



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

FY 2019 CONGRESSIONAL BUDGET JUSTIFICATION

February 12, 2018

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I. Introduction

The President's budget for FY 2019 requests \$3.1 million for the Administrative Conference of the United States (ACUS). ACUS submits this justification in support of the Administration's request that Congress maintain ACUS's existing annual appropriation of \$3.1 million for FY 2019.

ACUS is a unique executive branch agency whose principal mission is to recommend improvements in agency rulemaking, adjudication, and other regulatory processes to the President, federal agencies, Congress, and the federal judiciary. Recommendations are designed, in the words of the Administrative Conference Act, to (1) ensure that federal agencies' "regulatory activities . . . are carried out expeditiously in the public interest," (2) "promote more effective participation and efficiency in the rulemaking process," (3) "reduce unnecessary litigation in the regulatory process," (4) "improve the use of science" in that process, and (5) "improve the effectiveness of laws applicable" to that process. 5 U.S.C. § 591. Through its Office of the Chairman, ACUS also assists individual agencies to improve programs, publishes sourcebooks of enormous value to both the government and public, and provides nonpartisan advice to executive branch officials and members of Congress and their staffs. ACUS's work improves the efficiency and fairness of government processes. It also saves money for the taxpayers, which well exceeds its annual appropriation.

Many of ACUS's recommendations are adopted by federal agencies, cited in judicial opinions, or enacted into law. Recent examples of implementation include:

- Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*, which the Judicial Conference recently implemented by forming a special committee to consider whether to adopt efficiency-enhancing procedural rules governing the over 18,000 social security disability appeals filed each year;
- Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudication*, which the Social Security Administration (SSA) implemented in a 2017 regulation that will improve the accuracy of decisions in, and thereby reduce federal court litigation arising from, SSA's multi-billion dollar-a-year disability benefits program;
- *SSA Disability Benefits Programs: The Duty of Candor and Submission of All Evidence* (Office of the Chairman Report 2012), which SSA used as blueprint for a 2015 regulation that requires claimants to disclose all relevant evidence—not just, as under the previous rule, favorable evidence;
- *The SSA Representative Payee Program* (Office of the Chairman Report 2015), which the Social Security Advisory Board relied upon in its 2018 recommendations to eliminate abuse and fraud by representatives of elderly and disabled recipients of federal benefits;
- Recommendation 2012-8, *Inflation Adjustment Act*, which Congress implemented in the Bipartisan Budget Act of 2015 when it adjusted civil penalties for regulatory violations, with the result that revenues to the federal government will increase tens of millions of dollars annually;
- Recommendation 2011-6, *Promoting International Regulatory Cooperation*, which forms the basis of a 2012 executive order that promotes regulatory efficiency and enhances

trade by reducing divergence between overlapping United States and foreign regulations;
and

- Recommendation 2011-5, *Incorporation by Reference*, which the Federal Register has relied upon—both in a 2014 regulation and more recently in the revised addition of its IBR Handbook—to ensure that regulated parties and the public may access copyrighted private standards incorporated into federal regulations.

ACUS’s oversight committees in Congress have expressed strong bipartisan support for the agency’s work. Recently, the Chairmen and Ranking Members of the House Judiciary Committee and its Subcommittee on Regulatory Reform noted in the Congressional Record that “there is no other independent, non-partisan agency” on which “Congress can call . . . to evaluate ways to improve the regulatory process”; that “[a]s a result of” ACUS’s “excellent work, our Nation’s federal administrative procedures are not only looked to as a standard around the world, but constantly in the course of additional improvement;” and that “in recognition of its many accomplishments” ACUS “has enjoyed broad bipartisan and bicameral support over the years.” They also noted that ACUS “helps save taxpayer dollars.” On February 27, 2017, several Members of Congress acknowledged the value and contributions of ACUS during the floor debate preceding the passage of the bipartisan Open Book on Equal Access to Justice Act (H.R. 1033). One member characterized ACUS as “a highly respected nonpartisan agency which was greatly championed by Justice Scalia” and noted the key role that it “has historically played in helping Congress identify inefficiencies among the Federal agencies.”

In addition to ACUS recommendations implemented by law and regulation, ACUS has also served Congress as a practical tool for legislators to make their own proposed bills more effective. In drafting laws, members of Congress request future ACUS studies, recommendations, and reports to provide clarity and feedback on improvements their proposed laws seek to make. For example, the *Strengthening Protections for Social Security Beneficiaries Act of 2018*, which was recently unanimously passed by the House of Representatives, requests a study by ACUS to develop and analyze options for the Social Security Administration to engage in information sharing with state courts and agencies.

Members of the federal judiciary from diverse perspectives, among others, have likewise expressed strong support for ACUS. Justice Breyer and the late Justice Scalia even appeared before a congressional committee to testify in support of ACUS’s authorization. During his testimony in 2010, Justice Scalia observed that ACUS is one of the federal government’s “best bargains for the buck.”

The requested budget of \$3.1 million will enable ACUS to undertake a full program of research projects and other programs aimed at promoting the unique goals of the agency’s enabling statute.

II. Overview of ACUS

A. Brief History of ACUS

Following bipartisan endorsement of the work of two temporary administrative conferences during the Eisenhower and Kennedy administrations, Congress enacted the Administrative Conference Act of 1964, the fiftieth anniversary of which was recently marked by a symposium issue of *The George Washington Law Review* (Volume 83). The Act codified the prior structure of these conferences, which emphasized collaboration among a wide array of federal agencies, reliance on experts in administrative law and regulation from the private sector (many of them prominent academics), and the participation of public members representing a wide diversity of views. This collaborative effort is designed to produce consensus-based, nonpartisan recommendations for improvement in federal administrative processes, which, more than ever, affect every sector of our national economy and the lives of American citizens.

Since the beginning of its operations in 1968, ACUS has adopted hundreds of such recommendations, each of them based on careful study and the informed deliberations of its members in an open process that encouraged public input. A complete list of these recommendations was published at 60 Fed. Reg. 56,312 (1995) and appears at www.acus.gov. Congress enacted a number of them into law, and agencies and courts have adopted or relied upon many others. Among other initiatives, ACUS also played a leading role in developing and securing legislation to promote, and provided training in, alternative dispute resolution techniques for eliminating excessive litigation and long delays in federal agency programs, as well as negotiated rulemaking for consensual resolution of disputes in rulemaking.

B. Membership

The Assembly is the name given to the 101 statutory voting members of the Conference meeting in plenary session. The 101 members include the Chairman, the Council, Government Members, and Public Members. The Conference's bylaws permit the appointment of other types of members who are not part of the Assembly (as described below) but contribute immeasurably to the activities of ACUS. These individuals are afforded all the privileges of membership, except that they may not vote during plenary sessions. None of ACUS's members (except for the Chairman) are compensated for their services.

Voting (Assembly) Members

The Chairman

The ACUS Chairman is appointed for a five-year term by the President and is confirmed by the Senate. The Chairman presides at meetings of the Council and at each ACUS plenary session, where he or she makes a full report concerning the affairs of the Agency since the last preceding plenary session. The Chairman also submits to the President and Congress an annual report and interim reports he or she deems appropriate in communicating the value and accomplishments of

the Agency. During the absence, incapacity or vacancy of the office, the Vice Chairman serves as Chairman. Matthew L. Wiener currently serves as Vice Chairman.

The Council

The ten-member Council is composed of government officials and private citizens. All are appointed by the President for three-year terms. The Council is responsible for calling plenary sessions and approving their agendas, proposing bylaws and regulations for adoption by the Assembly, reviewing budgetary proposals, and approving the appointment of public members and the initiation of research studies. Federal officials named to the Council may constitute no more than one-half of the total Council membership.

Current ACUS Council

- Matthew Lee Wiener (Vice Chairman)
- Ronald A. Cass
- Danielle Gray
- Ronald A. Klain
- Theodore B. Olson
- Jane C. Sherburne
- Geovette E. Washington

Government Members

Government members come from federal executive departments, agencies, independent regulatory boards, and commissions.

Public Members

Public members come from the private sector, including academia, the practicing bar, industry, and public interest organizations.

Non-Voting Members

Liaison Representatives

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

Senior Fellows

Senior fellows include former ACUS Chairmen and former ACUS members who completed six years of service or served in the federal judiciary. Senior fellows are appointed by the Chairman with the approval of the Council. Senior fellows serve for two-year terms and may be reappointed.

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.

A full roster of the Conference's current membership is available at <https://www.acus.gov/about-members>.

C. Staff and Office of the Chairman

ACUS has a small, full-time, career staff that serves 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. The staff, together with Chairman, attend to the day-to-day activities of the Conference through the Office of the Chairman.

A full roster of the Conference's current staff is available at <https://www.acus.gov/about-staff>.

D. Program Description

The main statutory function of ACUS is to bring together the public and private sectors to recommend improvements to administrative and regulatory processes. The Assembly typically meets semi-annually in plenary session to debate, amend, and formally adopt recommendations. ACUS then undertakes to implement them.

In addition to issuing formal recommendations, ACUS performs other statutory functions, most of them through the staff of its Office of the Chairman rather than through the Assembly. They include collecting information and statistics from agencies for analysis and dissemination; publishing reports, sourcebooks, and other materials that may be useful for evaluating and improving administrative processes; preparing reports for Congress; providing technical advice to members of Congress, their staffs, and federal agencies, whether informally or through formal reports; facilitating interchange of information among departments and agencies on matters of administrative procedure; conducting training sessions for federal agencies; and holding public forums, sometimes with other entities, to discuss matters of public interest. These forums often lead to the implementation of "best practices" among agencies.

III. Strategic Goals and Notable Activities

A. Strategic Goals

To set priorities for the selection of projects, ACUS developed the following mission statement, strategic goals, and vision and values:

ACUS Mission Statement

ACUS brings together experts from the public and private sector to advise the President, Congress, federal agencies, and the federal judiciary. These experts collaborate to design recommendations seeking to maximize fairness and efficiency in the administration of government programs.

ACUS Strategic Goals

Participation: ACUS will expand citizen participation in the regulatory process through increased use of interactive communications technologies and creative means of outreach, in order to provide essential information to government officials and to inform the public.

Collaboration: ACUS will study and promote the most responsive and efficient means of sharing authority and responsibility among the federal government, state, and local governments, contractors, grantees, and citizens. This will include exploration of new models of collaborative governance as well as a more effective division of responsibility between government and the private sector.

