



## Improving Agency Coordination in Shared Regulatory Space

### Committee on Collaborative Governance – Draft Recommendation

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

The study underlying this recommendation<sup>3</sup> provides a comprehensive picture of overlapping and fragmented delegations, and makes some practical suggestions for addressing the coordination problems they create.<sup>4</sup> Because characterizing such delegations as redundant

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<sup>1</sup> Fragmented delegations create situations in which different agencies possess the authority necessary to tackle different aspects of a larger problem. *See, e.g.,* Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 806–13 (2005) (describing the complex distribution of federal and state authority over environmental regulation and resource management); *see also* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 84-1, PUBLIC REGULATION OF SITING OF INDUSTRIAL DEVELOPMENT PROJECTS, 49 Fed. Reg. 29,938 (July 25, 1984) (recognizing the challenge posed by agency overlap for environmental review of industrial development projects).

<sup>2</sup> 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>

<sup>3</sup> Jody Freeman & Jim Rossi, *Improving Agency Coordination Through Joint Rulemaking and Other Mechanisms* (Report to the Administrative Conference of the U.S., 2012).

<sup>4</sup> 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 authority between federal and state governments.

might suggest literal duplication, this recommendation uses instead the more nuanced concept of “shared regulatory space.” This term includes not only literally duplicative or overlapping authority, but also instances where cumulative statutory delegations create a situation in which agencies share closely related responsibilities for different aspects of a larger regulatory, programmatic, or management enterprise.

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

Although consolidation is frequently proposed as a solution to dispersed and overlapping authority, coordination may often be superior to consolidating agency functions, which runs a greater risk of resulting in a net loss of expertise and accountability or simply relocating interagency conflicts without meaningfully addressing them. Systematic efforts to institutionalize coordination (as opposed to relying exclusively on the ad hoc coordination that occurs as a matter of course among agencies) also will tend to be more stable, visible, and durable than relying only on informal networks for promoting interagency interactions.

Much coordination occurs against the backdrop of day-to-day, informal interactions among agency staffs, including casual conversations, meetings, and working groups. This recommendation does not purport to address all agency interactions, but focuses on the processes and instruments agencies use to memorialize agency interactions and agreements. In such instances, this recommendation endorses documented coordination policies to help formalize ad hoc approaches and provide useful guidelines for agency staff. Coordination policies can be top-down, through the President’s leadership, as well as bottom-up, beginning with agencies themselves.

Presidential leadership can be helpful in addressing the challenges posed by fragmented and overlapping delegations, especially in instances where there is conflict among agencies, inability of agency staffs to coordinate, or a reluctance of agency officials to work together. White House offices and councils with relevant policy expertise may be well positioned to promote coordination in their respective domains, and efforts in this regard could be bolstered. The White House can play a crucial role in fostering coordination by establishing priorities,

convening the relevant agencies, and managing a process that is conducive to producing agreement. For example, the White House Office of Energy and Climate Change Policy has been credited with spearheading the joint rulemaking effort of EPA and the Department of Transportation, which produced new fuel efficiency and greenhouse gas standards,<sup>5</sup> and the White House played a central role in convening and coordinating the nine-agency memorandum of understanding on siting of transmission lines on federal lands.<sup>6</sup> There are many other examples from prior administrations, involving policy initiatives large and small.

The President could seek to promote coordination through a comprehensive management strategy that puts coordination at its core, which might be done via a new executive order tasking one or more White House offices with an oversight role. Promoting consistency in agency rulemaking is already explicitly within OIRA's mandate under Executive Order 12,866 and was reiterated by President Obama in Executive Order 13,563.<sup>7</sup> While this is compatible with the larger goal of promoting greater interagency coordination where agencies exercise overlapping and closely related authority, still more could be done. For example, OMB could consider ways to achieve coordination as part of its implementation of the Government Performance and Results Modernization Act (GPRMA),<sup>8</sup> and propose cross-cutting budget allocations (sometimes referred to as "portfolio budgeting") to help incentivize the agencies to work together on a variety of projects, some of which might involve rulemakings. The White House might explore ways to strengthen existing interagency task forces or encourage similar interagency efforts where their potential benefits have been overlooked.<sup>9</sup>

However, centralized supervision is not the only means of improving agency coordination. Certain targeted reforms could be adopted voluntarily by the agencies. These reforms include

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<sup>5</sup> See Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 Harv. Envtl. L. Rev. 343 (2011).

<sup>6</sup> 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>.

<sup>7</sup> 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.

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

<sup>9</sup> 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. In addition, the Conference has previously recommended that: "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." (Recommendation 88-9, Presidential Review of Agency Rulemaking, 54 FR 5207, Feb. 2, 1989).

development of agency policies on coordination, sharing of best practices, adopting protocols for joint rulemaking and memoranda of understanding, and committing to ex post evaluation of the effectiveness of at least a subset of coordination processes. Congress could prescribe such reforms via statute. Yet even absent direction from the President or Congress, agencies could adopt such reforms.

