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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted four recommendations at its Fifty-fourth Plenary Session. The appended recommendations address electronic rulemaking, rulemaking comments, contractor ethics, and video hearings.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2011–1, Emily Schleicher Bremer, Attorney Advisor; for Recommendations 2011–2 and 2011–3, Reeve Bull, Attorney Advisor; and for Recommendation 2011–4, Funmi Olorunnipa, Attorney Advisor. For all four recommendations the address and phone number is: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW., Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations for improvements to agencies, the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *http://www.acus.gov.*

At its Fifty-fourth Plenary Session, held June 16–17, 2011, the Assembly of the Conference adopted four recommendations. Recommendation 2011–1, ''Legal Considerations in e-Rulemaking,'' provides guidance on issues that have arisen in light of the change from paper to electronic rulemaking procedures. It recommends that agencies (1) consider using content analysis software to reduce the need for agency staff to spend time reading identical or nearly identical comments, (2) provide timely, online access to all studies and reports upon which they rely, (3) implement appropriate procedures for the handling of confidential, trade secret, or other protected information, (4) consider the potential need to revise Privacy Act notices and recordkeeping schedules to accommodate e-Rulemaking, and (5) replace paper files with electronic records in the rulemaking docket and in the record for appellate review.

Recommendation 2011–2, ''Rulemaking Comments,'' recognizes innovations in the commenting process that could promote public participation and improve rulemaking outcomes. The recommendation encourages agencies (1) to provide public guidance on how to submit effective comments, (2) to leave comment periods open for sufficient periods, generally at least 60 days for significant regulatory actions and 30 days for other rulemakings, (3) to post comments received online within a specified period after submission, (4) to announce policies for anonymous and late-filed comments, and (5) to consider when reply and supplemental comment periods are useful.

Recommendation 2011–3, ''Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information'' responds to agencies' need to protect integrity and the public interest when they rely on contractors. The Conference recommends that the Federal Acquisition Regulatory Council provide model language for agency contracting officers to use when negotiating or administering contracts that pose particular risks that employees of contractors could have personal conflicts of interest or could misuse non-public information.

Recommendation 2011–4, ''Agency Use of Video Hearings: Best Practices and Possibilities for Expansion,'' encourages agencies, especially those with a high volume of cases, to consider the use of video teleconferencing technology for hearings and other administrative proceedings. The recommendation sets forth factors agencies should consider when deciding whether to use video teleconferencing and best practices for the implementation of this technology.

The Appendix (below) sets forth the full text of these four recommendations. The Conference will transmit them to affected agencies, to appropriate committees of the United States Congress, and (in the case of 2011–1) to the Judicial Conference of the United States. The recommendations are not binding, so the relevant agencies, the Congress and the courts will make decisions on their implementation.

The Conference based these recommendations on research reports that it has posted at: *http://www.acus.gov/events/54th-plenary-session/.* The transcript of the Plenary Session is available at the same web address.

Dated: August 4, 2011.

Paul R. Verkuil,

Chairman.

Appendix—Recommendations of the Administrative Conference of the United States

Administrative Conference Recommendation 2011–1

Legal Considerations in e-Rulemaking

Adopted June 16, 2011

Agencies are increasingly turning to e-Rulemaking to conduct and improve regulatory proceedings. ''E-Rulemaking'' has been defined as ''the use of digital technologies in the development and implementation of regulations'' [1] before or during the informal rulemaking process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA). It may include many types of activities, such as posting notices of proposed and final rulemakings, sharing supporting materials, accepting public comments, managing the rulemaking record in electronic dockets, and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.

A system that brings several of these activities together is operated by the eRulemaking program management office (PMO), which is housed at the Environmental Protection Agency and funded by contributions from partner Federal agencies. This program contains two components: Regulations.gov, which is a public Web site where members of the public

[1] Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process at 2 (2004) (working paper), *http://lsr.nellco.org/upenn_wps/108.*

can view and comment on regulatory proposals, and the Federal Docket Management System (FDMS), which includes FDMS.gov, a restricted-access Web site agency staff can use to manage their internal files and the publicly accessible content on Regulations.gov. According to the Office of Management and Budget, FDMS ''provides * * * better internal docket management functionality and the ability to publicly post all relevant documents on regulations.gov (e.g., **Federal Register** documents, proposed rules, notices, supporting analyses, and public comments).'' [2] Electronic docketing also provides significant costs savings to the Federal government, while enabling agencies to make proposed and final regulations, supplemental materials, and public comments widely available to the public. These incentives and the statutory prompt of the E-Government Act of 2002, which required agencies to post rules online, accept electronic comments on rules, and keep electronic rulemaking dockets,[3] have helped ensure that over 90% of agencies post regulatory material on Regulations.gov.[4]

Federal regulators, looking to embrace the benefits of e-Rulemaking, face uncertainty about how established legal requirements apply to the web. This uncertainty arises because the APA, enacted in 1946, still provides the basic framework for notice-and-comment rulemaking. While this framework has gone largely unchanged, the technological landscape has evolved dramatically.