Innovation: ACUS will seek new ideas that advance the core values of fairness and efficiency, and will study existing government programs to identify what works, what doesn't, and what's promising. Research will address the use of science, ensuring data quality, and performance evaluation.

Education: ACUS will bring together senior federal officials and outside experts to identify best practices and will advise agencies on revising their rulemaking and hearing processes, technology, and management systems to deliver better results. ACUS will be a central resource for agencies by compiling and publishing data and guidance on solving mutual problems.

ACUS Vision and Values

ACUS is given the power to “study the *efficiency, adequacy, and fairness* of administrative procedure” 5 U.S.C. § 594.

The work of the Conference is guided by these procedural values, which reflect legal and social science measures of performance.

The *fairness* value derives from law and employs principles embedded in the Administrative Procedure Act and the Due Process Clause of the Constitution's Fifth Amendment.

The *efficiency* value derives from economics and looks at how procedures employed by agencies achieve the public purposes the regulations are intended to serve. The question is

whether the agency procedures and management techniques reflect optimum resource allocations, not whether the benefits of the underlying substantive regulations exceed their costs.

The *adequacy* value borrows from the disciplines of psychology and political science and looks at the effectiveness of regulatory techniques from the public's perspective, including such factors as trust, transparency, and participation.

B. Notable Activities

1. Recently Adopted Recommendations

The Assembly adopted the following recommendations during calendar year 2017:

- ***Recommendation 2017-1 – Adjudication Materials on Agency Websites*** provides guidance regarding the online dissemination of administrative adjudication materials. It offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with the transparency objectives and privacy considerations of the Freedom of Information Act and other relevant laws and directives.
- ***Recommendation 2017-2 – Negotiated Rulemaking and Other Options for Public Engagement*** offers best practices to agencies for choosing among several possible methods—among them negotiated rulemaking—for engaging the public in agency rulemakings. It also offers best practices to agencies that choose negotiated rulemaking on how to structure their processes to enhance the probability of success.
- ***Recommendation 2017-3 – Plain Language in Regulatory Drafting*** identifies tools and techniques agencies have used successfully to write regulatory documents (including rulemaking preambles and guidance documents) using plain language, proposes best practices for agencies in structuring their internal drafting processes, and suggests ways agencies can best use trainings and other informational resources.
- ***Recommendation 2017-4 – Marketable Permits*** provides best practices for structuring, administering, and overseeing marketable permitting programs for any agency that has decided to implement such a program.
- ***Recommendation 2017-5 – Agency Guidance Through Policy Statements*** provides best practices to agencies on the formulation and use of policy statements. It lists steps that agencies can take to remain flexible in their use of policy statements and to encourage, when appropriate, public participation in the adoption or modification of policy statements.

- ***Recommendation 2017-6 – Learning from Regulatory Experience*** offers advice to agencies on learning from different regulatory approaches. It encourages agencies to collect data, conduct analysis at all stages of the rulemaking lifecycle (from pre-rule analysis to retrospective review), and solicit public input at appropriate points in the process.
- ***Recommendation 2017-7 – Regulatory Waivers and Exemptions*** provides best practices to agencies in structuring their waiver and exemption procedures for regulatory requirements. It encourages transparency and public input by asking agencies to consider establishing standards and procedures for approval of waivers and exemptions and to seek public comments in developing standards and procedures and in approving individual waivers and exemptions.

A full listing of adopted ACUS recommendations and statements is provided in *Appendix E* and appears, with supporting materials, at <https://www.acus.gov/recommendations/current-recommendations-2010-present>.

2. Recently Published Reports

As noted above, ACUS not only adopts recommendation through its membership at semi-annual plenary sessions, but also engages in other activities in furtherance of its mission through the activities of its Office of the Chairman. Notable among them are reports to improve procedures at specific agencies and widely disseminated publications for the benefit of officials in all three branches and the public. They include:

- ***Federal Court Review of SSA Disability Adjudication (2016)***. The Social Security Administration (SSA) engaged ACUS to conduct an independent study of federal court review in social security disability insurance and supplemental security income cases. The project consultants conducted an extensive study of federal district court cases reviewing SSA’s disability decisions and of SSA’s internal quality control procedures, identifying causes for the high rates of reversal. Their report offers recommendations to SSA for targeted reforms aimed at reducing the reversal rate. It also recommends reforms to the Federal Rules of Civil Procedure to account for the unique nature of SSA disability appeals in the district courts, which ultimately resulted in a Conference recommendation urging the Judicial Conference to consider such reforms (ACUS Recommendation 2016-3). The Conference staff also produced a short report targeted to federal judges that describes the multiple levels of appeal within SSA and the quality assurance initiatives the agency has undertaken
- ***Social Security Administration: Symptom Evaluation (2015)***. At the request of the SSA, ACUS’s Office of the Chairman prepared an independent study that reviewed and analyzed SSA’s laws, regulations, policies, and practices concerning evaluation of claimants’ symptoms in the adjudication of social security disability claims. The report advised SSA on how to best articulate the scope of symptom evaluation in its adjudication process, to improve consistency in disability determinations, reduce

complaints of bias and misconduct against SSA adjudicators, and lessen the frequency of remands attributable to credibility evaluations. In 2016, SSA issued Social Security Ruling 16-3p, which implemented ACUS's recommendations.

- ***Social Security Administration: Representative Payee (2015)***. Also at the request SSA, the Office of the Chairman examined state guardianship/conservatorship laws and court practices with an eye toward improving information sharing between the SSA and state courts. The final report, which was largely based on a survey of state courts, identifies trends, state court best practices, and opportunities for improved coordination and communication between SSA and state courts on matters relating to representative payee and state guardianship/conservatorship programs (with attention to situations where the SSA representative payee is also a court-appointed legal guardian). After reviewing the report, the Social Security Advisory Board (SSAB) turned to ACUS in helping to devise forthcoming recommendations to eliminate fraud in, and otherwise improve the administration of, the representative payee system. ACUS staff recently participated in an important SSAB forum on the subject. In January 2018, SSAB released a report regarding Social Security's representative payee program and discussed ACUS's report and survey results.
- ***Status and Placement of EEOC Adjudicators (2014)***. The Equal Employment Opportunity Commission engaged ACUS to conduct an independent study evaluating the status and organizational placement of Administrative Judges (AJs) within the Commission's federal sector hearing program. ACUS's study evaluates two primary issues: (1) the status of the program's adjudicators, including the authority of the Chair or Commission to appoint Administrative Law Judges (ALJs) instead of AJs or convert existing AJs to ALJs, as well as the potential consequences of the Commission using ALJs instead of AJs; and (2) certain issues related to the placement of AJs or ALJs within the Commission's organizational structure. ACUS did not evaluate whether the Commission should decide to use one type of adjudicator instead of another. Rather, the purpose of this study was to evaluate objectively the legal, regulatory, budgetary, and organizational considerations that would be relevant in the event the Commission decided to have ALJs preside over federal sector equal employment opportunity hearings instead of AJs.
- ***Sourcebook of United States Executive Agencies (2012)***. Published in December 2012, the *Sourcebook* examines the diverse characteristics of the departments, agencies, and other organizational entities that comprise the federal executive establishment. It catalogues a comprehensive set of characteristics for each entity, including structure (*e.g.*, commission or single-head agency, internal organization), personnel (*e.g.*, number and types of appointed positions, limitations on removal), decision-making processes and requirements, political oversight, and sources of funding. The *Sourcebook* serves as a resource for members of Congress and their staffs, administration and agency officials, and the public. Demand for the *Sourcebook* has been so strong that it is now in its second printing. In 2013, Chief Justice Roberts cited it in a Supreme Court opinion.

- ***Social Security Administration Disability Benefits Program. The Duty of Candor and Submission of All Evidence (2012).*** At the request of SSA, the Office of the Chairman studied the duty of candor and the submission of all evidence in Social Security disability benefits cases. The resulting report summarizes the Social Security Act and SSA's current regulations and practices regarding the duty of candor and the submission of all evidence; reviews requirements from other tribunals, the Federal Rules of Civil Procedure, and regulations governing other agencies; and analyzes ethical standards concerning disclosure of information by representatives. The report presents the regulatory options available to SSA (and offers accompanying recommendations for each) regarding future actions to improve the disability adjudication process. In March 2015, SSA issued a regulation implementing the report's recommendations.

3. Projects Underway

ACUS issues an average of 7 to 10 recommendations each year, and at any one time has from 15 to 25 ongoing research projects. A listing and summary of projects actively under study and expected to lead to recommendations, reports, or publications in FY 2017 or FY 2018 follows. A full listing of active ACUS projects and related documents is available at <https://www.acus.gov/current-projects>

Projects Anticipated to Result in Recommendations

- ***Administrative Judges*** explores agencies' use of administrative judges (AJs), who are used in hearings outside of those governed by the Administrative Procedure Act. It studies the use of AJs across numerous agencies and offers recommendations on selection, supervision, evaluation, and removal practices
- ***Electronic Case Management in Federal Administrative Adjudication*** examines the use and incorporation of electronic case management in agency adjudication in order to make recommendations and share best practices. Electronic case management is a comprehensive system that enables an agency to manage its adjudications for increased efficiency and access.
- ***Minimizing the Cost of Judicial Review*** examines what actions agencies undertake to contain the costs of reversal and remand. A primary focus will be on the use of severability clauses and the division of rules into discrete segments that clearly show the independence of rule provisions.
- ***Paperwork Reduction Act Efficiencies*** considers how agencies have used the generic clearance and fast track processes under the Paperwork Reduction Act to determine what challenges agencies have encountered, highlight successes that they have realized, and identify best practices. It examines potential reforms and strategies designed to streamline the clearance process and promote reduced paperwork burdens, in line with the aims of the Act.

- ***Public Engagement in Rulemaking*** explores agency strategies to enhance public engagement prior to and during informal rulemaking. It seeks to ensure that agencies invest resources in a way that maximizes the probability that rule writers obtain high quality public information as early in the process as possible.
- ***Regulations.gov and the Federal Docket Management System*** examines practice-based or technological changes designed to enable agencies to better track data for internal purposes, and methods of presenting information in a way that accurately informs stakeholders of relevant agency actions and supports informed engagement in rulemaking.

