To better evaluate the effectiveness of coordination initiatives, an appropriate office or
157 offices of the federal government should assess the costs and benefits, both quantitative

¹⁵ In several of the examples reviewed in the Freeman/Rossi report, *supra* note 2, the agencies were negotiating new MOUs to replace outdated ones (often negotiated by previous administrations)—a clear sign that ineffective MOUs can be left to languish for too long.

Comment [CMA2]: DHS Amendment:

(1) DHS offers a substantive amendment, to account for the range of situations in which consultation requirements arise.

(2) DHS engages in consultation pursuant to statutory and legal requirements on a regular basis, on matters ranging from environmental protection to immigration and intelligence policy.

(3) DHS believes that the resources required to engage in such consultation are not always significant, and may not justify the administrative burden of sharing agency resources in every instance of consultation.

(4) DHS also believes that legal consultation requirements usually operate to protect the equities of both the “consulting” and the “consulted” agencies. In light of the shared benefits of consultation, DHS does not believe it is appropriate for the “consulting” agency to bear a disproportionate burden in every instance.

158 and qualitative, of interagency consultations, MOUs, joint rules, and other similar
159 instruments. Such offices might include the Government Accountability Office or the
160 Congressional Research Service, perhaps with the assistance of the Administrative
161 Conference of the United States. To minimize the burden on the agencies of such
162 evaluation, at the outset, this effort might be limited to high-priority, high-visibility
163 interagency coordination efforts, such as important joint rulemakings, or equivalent
164 initiatives.