The recommendations below suggest some initial and relatively modest measures that government agencies could adopt voluntarily to help conduct, track and evaluate existing coordination initiatives, subject, of course, to budget constraints. These include development of agency policies on coordination, sharing of best practices, ex post evaluation of at least a subset of coordination processes, tracking of outcomes and costs, and making coordination tools more transparent.

Of course, this recommendation does not seek to preclude other measures that might promote interagency collaboration, consultation and coordination, either at the federal level, or between federal and state and local agencies. It is not meant to displace or preclude any additional effort, whether under the GPRMA amendments or otherwise, to develop “national strategies.”<sup>10</sup> In addition, in many instances, informal agency consultation and negotiation work effectively to resolve inconsistencies and conflict. This recommendation is meant to augment rather than displace such efforts.

## RECOMMENDATION

### 1. *Developing Agency Coordination Policies.*

(a) Federal agencies should identify any areas of shared, overlapping or closely related jurisdiction or operation that might require, or benefit from, interagency coordination.<sup>11</sup> Federal agencies that do share overlapping or closely related authority should adopt policies and procedures for facilitating coordination with other agencies.<sup>12</sup>

(b) The President or the Executive Office of the President should work with the agencies to develop a policy to promote coordination where agencies share overlapping or closely related authority. The policy should address how agencies will, among other things:

(i) resolve disagreements over jurisdiction;

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<sup>10</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-408T, COMBATING TERRORISM: EVALUATION OF SELECTED CHARACTERISTICS IN NATIONAL STRATEGIES RELATED TO TERRORISM (2004).

<sup>11</sup> 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 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”).

<sup>12</sup> 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.

- (ii) share or divide information-production responsibilities;
- (iii) solicit and address potentially conflicting views on executing shared authority;
- (iv) minimize duplication of effort;
- (v) identify and resolve differences over the application of analytic requirements imposed by statute or executive order; and
- (vi) formalize agreements allocating respective responsibilities or develop standards or policies jointly, where appropriate.

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

## 2. *Improving Joint Rulemaking*

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

## 3. *Improving Interagency Agreements*

(a) The coordination policy should include best practices for agency agreements such as memoranda of understanding (MOUs). Such best practices might include specification of progress metrics that will enable agencies to assess the effectiveness of their agreement, and sunset provisions, that would require signatory agencies to review MOUs regularly to determine whether they continue to be of value.<sup>13</sup>

(b) Agencies should make available to the public in an accessible manner all interagency agreements that have broad policy implications or that may affect the rights and interests of the general public.

## 4. *Supporting and Funding Interagency Consultation.*

(a) The President or the Executive Office of the President should encourage agencies to conduct interagency consultations early in a decisionmaking process, before initial positions

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<sup>13</sup> In several of the examples reviewed in the Freeman/Rossi report, *supra* note 3, 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. And, as noted in the food safety and border security examples cited in the report, there are many outdated MOUs still on the books.

are locked in, and to conduct such consultations in a continuing and integrated, rather than periodic and reactive, way. To this end, when appropriate, the President or Executive Office of the President should encourage coordinating agencies to establish a cross-cutting interagency team to produce and analyze data together over the course of the decisionmaking process, and ensure such teams have adequate funding and support.

(b) The White House should effectively utilize the Regulatory Working Group, established by Executive Order 12,866, or establish and utilize other comparable bodies to assist agencies in identifying opportunities for coordination.<sup>14</sup>

(c) OMB and agencies involved in coordinated interagency activities should take into account, in the budgetary process, the need for sufficient resources to participate effectively in interagency processes, and the need to provide specifically for such cross-cutting activities. Further, an action agency, on whom the duty to consult with other agencies falls, should, to the extent it possesses the discretion to do so, commit to contribute a share of its resources to support joint technical and analytic teams, even if those resources will be consumed in part by other agencies.

##### 5. *Tracking Total Resources.*

To better evaluate the effectiveness of coordination initiatives, an appropriate office or offices of the federal government should assess the costs and benefits, both quantitative and qualitative, of interagency consultations, MOUs, joint rules, and other similar instruments. To minimize the burden of such evaluation, at the outset, this effort might be limited to high-priority, high-visibility interagency coordination efforts, such as important joint rulemakings, or equivalent initiatives.<sup>15</sup> Such offices might include the Government Accountability Office, Congressional Research Service, or agency inspectors general, perhaps with the assistance of the Administrative Conference of the United States.

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<sup>14</sup> 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”).

<sup>15</sup> For example, given that the volume of joint rulemakings will likely increase as a result of the Dodd-Frank Act, it would be worthwhile to begin tracking and gathering data about these efforts soon. Without creating an enormous burden, it might be possible to compare the average cost of major rules that are jointly produced to that of major rules that are produced by agencies acting independently. See CURTIS W. COPELAND, CONG. RESEARCH SERV., R41380, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU, at 5-7.