Forthcoming Publications of the Office of the Chairman

- ***Federal Administrative Adjudication Outside of the Administrative Procedure Act.*** ACUS will soon publish an exhaustive sourcebook that will examine and provide recommendations to improve federal administrative adjudication that is not subject to the adjudicatory provisions of the Administrative Procedure Act (APA). Non-APA adjudication, as it is known, constitutes the vast majority of agency adjudications and affects the lives of millions of American each year. The sourcebook will assist agencies and Congress in enhancing the fairness and efficiency of existing programs and in designing new ones.
- ***Federal Administrative Procedure Sourcebook.*** ACUS is partnering with the American Bar Association (ABA) in publishing subsequent editions of the *Federal Administrative Procedure Sourcebook* that was originated by ACUS in the 1980s and later published exclusively by the ABA. The Sourcebook will include the key statutes governing the administrative state and provide updates on judicial opinions and other developments relevant to the interpretation of those laws. As an online publication that will be updated on a regular basis, the Sourcebook will become an indispensable, free reference for Congress, federal agencies, and the judiciary.
- ***Guide to Judicial Review of Federal Administrative Action.*** This project catalogs all provisions in the United States Code that govern federal judicial review of agency action. Topics include the availability of review, choice of court, administrative exhaustion, limitations periods, and the scope and standard of review. The project will result in a guide for use by Congress, the judiciary, agencies, and the public. Leading experts will serve as project advisors.
- ***Revised Edition of the Sourcebook of United States Executive Agencies.*** ACUS will publish a thoroughly revised (second edition) of the above-described Sourcebook in early 2018.
- ***Public-Private Partnerships.*** The federal government has long interacted with private entities in a wide range of ways outside of regulating them. Through this project, a working group of key federal officials convened by the Conference will attempt to chart

the universe of public private partnerships at the federal level, ideally settling on some consensus definition of the term, and then prepare one or more checklists of legal issues based on that initial inquiry.

A principal program activity for ACUS in FY 2018-19 will include necessary follow up on, or continuation of, these research projects and programs and implementation of any recommendations resulting from them and the initiation of other projects in furtherance of ACUS's mission.

4. Collaborative Initiatives Through the Office of the Chairman

The Office of the Chairman is pursuing other projects that will advance ACUS's statutory mission and strategic goals through forums, symposia, and other events in partnership with other federal agencies as well as non-governmental organizations. Notable recent events include:

Model Adjudication Rules Working Group. The Office of the Chairman has established the Model Adjudication Rules Working Group to review and revise the Conference's Model Adjudication Rules, on which many agencies have relied over the years in designing and revising their adjudicative programs. Released in 1993 by a similar working group of the Conference, the Model Adjudication Rules were designed for use by federal agencies to amend or develop their procedural rules for hearings conducted under the Administrative Procedure Act. Significant changes in adjudicative practices and procedures since 1993—including use of electronic case management and video hearings—necessitate a careful review and revision of the Model Adjudication Rules. In reviewing and revising the Model Rules, the Working Group will rely on the Conference's extensive empirical research of adjudicative practices reflected in the Federal Administrative Adjudication Database, amendments to the Federal Rules of Civil Procedure since 1993, and input from agency officials, academics, practitioners, and other stakeholders.

Forum on Federal Administrative Adjudication (September 2017). ACUS cosponsored a forum on federal administrative adjudication. The forum took place on Capitol Hill with congressional staff, and Kim Hildred, the Chair of the Social Security Advisory Board, appeared as a featured speaker. The event included three panels that addressed agency adjudication and possible reforms. These panels discussed adjudication in the administrative state; technological innovations in adjudication; and balancing fairness and efficiency in high volume adjudication programs.

Symposium on New Developments in Regulatory Benefit-Cost Analysis (September 2017). ACUS cosponsored a symposium on regulatory benefit-cost analysis with the George Washington University Regulatory Studies Center and the Society for Benefit-Cost Analysis. Former OIRA Administrators Susan Dudley and Sally Katzen appeared as featured speakers. The event included discussions on tools for evaluating regulatory and deregulatory impacts and on experience using regulatory analysis to implement new directives.

Regulatory Capture (March 2016). ACUS cosponsored a bipartisan forum on regulatory capture. Senators Lee, Warren, and Whitehouse delivered remarks and offered their respective thoughts on special interest influence in the administrative state. They were followed by two bipartisan panels that discussed how to measure regulatory capture in the rulemaking context; whether federal agencies' allegedly weak enforcement of regulatory crimes is evidence of capture; and whether increased transparency, robust enforcement, enhanced judicial oversight, or deregulation are plausible solutions to special interest influence.

5. Assistance to Congress and Federal Agencies by the Office of the Chairman

- ***Memorandum on Pending Regulatory Reform Bills.*** In the last several years, Members of Congress from both political parties have introduced numerous bills designed to amend or overhaul certain aspects of the federal administrative state. Given the significance of these proposed reforms and the large number of bills introduced, the Office of the Chairman has compiled summaries of bills introduced in the last few years. The Office updates this document periodically to introduce new bills and to reflect subsequent developments for existing bills.
- ***Statutory Review Program.*** ACUS has initiated a pilot program under which its staff will transmit to Congress federal judicial opinions that identify technical and related problems in statutes dealing with administrative procedure. Its purpose is primarily to provide legislative drafters with the information they need to ensure future statutes adequately reflect Congress's intent. Opinions will be selected by Conference staff based on independent research and, most importantly, suggestions from federal agencies. Selected opinions will be transmitted, under the cover of a letter briefly identifying the issues warranting transmittal, to the Speaker of the House, the Senate Pro Tempore of the Senate, the Office of the Legislative Counsel in both the House and Senate, the Committee on the Judiciary in both the House and Senate, and, as appropriate, other committees that may have an interest in the subject matter. All letters and accompanying opinions will be made publicly available on the Conference's website.
- ***Congressional Trainings.*** ACUS has offered trainings to congressional staffers. In July 2016, ACUS conducted a training on legislative drafting involving delegation of power to administrative agencies. In March 2016, ACUS conducted a training on fundamental principles of administrative law and the role of administrative agencies.

6. Leadership of Inter-Agency Working Groups

Council of Independent Regulatory Agencies. The Office of the Chairman convenes the Council of Independent Regulatory Agencies. A council for leaders in independent

regulatory agencies, CIRA's goal is to provide a forum to discuss issues common to these agencies.

Working Group on Self-Represented Parties in Administrative Hearings. The Working Group on Self-Represented Parties in Administrative Hearings is co-led by the ACUS and the Department of Justice's Office for Access to Justice. The working group's aim is to identify the challenges posed by self-represented parties in administrative hearings and find solutions to common problems. The working group has met since the Spring of 2015, and participating agencies include the Social Security Administration, Board of Veterans' Appeals, Executive Office for Immigration Review, Department of Health and Human Services, and Department of Housing and Urban Development.

OPM-SSA Working Group on Administrative Law Judges. ACUS co-led a working group in 2015, established by the President in February 2015, to expedite the OPM-administered process for hiring administrative law judges and thereby reduce the growing backlogs of disability claims at SSA. One of the group's proposals was implemented by Congress in Section 846 of the Bipartisan Budget Act of 2015, which requires OPM to "expeditiously administer a sufficient number of competitive examinations [to ensure that] an adequate number of candidates . . . be appointed as" ALJs.

IV. Budget Status and Request

A. Proposed Appropriations Language for FY 2019

Administrative Conference of the United States

Salaries and Expenses

For necessary expenses of the Administrative Conference of the United States, authorized by 5 U.S.C. §§ 591 et seq., \$3,100,000 to remain available until September 30, 2020, of which not to exceed \$1,000 is for official reception and representation expenses.

Note.—A full-year 2018 appropriation for this account was not enacted at the time the budget was prepared; therefore, the budget assumes this account is operating under the Continuing Appropriations Act, 2018 (Division D of P.L. 115-56, as amended). The amounts included for 2018 reflect the annualized level provided by the continuing resolution.

B. Budget Authority and Staffing by Activity

Salaries and Expenses

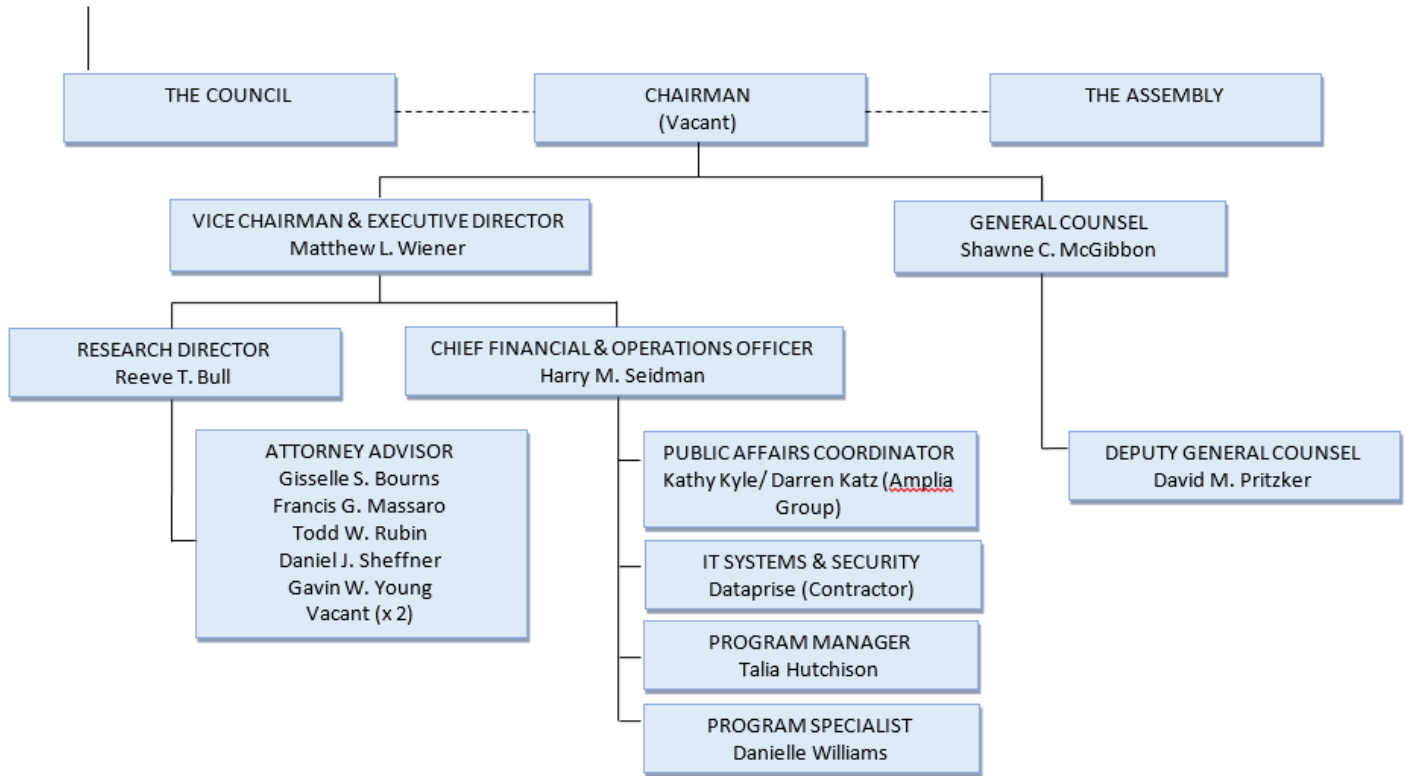
	FY 2015 Enacted	FY 2016 Enacted	FY 2017 Enacted	FY 2018 Requested	FY 2019 Requested
Budget Authority	\$3,100,000*	\$3,100,000	\$3,100,000	\$3,094,000	\$3,100,000
Authorized FTE	18	18	18	18	18
Filled FTE	15	16	15	15	16

*FY 2015-18 appropriations assumed carryover funds for total budgetary resources of \$3.2 million.

C. ACUS Organization Chart
 Current as of January 2018



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



UPDATED January 2018

D. Financial Summary

	FY 2017 OBLIGATIONS ACTUAL	FY 2018 CURRENT BUDGET	FY 2019 PROPOSED BUDGET
Appropriation	\$3,100,000	\$3,100,000	\$3,100,000
Carry Forward	\$249,880	\$184,905	\$0
Sequestration	\$0	\$0	\$0
Net Appropriation	\$3,349,880	\$3,278,905	\$3,100,000
<i>Obligations/Expenses</i>			
Salaries, Full Time	\$1,522,692	\$1,750,000	\$1,750,000
Benefits	\$427,544	\$460,000	\$419,000
Subtotal, Salaries and Benefits	\$1,950,236	\$2,210,000	\$2,169,000
Member/ Staff Travel	\$25,138	\$20,000	\$15,000
Rent & Utilities	\$486,622	\$485,000	\$485,000
Communications/ IT	\$69,886	\$50,000	\$20,000
Printing/Reproduction	\$28,002	\$25,000	\$15,000
Consultant Contracts (Research & Projects)	\$355,773	\$312,905	\$270,000
Administrative Contracts	\$161,701	\$140,000	\$110,000
Supplies	\$68,777	\$16,000	\$16,000
Equipment	\$18,636	\$20,000	\$0
Subtotal, Operating expenses	\$1,214,535	\$1,068,905	\$931,000
Total Obligation/Expenses	\$3,164,771	\$3,278,905	\$3,100,000
Unexpended Prior Year Funds	(\$204)		
Unobligated Balance Brought Forward	\$184,905	\$0	\$0

E. Recent Appropriations History

<u>Salaries and Expense Account</u>	
(Amounts in thousands of dollars)	
<u>Fiscal Year</u>	<u>Budget Authority</u>
2015	3,100*
2016	3,100*
2017	3,100*
2018	3,100 (CR/ President's FY '18 Budget)
2019	3,100 (President's FY '19 Budget)

*FY 2015-18 appropriations assumed carryover funds for total budgetary resources of \$3.2 million.

The budget request of \$3.1 million, including two-year spending authority, to support a full year of agency operations during FY 2019 is less than the \$3.2 million requested in FY 2014 through FY 2017. Although ACUS did not receive a full \$3.2 million appropriation, Congress has consistently appropriated funding for ACUS at a level equal to, or more than, \$3.2 million in total budgetary resources once prior year carryover funds are added. And Congress has consistently given ACUS two-year funding authority. Tight control of agency expenditures has allowed ACUS to utilize its two-year funding authority to carryover small balances from one fiscal year to the next. This authority is necessary to maintain optimal spending efficiency given the nature of ACUS's work and the agency's small size.

ACUS's recent budgetary history is as follows:

In FY 2014, the President's budget requested \$3.2 million to support a full year of agency operations. H.R. 3547, the Consolidated Appropriations Act of 2014, funded ACUS at \$3.0 million. FY 2013 carryover funds of \$197,056 netted total budgetary resources just shy of \$3.2 million in FY 2014.

In FY 2015, the President's budget again requested \$3.2 million to support a full year of agency operations. The bill reported by the Senate Committee on Appropriations Subcommittee on Financial Services and General Government maintained ACUS's FY 2014 funding level—\$3.2 million—for FY 2015. The House of Representatives Financial Services and General Government Appropriations Act, FY 2015, H.R. 5016, which passed the House, included \$3.0 million for ACUS. Ultimately, H.R. 83 became Public Law 113-235 and included a FY 2015 appropriation of \$3.1 million for ACUS. Prior year carryover funds were expected to make up the \$100,000 difference between the President's request and Congress's appropriation.

For FY 2016, the President's budget again requested \$3.2 million to support a full year of agency operations. The relevant bills reported by the House and Senate Appropriations Committees governing FY 2016 appropriations for financial services and general government (S. 1910 and H.R. 2995) would have funded ACUS at \$3.1 million. Through the Consolidated Appropriations Act of 2016 (Public Law 114-113), ACUS received an appropriation of \$3.1 million for FY 2016.

For FY 2017, the President's budget again requested \$3.2 million to support a full year of agency operations. The Consolidated Appropriations Act of 2017 funded ACUS at \$3.1 million through the end of FY 2017.

For FY 2018, the President's budget requested \$3,094,000 (\$3.1 million) to support a full year of agency operations. Since October 1, 2017, ACUS, like other federal agencies, has operated on Continuing Resolution at FY 2017 funding levels while FY 2018 appropriations await further Congressional action.

ACUS ended FY 2017, the most recently closed fiscal year, with a carryover balance of \$184,905 due to personnel vacancies in senior-level legal and administrative positions. An appropriation of \$3.1 million would fund ACUS at the level required to cover operating and personnel costs at the current reduced staffing level.

F. FY 2019 Request

1. Agency Personnel (Object Classes 11 and 12)

For FY 2019, ACUS anticipates a staff of 14 filled FTEs, 2 filled contract FTEs, and 2 vacant but authorized FTEs. This includes the Chairman and 13 permanent employees included under Object Class 11. In some past years, ACUS has filled 1-2 of its allotted FTE positions under the Intergovernmental Personnel Act or other reimbursable arrangements. ACUS may opt to use these hiring mechanisms for personnel in FY 2019, contingent upon agency needs and the availability of funding.

The ACUS staff supports the 101 voting Members of the Conference as well as the approximately other ACUS members who serve in a non-voting capacity.

Agency Management

The ACUS Chairman is appointed for a five-year term by the President with the advice and consent of the Senate. Among his or her duties, the Chairman appoints Public Members (with the consent of the Council), initiates and oversees research studies designed to result in ACUS recommendations, and presides at meetings of the Council and plenary sessions. The Chairman also oversees the staff of ACUS and, together with the staff, constitutes the Office of the Chairman. During a vacancy in the office, the Vice Chairman exercises the Chairman's powers. Currently, Matthew L. Wiener serves as ACUS Vice Chairman. On September 5, 2017, the White House nominated Jonathan F. Mitchell as ACUS Chairman.

The Executive Director provides executive leadership, planning, direction, and coordination for all ACUS operations and administrative activities, including recruiting and managing the ACUS staff and administering the daily operations of ACUS. The Executive

Director provides managerial expertise and staff support to the ACUS Chairman and Council in developing the agency's strategic planning and direction and implementing activities essential to ensuring that ACUS continues to meet its statutory mission. The Executive Director assesses the overall effectiveness, efficiency, and productivity of ACUS operations.

The General Counsel serves as the chief legal officer for ACUS and provides legal advice and counsel to the agency and its staff on a wide variety of legal matters. The General Counsel is responsible for ensuring that ACUS meets all federal legal and regulatory requirements, including compliance with the Administrative Conference Act and the Federal Advisory Committee Act, which govern operations of the ACUS Assembly and its committees, as well as all other federal statutes governing the operation of executive branch agencies. The General Counsel reviews and comments on proposed legislation and may respond to congressional inquiries and requests to ACUS.

The Chief Financial and Operations Officer is responsible for oversight of the agency's budget as well as management of daily operations and management of the agency's administrative and support staff. The position also oversees contracts for external administrative and operational support services such as payroll, human resources, and accounts payable. The position develops performance standards, financial and organizational staffing plans, and is responsible for the preparation of annual budgetary and administrative reports to Congress and OMB in accordance with applicable legislation and regulations. The Chief Financial Officer reviews and comments on proposed legislation and may respond to congressional inquiries and requests to ACUS.

The Research Director is a Senior Attorney responsible for directing the activities of attorney advisors in developing new research projects and managing existing projects. This includes working in conjunction with agency leadership in developing the agency's policy recommendations, keeping abreast of issues and developments in administrative law and practice, and identifying and prioritizing issues to be studied.

Legal Staff

Attorney Advisors comprise the bulk of the agency's professional staff. Among other things, they are responsible for managing the work of committees in their development of recommendations for consideration by the full membership of ACUS. This includes reviewing research studies for projects assigned to the committees, assisting the committees in drafting proposed recommendations, responding to requests for information about committee activities, reviewing and summarizing public comments and, in general, providing procedural and legal oversight for the work of the committees. Staff attorneys also serve as in-house researchers on select projects in lieu of outside consultants, research and draft reports of the Office of the Chairman, and participate in the implementation of ACUS recommendations.

Administrative and Support Staff

A Public Affairs Coordinator is responsible for developing and managing the agency's strategic communications program, which includes media relations, digital outreach, marketing, and special events. The Public Affairs Coordinator serves as the media spokesperson for ACUS and is responsible for ensuring that agency activities are communicated clearly with members of the media. The Public Affairs Coordinator also creates communications materials about the agency's work that are comprehensible to journalists, Congressional members and staff, and other stakeholders. In recent years, ACUS has experimented with this functional area to determine if communications-related objectives can be delivered at lower cost to the agency. Initial results are encouraging.

The ACUS staff also includes an Information Technology Specialist to support both internal and external communications, including technical support, website development and maintenance, network management, and IT security.

Finally, an Executive Assistant supports the Chairman, and an Office Manager supports the Conference members and staff. These positions provide administrative support for the ACUS staff and the Conference members.

ACUS's FY 2019 budget request leaves vacant 2 allotted FTEs for additional legal and administrative support. As in previous budget requests, these vacancies reduce the agency's total FTE count below the allotted 18. During FY 2019, ACUS anticipates 16 total FTEs while maintaining salaries and benefits at their current spending level. This will be accomplished by backfilling naturally occurring senior-level vacancies (GS 13/14/15) with more junior-level attorneys (GS 9/11/12). Historically, this approach has worked well in controlling agency personnel costs while providing much-needed capacity for in-house research and project management. Use of personnel contracts rather than permanent staff to fill up to 2 of the total 16 FTE positions will generate additional savings and staffing-level flexibility.

Therefore, the FY 2019 budget maintains salary and benefits costs at FY 2018 levels while anticipating a total 16 filled FTE positions.

For FY 2019, ACUS requests a budget of **\$1,750,000** for salary expenses associated with full-time employees (Object Class 11). This amount represents the projected cost for a total of 16 full-time positions including annual civil service cost-of-living salary increases and grade/step increases. Like all federal civilians in the Washington D.C. area, non-SES ACUS employees received a 2.29% cost-of-living adjustment in January 2018 which is included in this salary estimate. ACUS has not requested an overall increase in appropriation. Rather, this request assumes ACUS will absorb the cost of the increase within the requested appropriation.

A total of **\$419,000** is budgeted for personnel benefits during FY 2019 (Object Class 12). Personnel benefits are a direct function of the amount of budgeted salary/wages and inclusive of transit subsidy.

2. Research, Consulting, And Professional Services (Object Class 25)

As discussed in the introductory section above, the research and policy work of ACUS is most frequently pursued through contracts with academics in law, public administration, or other expert consultants. ACUS's research activities are at the core of the agency's ability to analyze issues and develop proposed recommendations through the ACUS committee consensus process. ACUS uses acquisition procedures that provide high value and low risk to the government. ACUS research contracts are generally competitive, fixed-price contracts with recognized experts in their respective fields.

The typical research contract awarded by ACUS, including expenses for research assistance and consultant travel, is approximately \$22,000. These modest contracts allow the federal government to enlist the expertise of scholars in academia and the private bar, many of whom would receive research grants or bill private clients at several multiples of the effective hourly rates the government is paying.

In FY 2019, ACUS is requesting **\$270,000** in funding for research contracts (Object Class 25). This funding will allow ACUS to maintain a research program of new projects directed toward ACUS's statutory mission to study and cooperatively seek solutions to issues and problems arising in the administration of federal agency programs. The number of projects is dependent on the funding level, which enables ACUS to pursue the projects described in the performance section above, including projects undertaken at the request of Congress.

To minimize contracting costs, ACUS staff attorneys sometimes conduct in-house research in addition to serving as legal counsel for ACUS committee projects and staffing the numerous projects undertaken by the Office of the Chairman described in this justification. In-house research initiatives have resulted in several Conference recommendations and significant Office of the Chairman projects for agencies such as SSA, EEOC, CMS, and DHHS. In-house staff research projects and other outreach initiatives, including inter-agency workshops, are included within ACUS's salary and administrative overhead expenses.

In addition to funding for research contracts, ACUS requests **\$110,000** for administrative support contracts. As a small agency, ACUS is required by law and policy to contract with multiple agencies or private vendors for many of the administrative functions typically performed in-house at larger agencies. These contracts cover items such as personnel, payroll, finance, accounting, website hosting, mailing services, and mandated financial auditing. For FY 2019, ACUS requests \$110,000 for external administrative support including the mandated annual agency financial audit (\$28,000). Expenditures for external administrative support have declined over the past several fiscal years as ACUS continuously reviews strategies for contracting administrative support, including using reimbursable services offered by other federal agencies, GSA schedules, and Cloud computing solutions, to find the most cost-effective ways to provide these required and, in some cases, mandated services.

As discussed above in the section on personnel, ACUS has utilized contract positions in past years instead of full time permanent employees to give the agency flexibility to match

expertise with current projects and to rotate experts from academia, nonprofits, or other federal agencies to provide fresh and innovative thinking to ACUS. In FY 2019, ACUS anticipates filling as many as 2 FTE positions with contract personnel. Any contract positions would utilize resources repurposed from other sections of the agency budget, principally object classes 11 and 12.

3. Support and Infrastructure (Object Classes 21, 23, 24 and 26)

Travel by Conference members and staff is budgeted at **\$15,000** for FY 2019 (Object Class 21). This is a reduction from previous budget requests, and reflects the agency's tight control of travel-related costs. Most of these travel expenses involve the travel of out-of-town members of the Conference to Council, committee, and plenary session meetings. Conference members, other than the Chairman, serve without pay and are only reimbursed for travel and per diem, pursuant to 5 U.S.C § 593(c) and 5 U.S.C § 5703. To the extent practicable, the Conference will use videoconferencing and other virtual hosting technologies to minimize travel expenses for Conference members at the committee meetings. In addition, some staff members will travel to conduct research or, as required, participate in various professional meetings and conferences.

ACUS has negotiated a lease to occupy office space at 1120 20th Street, NW, Suite 706 South, Washington, D.C. 20036 until August 2020. Leasing arrangements are coordinated for ACUS through the Building Services Division of the General Services Administration (GSA). During FY 2019 ACUS will be responsible for **\$485,000** in rental payments through its lease, based on estimates set forth in the agency's Occupancy Agreement with GSA (Object Class 23).

ACUS's budget includes an estimated **\$20,000** for electronic communications expenses, including telephone service and website hosting during FY 2019 (Object Class 23). This estimate is based on ACUS's historical usage as well as compliance costs related to mandated security and accessibility requirements for all federal government-owned websites. This estimate also accounts for the natural growth in ACUS's electronic records and online presence that will require incremental scaling-up of data storage and processing capacity. This amount also includes the cost of conference calls for Council and other meetings, which is a much more cost-effective method for conducting interim business than face-to-face meetings.

ACUS has budgeted **\$15,000** in FY 2019 for printing costs (Object Class 24). The majority of this expense, approximately \$14,000, is the cost of printing notices in *The Federal Register* as mandated by the Federal Advisory Committee Act. The remaining balance funds annual and interim reports to Congress and the President, inter-agency reporting requirements, outreach to ACUS members and key stakeholders, and other mandated reports and publications.

ACUS's budget includes **\$16,000** for the purchase of supplies, materials, and legal publications during FY 2019 (Object Class 26). The amount includes supplies for mailing, copying, and ordinary office supplies such as paper, pens, and printer cartridges. Also budgeted are funds for the purchase of computer software, mandated anti-virus protection for the agency's

IT network, library materials, and for subscriptions to relevant technical and policy-oriented publications and online services such as Lexis Nexis.

Conclusion

For FY 2019, ACUS submits a budget request of \$3,100,000. This level of funding will allow ACUS to pursue a full program of research projects and other programs aimed at discharging the agency's statutory responsibilities. This level of funding will also allow ACUS to pursue a robust research program that will help improve and reform government procedures. Such reforms will be designed to enhance fairness, efficiency, expedition, and public participation in the work of federal executive branch agencies, given their substantial impact on all sectors of the national economy and on the lives of all our citizens.

Appendix A: Council Members

Current as of January 2018

Matthew L. Wiener (Vice Chairman)

Matthew Lee Wiener is the Vice Chairman and Executive Director of the Administrative Conference of the United States. Before affiliating with the Conference, he was general counsel to U.S. Senator Arlen Specter, counsel to the U.S. House of Representatives Committee on the Judiciary, a partner at Dechert LLP, and special counsel to Cuneo Gilbert & LaDuca. Mr. Wiener is an elected member of the American Law Institute and a fellow of the American Bar Foundation. Among his outside activities, he co-chairs the Adjudication Committee of the American Bar Association's Section of Administrative Law and Regulatory Practice and previously served on the Steering Committee of the D.C. Bar's Administrative Law and Agency Practice Section. He has taught courses on congressional powers and the judiciary, statutory interpretation, and remedies as a lecturer at the University of Pennsylvania Law School, George Mason University School of Law, and Rutgers University Law School. He holds a J.D. from Stanford Law School, where he was articles editor of the *Stanford Law Review*, and an A.B. from William and Mary.

Ronald A. Cass

Ronald A. Cass has been the President of Cass & Associates since 2004. He is also Dean Emeritus of Boston University School of Law where he served as Dean from 1990-2004. Cass was a law professor at the University of Virginia School of Law from 1976-1981 and at Boston University from 1981-2004. Outside of his professional activities, he has also served as Vice Chairman of the U.S. International Trade Commission (1988-1990), U.S. Representative to the World Bank Panel of Conciliators (2009-Present), advisor to the American Law Institute, Chairman of the Federalist Society Practice Group on Administrative Law, Past Chair of the American Bar Association Administrative Law Section, and President of the American Law Deans Association. Cass received his B.A. with high distinction from the University of Virginia and J.D. with honors from the University of Chicago Law School in 1973.

Danielle Gray

Danielle Gray is a partner in O'Melveny & Myers LLP New York and Washington, D.C. offices. She is a member of O'Melveny's Financial Services Practice Group and provides counseling to financial institutions, health-care companies, and other consumer financial services companies on complex regulatory problems and litigation. Gray also plays an active role in the firm's Appellate and White Collar and Corporate Investigations Practices. Gray served in the administration of President Barack Obama for five years in senior legal and policy positions, most recently as Assistant to the President and Cabinet Secretary. In that role, she was responsible for policy and communications coordination among all Cabinet-level agencies and worked closely with Executive Branch agencies on a range of high-stakes matters—from congressional investigations to the promulgation of agency rules and regulations.

Ronald A. Klain

Ron Klain is General Counsel of Revolution LLC, an investment firm launched by AOL Co-Founder Steve Case to back disruptive, innovative companies that offer consumers more choice, convenience, and control in their lives. Prior to joining Revolution in 2005, Klain spent four years as a partner and National Practice Group Chair at O'Melveny & Myers LLP, where his practice focused on constitutional and commercial litigation, antitrust, and corporate transactions. In addition to his private sector career, Klain has devoted considerable time to public service, most recently as a senior White House aide to President Obama, and Chief of Staff to Vice President Joe Biden from 2009 to 2011. Earlier, he served as Chief of Staff for Vice President Al Gore, Chief of Staff and Counselor to Attorney General Janet Reno, Staff Director of the Senate Democratic Leadership Committee, and Chief Counsel of the Senate Judiciary Committee. Klain was also Associate Counsel to President Clinton in charge of judicial selection. Through his work on the Judiciary Committee, and in the Clinton and Obama administrations, he has played a role in the selection or confirmation of eight Supreme Court Justices. Klain began his legal career as a law clerk to Justice Byron White, for the Supreme Court's 1987 and 1988 Terms.

Theodore B. Olson

Theodore B. Olson is a partner in Gibson, Dunn & Crutcher's Washington, D.C. office and a member of the firm's Executive Committee, Co-Chair of the Appellate and Constitutional Law Group and the firm's Crisis Management Team. Previously, he served as the 42nd Solicitor General of the United States from 2001-2004. Mr. Olson also served as Assistant Attorney General for the Office of Legal Counsel from 1981 to 1984. Except for those two intervals, he has been a lawyer with Gibson, Dunn & Crutcher in Los Angeles and Washington, D.C. since 1965. Throughout his career, Mr. Olson has argued numerous cases before the Supreme Court of the United States. Mr. Olson is a Fellow of both the American College of Trial Lawyers and the American Academy of Appellate Lawyers. He has written and lectured extensively on appellate advocacy, oral advocacy in the courtroom, and constitutional law. He received his bachelor's degree cum laude from the University of the Pacific in Stockton, California, where he received awards as the outstanding graduating student in both journalism and forensics, and his law degree from the University of California at Berkeley (Boalt Hall), where he was a member of the California Law Review and Order of the Coif.

Jane C. Sherburne

Jane C. Sherburne is the owner of Sherburne PLLC, a legal consulting firm providing strategic advice in crisis environments and in connection with regulatory policy developments. Previously, Sherburne was Senior Executive Vice President and General Counsel of BNY Mellon. She was formerly Senior Executive Vice President and General Counsel of Wachovia Corporation. Before joining Wachovia in mid-2008, she served as Deputy General Counsel and Senior Deputy General Counsel of Citigroup, and General Counsel of Citigroup's Global Consumer Group. Sherburne was previously a Partner at Wilmer, Cutler & Pickering, where she practiced litigation, representing clients in matters requiring crisis management, including matters involving Congressional investigations, internal government and corporate

investigations, and complex civil litigation. She has also served as Special Counsel to the President during the Clinton Administration, Chief of Staff and Executive Assistant to the Commissioner of Social Security in the Carter Administration, and as a Legislative Assistant to Congressman Donald Fraser (D-MN). Sherburne is a trustee of the Lawyers' Committee for Civil Rights Under Law and the National Women's Law Center. She is also an executive committee member of the New York City Bar. She received her B.A. and M.S.W. from the University of Minnesota in 1974 and 1976, respectively, and her J.D. from Georgetown University Law Center in 1983.

Geovette E. Washington

Geovette E. Washington is the Senior Vice Chancellor and Chief Legal Officer of the University of Pittsburgh, a position she has held since August 2015. Prior to this role, Ms. Washington served as General Counsel for the Office of Management and Budget from 2013 to 2015. Ms. Washington was first appointed by the President as a Member to the Administrative Conference of the United States in 2013. From 2010 to 2013, Ms. Washington was Deputy General Counsel for the Department of Commerce. Prior to this, she worked at Lewis Baach PLLC (formerly Baach Robinson and Lewis PLLC), as partner from 2000 to 2010 and as an associate from 1996 to 1999. Ms. Washington was a Special Assistant to the Assistant Attorney General in the Office of Legal Counsel at the Department of Justice from 1993 to 1996 and a law clerk for the Honorable Aubrey E. Robinson, Jr. of the U.S. District Court for the District of Columbia from 1992 to 1993. Ms. Washington received a B.A. from Wesleyan College in Macon, Georgia and a J.D. from the Duke University.

Appendix B: Government Members

The following were government members as of January 15, 2018:

David J.	Apol	Office of Government Ethics
Gregory G.	Baker	Federal Election Commission
Eric S.	Benderson	Small Business Administration
Allison	Brigati	General Services Administration
Paige	Bullard	Federal Energy Regulatory Commission
Brian	Callanan	Department of the Treasury
Daniel	Cohen	Department of Energy
Anika	Cooper	Surface Transportation Board
Peter	Davidson	Department of Commerce
Elizabeth	Dickinson	Food & Drug Administration
Margaret M.	Doane	Nuclear Regulatory Commission
Bridget	Dooling	Office of Management & Budget
Chai R.	Feldblum	Equal Employment Opportunity Commission
Robert	Girouard	Office of Personnel Management
Richard	Hipolit	Department of Veterans Affairs
Janice L.	Hoffman	Centers for Medicare & Medicaid Services
Patricia	Jonas	Social Security Administration
Robert	Keith	Department of Health and Human Services
Christopher J.	Kirkpatrick	Commodity Futures Trading Commission
Paul	Koffsky	Department of Defense
Alice	Kottmyer	Department of State
Clara E.	Kuehn	International Trade Commission
Robert	Lesnick	Federal Mine Safety & Health Review Commission
Juliette A.F.	Lillie	Department of the Interior
Nadine	Mancini	Occupational Safety & Health Review Commission
Christina	McDonald	Department of Homeland Security
Elizabeth A. M.	McFadden	Department of Education
Mary	McLeod	Consumer Financial Protection Bureau
James	Owens	Department of Transportation
Alfred M.	Pollard	Federal Housing Finance Agency
Patricia	Pollitzer	Consumer Product Safety Commission
Connor	Raso	Securities and Exchange Commission
Carrie F.	Ricci	Department of Agriculture

Mark A.	Robbins	Merit Systems Protection Board
Bob	Schiff	National Labor Relations Board
Alina	Semo	National Archives and Records Administration
Robert A.	Shapiro	Department of Labor
Elisabeth S.	Shellan	Postal Regulatory Commission
David	Shonka	Federal Trade Commission
Carol Ann	Siciliano	Environmental Protection Agency
Kevin M.	Simpson	Dept. of Housing & Urban Development
Beth	Williams	Department of Justice
Tyler	Wood	Federal Maritime Commission
Charles	Yi	Federal Deposit Insurance Corp.
Chin	Yoo	Federal Communications Commission
Vacant		Federal Reserve Board
Vacant		Internal Revenue Service
Vacant		Occupational Safety & Health Administration
Vacant		Office of the Comptroller of the Currency
Vacant		Office of Science and Technology Policy

Appendix C: Public Members

The following were public members as January 15, 2018:

Gary	Bass	The Bauman Foundation
Jack	Beermann	Boston University School of Law
Boris	Bershteyn	Skadden Arps Slate Meagher & Flom LLP
Emily	Bremer	University of Wyoming College of Law
Jonathan	Cedarbaum	WilmerHale
Cary	Coglianesse	University of Pennsylvania Law School
Steven	Croley	Latham & Watkins
Christopher	DeMuth	Hudson Institute
Michael	Fitzpatrick	General Electric Company
George	Frampton	Partnership for Responsible Growth
Meredith	Fuchs	Capital One Financial Corporation
Lisa	Heinzerling	Georgetown University Law Center
Kristin E.	Hickman	University of Minnesota Law School
Marc	Kesselman	Yum! Brands Inc.
Richard D.	Klingler	Sidley Austin LLP

Renée M.	Landers	Suffolk University Law School
Elliott P.	Laws	Crowell & Moring
Jennifer L.	Mascott	Antonin Scalia Law School, George Mason University
Blake D.	Morant	The George Washington University School of Law
Aaron L.	Nielson	Brigham Young University
Jennifer	Nou	The University of Chicago Law School
Victoria	Nourse	Georgetown University Law Center
Anne Joseph	O'Connell	UC Berkeley School of Law
Lee Liberman	Otis	The Federalist Society for Law & Public Policy Studies
Nicholas R.	Parrillo	Yale Law School
Edith	Ramirez	Hogan Lovells
Eugene	Scalia	Gibson Dunn & Crutcher LLP
Peter	Shane	Ohio State University Michael E. Moritz College of Law
Sidney A.	Shapiro	Wake Forest University School of Law
Catherine M.	Sharkey	New York University Law School
Anna Williams	Shavers	ABA Section of Administrative Law & Regulatory Practice
Jonathan	Siegel	The George Washington University School of Law
Kate Comerford	Todd	Formerly U.S. Chamber Litigation Center
Daniel	Troy	GlaxoSmithKline
Andrew	Vollmer	University of Virginia School of Law
Christopher	Walker	Ohio State University Michael E. Moritz College of Law
Kathryn	Watts	University of Washington School of Law
Russell	Wheeler	Brookings Institution
Adam J.	White	Center for the Study of the Administrative State, Antonin Scalia Law School, George Mason University; The Hoover Institution
Vacant		

Appendix D: Liaison Representatives, Senior Fellows, and Special Counsel

The following were liaison representatives as of January 15, 2018:

Thomas	Armstrong	Government Accountability Office
Krista	Boyd	U.S. House of Representatives, Committee on Oversight and Government Reform
Susan	Braden	United States Court of Federal Claims
Amy	Bunk	Office of the Federal Register
Charles	Center	Federal Labor Relations Authority

Ronald S.	Flagg	Legal Services Corporation
Daniel	Flores	Subcommittee on Regulatory Reform Commercial and Antitrust Law Committee on the Judiciary U.S. House of Representatives
Kristen	Gustafson	National Oceanic & Atmospheric Administration
Eileen	Hoffman	Federal Mediation and Conciliation Service
Michael E.	Horowitz	Council of the Inspectors General on Integrity & Efficiency
Susan	Jensen	Committee on the Judiciary U.S. House of Representatives
Brett M.	Kavanaugh	U.S. Court of Appeals for the D.C. Circuit
Jean	King	Executive Office for Immigration Review
Katia	Kroutil	U.S. Coast Guard
Charles	Maresca	Office of Advocacy SBA
Thomas	McCarthy	Federal Administrative Law Judges Conference
Mary C.	McQueen	National Center for State Courts
Stephanie	Middleton	American Law Institute
Jeffrey P.	Miner	Judicial Conference of the U.S.
Randolph	Moss	United States District Court for the District of Columbia
Katie L.	Nash	Office of the Director of National Intelligence
Nina	Olson	Internal Revenue Service Office of the Nat'l Taxpayer Advocate
Timothy	Reif	Office of the U.S. Trade Representative
Katy	Rother	U.S. House of Representatives Committee on Oversight & Government Reform
Viktoria	Seale	Council on Environmental Quality
Thomas W.	Snook	ABA Nat'l Conference of Administrative Law Judges
Judith	Starr	Pension Benefit Guaranty Corporation
Kara	Stein	American Constitution Society
Max	Stier	Partnership for Public Service
Thomas M.	Susman	American Bar Association Section of Administrative Law and Regulatory Practice
Sheryl	Walter	Administrative Office of the United States Courts
Devon	Westhill	The Federalist Society
Stephen	Wood	National Highway Traffic Safety Administration
Marilyn	Zahm	The Association of Administrative Law Judges

The following were senior fellows as of January 15, 2018:

Warren	Belmar	Capitol Counsel Group LLC
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Jodie Z.	Bernstein	Kelley Drye & Warren LLP
Marshall J.	Breger	The Catholic University Columbus School of Law
Stephen	Breyer	Supreme Court of the U.S.
James Ming	Chen	Michigan State University College of Law
Betty Jo	Christian	Steptoe & Johnson LLP
H. Clayton	Cook, Jr.	Cook Maritime Finance
John F.	Cooney	Venable LLP
Susan	Dudley	Trachtenburg School of Public Policy & Public Administration, The George Washington Univ.
Neil	Eisner	Formerly Department Transportation
E. Donald	Elliott	Covington & Burling LLP; Yale Law School
Cynthia R.	Farina	Cornell Law School
Fred	Fielding	Morgan Lewis & Bockius
David C.	Frederick	Kellogg Huber Hansen Todd Evans & Figel
H. Russell	Frisby, Jr.	Stinson Morrison Hecker LLP
Brian C.	Griffin	Clean Energy Systems Inc.
Susan Tsui	Grundmann	U.S. Congress Office of Compliance
Michael E.	Herz	Benjamin N. Cardozo School of Law
Elena	Kagan	Supreme Court of the U.S.
Paul D.	Kamenar	Formerly Washington Legal Foundation
John M.	Kamensky	IBM Center for the Business of Government
Sally	Katzen	New York University School of Law; and the Podesta Group
Robert A.	Katzmann	U.S. Court of Appeals for the Second Circuit
Richard J.	Leighton	Formerly Keller & Heckman LLP
Ronald	Levin	Washington University School of Law
Dan R.	Levinson	Department of Health & Human Services Office of Inspector General
Jerry L.	Mashaw	Yale Law School
Randolph J.	May	Free State Foundation
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James C.	Miller, III	Formerly Office of Mgmt. & Budget; and Federal Trade Commission
Alan B.	Morrison	The George Washington University School of Law
David W.	Ogden	Wilmer Cutler Pickering Hale & Dorr
Sallyanne	Payton	University of Michigan Law School
Richard J.	Pierce Jr.	The George Washington University Law School

S. Jay	Plager	U.S. Court of Appeals for the Federal Circuit
Richard L.	Revesz	New York University School of Law
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Teresa Wynn	Roseborough	The Home Depot
Lon	Smith	Formerly Internal Revenue Service
Loren A.	Smith	U.S. Court of Federal Claims
Stanley	Sporkin	Gavel Consulting Group
Kenneth	Starr	Baylor University School of Law
Peter L.	Strauss	Columbia Law School
James J.	Tozzi	Center for Regulatory Effectiveness
Paul R.	Verkuil	Center for American Progress; and National Academy of Public Administration
John	Vittone	Formerly Department of Labor
David C.	Vladeck	Georgetown University Law Center
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Richard E.	Wiley	Wiley Rein LLP
Stephen F.	Williams	U.S. Court of Appeals for the District of Columbia Circuit
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The following were special counsel as of January 15, 2018:

Blake	Emerson	UCLA School of Law
Andrew	Emery	The Regulatory Group
Jeffrey	Lubbers	American University Washington College of Law

Appendix E: Recommendations and Statements Adopted 2010 – 2017:

- ***Recommendation 2017-1 – Adjudication Materials on Agency Websites*** provides guidance regarding the online dissemination of administrative adjudication materials. It offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with the transparency objectives and privacy considerations of the Freedom of Information Act and other relevant laws and directives.
- ***Recommendation 2017-2 – Negotiated Rulemaking and Other Options for Public Engagement*** offers best practices to agencies for choosing among several possible

methods—among them negotiated rulemaking—for engaging the public in agency rulemakings. It also offers best practices to agencies that choose negotiated rulemaking on how to structure their processes to enhance the probability of success.

- ***Recommendation 2017-3 – Plain Language in Regulatory Drafting*** identifies tools and techniques agencies have used successfully to write regulatory documents (including rulemaking preambles and guidance documents) using plain language, proposes best practices for agencies in structuring their internal drafting processes, and suggests ways agencies can best use trainings and other informational resources.
- ***Recommendation 2017-4 – Marketable Permits*** provides best practices for structuring, administering, and overseeing marketable permitting programs for any agency that has decided to implement such a program.
- ***Recommendation 2017-5 – Agency Guidance Through Policy Statements*** provides best practices to agencies on the formulation and use of policy statements. It lists steps that agencies can take to remain flexible in their use of policy statements and to encourage, when appropriate, public participation in the adoption or modification of policy statements.
- ***Recommendation 2017-6 – Learning from Regulatory Experience*** offers advice to agencies on learning from different regulatory approaches. It encourages agencies to collect data, conduct analysis at all stages of the rulemaking lifecycle (from pre-rule analysis to retrospective review), and solicit public input at appropriate points in the process.
- ***Recommendation 2017-7 – Regulatory Waivers and Exemptions*** provides best practices to agencies in structuring their waiver and exemption procedures for regulatory requirements. It encourages transparency and public input by asking agencies to consider establishing standards and procedures for approval of waivers and exemptions and to seek public comments in developing standards and procedures and in approving individual waivers and exemptions.
- ***Recommendation 2016-1 – Consumer Complaint Databases*** encourages agencies that make consumer complaints publicly available through online databases or downloadable data sets to adopt and publish written policies governing the dissemination of such information to the public. These policies should inform the public of the source and limitations of the information and permit entities publicly identified to respond or request corrections or retractions
- ***Recommendation 2016-2 – Aggregate Agency Adjudication*** provides guidance to agencies on the use of aggregation techniques to resolve similar claims in adjudications. It sets forth procedures for determining whether aggregation is appropriate. It also considers what kinds of aggregation techniques should be used in certain cases and offers guidance on how to structure the aggregation proceedings to promote both efficiency and fairness.

- ***Recommendation 2016-3 – Special Procedural Rules for Social Security Litigation in District Court*** encourages the Judicial Conference of the United States to develop a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).
- ***Recommendation 2016-4 – Evidentiary Hearings Not Required by the Administrative Procedure Act*** offers best practices to agencies for structuring evidentiary hearings that are not required by the Administrative Procedure Act. It suggests ways to ensure the integrity of the decisionmaking process; sets forth recommended pre-hearing, hearing, and post-hearing practices; and urges agencies to describe their practices in a publicly accessible document and seek periodic feedback on those practices.
- ***Recommendation 2016-5 – The Use of Ombuds in Federal Agencies*** takes account of the broad array of federal agency ombuds offices that have been established since the time of Recommendation 90-2. The recommendation suggests that agencies and Congress consider creating additional ombuds offices where they may be of benefit. It also emphasizes the importance of adherence by ombuds to the three core standards of independence, confidentiality, and impartiality, and identifies best practices for the operation, staffing, and evaluation of federal agency ombuds offices.
- ***Recommendation 2016-6 – Self-Represented Parties in Administrative Hearings*** offers best practices for agencies dealing with self-represented parties in administrative hearings. Recommendations include the use of triage and diagnostic tools, development of a continuum of services to aid parties, and re-evaluation and simplification of existing hearing practices, where possible. The project builds on the activity of a working group on Self-Represented Parties in Administrative Hearings that is co-led by the Administrative Conference and the Department of Justice’s Office for Access to Justice.
- ***Recommendation 2015-1 – Promoting Accuracy and Transparency in the Unified Agenda*** offers proposals for improving the accuracy and transparency of the Unified Agenda of Federal Regulatory and Deregulatory Actions. Among other things, it urges agencies to consider providing relevant updates between Agenda reporting periods, offers recommendations for ensuring that Agenda entries are properly categorized by projected issuance date and status, and encourages agencies to provide notice when entries are removed from the Agenda.
- ***Recommendation 2015-2 - Technical Assistance by Federal Agencies in the Legislative Process*** offers best practices for agencies when providing Congress with technical drafting assistance. It is intended to apply to situations in which Congress originates the draft legislation and asks an agency to review and provide expert technical feedback on the draft without necessarily taking an official substantive position.

- ***Recommendation 2015-3 - Declaratory Orders*** identifies contexts in which agencies should consider the use of declaratory orders in administrative adjudications. It also highlights best practices relating to the use of declaratory orders.
- ***Recommendation 2015-4 - Designing Federal Permitting Programs*** describes different types of permitting systems and provides factors for agencies to consider when designing or reviewing permitting programs. It encourages agencies that adopt permitting systems to design them so as to minimize burdens on the agency and regulated entities while maintaining required regulatory protections.
- ***Statement # 19 (Adopted 9/25/2015)*** examines judicial application of an issue exhaustion requirement in pre-enforcement review of administrative rulemaking.
- ***Recommendation 2014-1 - Resolving FOIA Disputes Through Targeted ADR Strategies*** addresses more effective use of alternative dispute resolution (ADR) approaches to help resolve disputes arising under the Freedom of Information Act (FOIA). The OPEN Government Act of 2007 created the Office of Government Information Services (OGIS), a part of the National Archives and Records Administration, to assist in the resolution of FOIA disputes through use of mediation and other ADR techniques. The recommendation suggests ways that OGIS can maximize the effectiveness of its resources for this purpose. The recommendation also suggests steps agencies can take to prevent or resolve FOIA disputes, including cooperating with OGIS and making FOIA staff and requesters aware of OGIS services.
- ***Recommendation 2014-2 - Government in the Sunshine Act*** highlights best practices designed to enhance transparency of decision making at multi-member boards and commissions subject to the Government in the Sunshine Act. The recommendation urges covered agencies to provide a description of the primary mechanisms for conducting business, describe substantive business disposed of outside of open meetings subject to the Act (with appropriate protections for information made exempt from disclosure), and exploit new technologies to disseminate relevant information more broadly.
- ***Recommendation 2014-3 - Guidance in the Rulemaking Process*** identifies best practices for agencies when providing guidance in preambles to final rules. It suggests ways that agencies can improve the drafting and presentation of these preambles, including making it easier to identify any guidance content. The recommendation also urges agencies to ensure that users of their websites can easily locate the required small entity compliance guides.
- ***Recommendation 2014-4 - "Ex Parte" Communications in Informal Rulemaking*** provides guidance and best practices to agencies for managing "ex parte" communications between agency personnel and nongovernmental interested persons regarding the substance of informal rulemaking proceedings conducted under 5 U.S.C. § 553.

- ***Recommendation 2014-5 - Retrospective Review of Agency Rules*** examines agencies' procedures for reanalyzing and amending existing regulations and offers recommendations designed to promote a culture of retrospective review at agencies. Among other things, it urges agencies to plan for retrospective review when drafting new regulations; highlights considerations germane to selecting regulations for reevaluation; identifies factors relevant to ensuring robust review; and encourages agencies to coordinate with the Office of Management and Budget, other agencies, and outside entities (including stakeholders and foreign regulators) when designing and conducting retrospective reviews.
- ***Recommendation 2014-6 – Petitions for Rulemaking*** identifies agency procedures and best practices for accepting, processing, and responding to petitions for rulemaking. It seeks to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy. Building upon ACUS's previous work on the subject, it provides additional guidance that may make the petitioning process more useful for agencies, petitioners, and the public.
- ***Recommendation 2014-7 – Best Practices for Using Video Teleconferencing for Hearings*** offers practical guidance regarding how best to conduct video hearings, and addresses the following subjects: equipment and environment, training, financial considerations, procedural practices, fairness and satisfaction, and collaboration among agencies. It also provides for the development of a video hearings handbook by ACUS's Office of the Chairman.
- ***Recommendation 2013-1 – Improving Consistency in Social Security Disability Adjudication*** identifies ways to improve the adjudication of Social Security disability benefits claims before administrative law judges and the Social Security Administration's Appeals Council, suggests changes to the evaluation of opinion evidence from medical professionals, and encourages the SSA to enhance data capture and reporting. As announced in the Unified Agenda, the Administration is working on proposed regulations that would implement much of this recommendation.
- ***Recommendation 2013-2 – Benefit-Cost Analysis at Independent Regulatory Agencies*** highlights a series of best practices directed at independent regulatory agencies in the preparation of benefit-cost analyses that accompany proposed and final rules.
- ***Recommendation 2013-3 - Science in the Administrative Process*** promotes transparency in agencies' scientific decision-making, including: articulation of questions to be informed by science information; attribution for agency personnel who contributed to scientific analyses; public access to underlying data and literature; and conflict of interest disclosures for privately funded research used by the agencies in licensing, rulemaking, or other administrative processes.
- ***Recommendation 2013-4 - Administrative Record in Informal Rulemaking*** offers best practices for agencies in the compilation, preservation, and certification of records in

informal rulemaking, and it supports the judicial presumption of regularity for agency administrative records except in certain limited circumstances.

- **Recommendation 2013-5 - Social Media in Rulemaking** addresses the various policy and legal issues agencies face when using social media in rulemaking. The recommendation examines whether and when agencies should use social media to support rulemaking activities. It also seeks to identify relevant issues, define applicable legal and policy constraints on agency action, resolve legal uncertainty to the greatest extent possible, and encourage agencies to find appropriate and innovative ways to use social media to facilitate broader, more meaningful public participation in rulemaking activities.
- **Recommendation 2013-6 - Remand without Vacatur** examines judicial remand of an agency decision for further consideration while allowing the decision to remain in place. It examines this remedy and equitable factors that may justify its application. The recommendation offers guidance for courts that remand agency actions and for agencies responding to judicial remands.
- **Recommendation 2013-7 - Review of GPRA Modernization Act of 2010** examines the Act's requirements for cross-agency collaboration; identifies existing constraints to collaboration; highlights tools available to help agencies collaborate; and recommends potential new or enhanced avenues of collaboration.
- **Statement #18 - Improving the Timeliness of OIRA Regulatory Review** (adopted December 6, 2013) highlights potential mechanisms for improving review times of rules under review by the Office of Information and Regulatory Affairs (OIRA), including promoting enhanced coordination between OIRA and agencies prior to the submission of rules, encouraging increased transparency concerning the reasons for delayed reviews, and ensuring that OIRA has adequate staffing to complete reviews in a timely manner.
- **Recommendation 2012-1 - Regulatory Analysis Requirements** addresses the issue of agencies having to comply with numerous regulatory analysis requirements created by statute and executive orders. The recommendation is supported by an extensive report that includes an appendix charting all of the regulatory analysis requirements of the 100 major rules subject to OMB review in 2010. The goal of the recommendation is to ensure agencies fulfill the regulatory analysis requirements efficiently and to enhance the transparency of the process. Agencies, the Congress, the President, and OMB's OIRA are all encouraged to play a role in this effort.
- **Recommendation 2012-2 - Midnight Rules** addresses several issues raised by the publication of rules in the final months of a presidential administration and offers proposals for limiting the practice by incumbent administrations and enhancing the powers of incoming administrations to review midnight rules.
- **Recommendation 2012-3 - Immigration Removal Adjudication** addresses the problem of case backlogs in immigration removals and suggests ways to enhance efficiency and

fairness in these cases. Much of the recommendation was incorporated into the bipartisan immigration legislation (S. 744) that passed the Senate in 2013.

- ***Recommendation 2012-4 - Paperwork Reduction Act*** addresses a variety of issues that have arisen since the Act was last revised in 1995, including those arising from the emergence of new technologies. The proposal offers suggestions for improving public engagement in the review of information collection requests and for making the process more efficient for the agencies and OMB.
- ***Recommendation 2012-5 - Improving Coordination of Related Agency Responsibility*** addresses the problem of overlapping and fragmented procedures associated with assigning multiple agencies similar or related functions, or dividing authority among agencies. This recommendation proposes reforms aimed at improving coordination of agency policymaking, including joint rulemaking, interagency agreements, and agency consultation provisions.
- ***Recommendation 2012-6 - Reform of 28 U.S.C. § 1500*** urges Congress to repeal Section 1500, which divests the United States Court of Federal Claims of jurisdiction when a plaintiff has claims against the government based on substantially the same operative facts pending in another court, and replace it with a provision that would create a presumption that in such circumstances, later-filed actions would be stayed. In 2015, the House Judiciary Committee favorably reported a bill in accordance with this recommendation and a companion ABA resolution endorsing the recommendation.
- ***Recommendation 2012-7 - Third-Party Programs to Assess Regulatory Compliance*** addresses issues that arise when agencies develop programs in which third parties assess whether regulated entities are in compliance with regulatory standards and other requirements. In some areas of regulation, Congress has directed agencies to develop a third-party program; in others, regulatory agencies have developed programs under existing statutory authority. The recommendation sets forth guidance for federal agencies that are establishing, or considering establishing, such programs.
- ***Recommendation 2012-8 - Inflation Adjustment for Civil Penalties*** addresses agency adjustments to civil monetary penalties under the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. 2461 note). The recommendation urges Congress to change the current statutory framework by which agencies periodically adjust their penalties to address three provisions that result in penalty adjustments that may not track the actual rate of inflation. It also advises agencies to adjust their penalties for inflation as required by law. As urged by the Administration, Congress implemented the recommendation in the Bipartisan Budget Act of 2016. The inflation-adjustment provisions of that Act will increase general revenues to the government by \$1.3 billion over the next ten years.
- ***Recommendation 2011-1 - Legal Considerations in e-Rulemaking*** addresses legal issues associated with e-rulemaking and recommends best practices in dealing with them. These include whether agencies can require electronic filing, how they should address copyright and privacy concerns, whether and under what framework they can solicit

comments through social media, and whether any amendments to the Administrative Procedure Act would be appropriate to address such issues.

- ***Recommendation 2011-2 - Rulemaking Comments*** addresses certain best practices for agencies to consider in conducting the “comment” aspect of traditional notice-and-comment rulemaking under the Administrative Procedure Act. The recommendation addresses a possible minimum period for comments, standards for extension of the comment period, availability of comments to the public and provision for reply comments, whether agency delays may require updated comment periods, and the circumstances warranting confidentiality of material filed in public comments.
- ***Recommendation 2011-3 - Government Contractor Ethics*** addresses the increasing use of contractors in government and asks the Federal Acquisition Regulation Council to adopt revisions regarding compliance standards for government contractor employees relating to personal conflicts of interest and use of certain non-public information. In February 2013, the American Bar Association’s House of Delegates adopted a resolution—based on Recommendation 2011-3—urging federal action to minimize government contractor personal conflicts of interest.
- ***Recommendation 2011-4 - Video Hearings*** addresses best practices for the use of video hearings by federal government agencies with high volume case loads as a means of reducing caseload backlog and conducting more efficient adjudication.
- ***Recommendation 2011-5 - Incorporation by Reference*** addresses ways in which agencies publish rules that refer to standards or other materials that have been published elsewhere. The recommendation proposes ways to ensure that materials subject to incorporation by reference are reasonably available to the regulated community and other interested parties, to update regulations that incorporate by reference, and to navigate procedural requirements and drafting difficulties when incorporating by reference. The Office of the Federal Register (OFR), among other agencies, has relied heavily on this recommendation in setting its regulatory policies. In late 2014, in fact, the OFR implemented the recommendation in a final rule modifying its long-standing requirements for incorporation by reference in all federal regulations.
- ***Recommendation 2011-6 - International Regulatory Cooperation*** addresses how United States regulators can interact with foreign authorities to accomplish their domestic regulatory missions and eliminate unnecessary non-tariff barriers to trade. The project updates Administrative Conference Recommendation 91-1, *Federal Agency Cooperation with Foreign Government Regulators*. The recommendation includes proposals for enhanced cooperation and information gathering, more efficient deployment of limited resources, and better information exchanges. The key features of this recommendation were incorporated into Executive Order 13609.
- ***Recommendation 2011-7 - FACA in the 21st Century*** addresses the administrative load imposed by Federal Advisory Committee Act (FACA) and offers proposals to Congress, the General Services Administration, and agencies that use advisory committees, to

alleviate certain procedural burdens associated with the existing regime, clarify the scope of the Act, and enhance the transparency and objectivity of the advisory committee process.

- ***Recommendation 2011-8 - Agency Innovations in e-Rulemaking*** addresses ways in which agency innovations and best practices can engage the public in rulemaking activities at low cost to the government.
- ***Recommendation 2010-1 - Regulatory Preemption*** addresses agency procedures for determining whether to preempt state law. The recommendation presents best practices by federal agencies in implementing the requirements of Executive Order 13132 and the President's May 2009 memorandum governing agency preemption of state law, including procedures for securing meaningful participation by state and local government officials in the process of considering questions of federal preemption.