The Conference has therefore examined some of the legal issues agencies face in e-Rulemaking and this recommendation provides guidance on these issues. The Conference has examined the following issues:

• *Processing large numbers of similar or identical comments.* The Conference has considered whether agencies have a legal obligation to ensure that a person reads every individual comment received, even when comment-processing software reports that multiple comments are identical or nearly identical.

• *Preventing the publication of inappropriate or protected information.* The Conference has considered whether agencies have a legal obligation to prevent the publication of certain types of information that may be included in comments submitted in e-Rulemaking.

• *Efficiently compiling and maintaining a complete rulemaking docket.* The Conference has considered issues related to the maintenance of rulemaking dockets in electronic form, including whether an agency is obliged to retain paper copies of comments once they are scanned to electronic format and how an agency that maintains its comments files electronically should handle comments that cannot easily be reduced to electronic form, such as physical objects.

• *Preparing an electronic administrative record for judicial review.* The Conference has considered issues regarding the record on review in e-Rulemaking proceedings.

This recommendation seeks to provide all agencies, including those that do not participate in Regulations.gov, with guidance to navigate some of the issues they may face in e-Rulemaking.[5] With respect to the issues addressed in this recommendation, the APA contains sufficient flexibility to support e-Rulemaking and does not need to be amended for these purposes at the present time. Although the primary goal of this recommendation is to dispel some of the legal uncertainty agencies face in e-Rulemaking, where the Conference finds that a practice is not only legally defensible, but also sound policy, it recommends that agencies use it. It bears noting, however, that agencies may face other legal issues in e-Rulemaking, particularly when using wikis, blogs, or similar technological approaches to solicit public views, that are not addressed in this recommendation. Such issues, and other broad issues not addressed herein, are beyond the scope of this recommendation, but warrant further study.[6]

Recommendation

Considering Comments

1. Given the APA's flexibility, agencies should:

(a) Consider whether, in light of their comment volume, they could save substantial time and effort by using reliable comment analysis software to organize and review public comments.

(1) While 5 U.S.C. 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.

(2) Agencies should also work together and with the eRulemaking program management office (PMO), to share experiences and best practices with regard to the use of such software.

(b) Work with the eRulemaking PMO and its interagency counterparts to explore providing a method, including for members of public, for flagging inappropriate or protected content, and for taking appropriate action thereon.

(c) Work with the eRulemaking PMO and its interagency counterparts to explore mechanisms to allow a commenter to indicate prior to or upon submittal that a comment filed on Regulations.gov contains confidential or trade secret information.

(d) Confirm they have procedures in place to review comments identified as containing confidential or trade secret information. Agencies should determine how such information should be handled, in accordance with applicable law.

Assessing Privacy Concerns

2. Agencies should assess whether the Federal Docket Management System (FDMS) System of Records Notice provides sufficient Privacy Act compliance for their uses of Regulations.gov. This could include working with the eRulemaking PMO to consider whether changes to the FDMS System of Records Notice are warranted.

Maintaining Rulemaking Dockets in Electronic Form

3. The APA provides agencies flexibility to use electronic records in lieu of paper records. Additionally, the National Archives and Records Administration has determined that agencies are not otherwise legally required, at least under certain circumstances, to retain paper copies of comments properly scanned and included in an approved electronic recordkeeping system. The circumstances under which such destruction is permitted are governed by each agency's records schedules. Agencies should examine their record schedules and maintain electronic records in lieu of paper records as appropriate.

4. To facilitate the comment process, agencies should include in a publicly available electronic docket of a rulemaking proposal all studies and reports on which the proposal for rulemaking draws, as soon as practicable, except to the extent that they would be protected from disclosure in response to an appropriate Freedom of Information Act request.[7]

5. Agencies should include in the electronic docket a descriptive entry or photograph for all physical objects received during the comment period.

Providing Rulemaking Records to Courts for Judicial Review

6. In judicial actions involving review of agency regulations, agencies should work with parties and courts early in litigation to provide electronic copies of the rulemaking record in lieu of paper copies, particularly where the record is of substantial size. Courts should continue their efforts to embrace electronic filing and minimize requirements to file paper copies of rulemaking records.

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[2] Office of Mgmt. & Budget, Executive Office of the President, FY 2009 Report to Congress on the Implementation of the E-Government Act of 2002, at 10 (2009), *http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/2009_egov_report.pdf.*

[3] *See* Public Law 107–347 § 206.

[4] Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies, p. D–1 (Nov. 30, 2010), *http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf.* Some agencies rely on their own electronic docketing systems, such as the Federal Trade Commission (which uses a system called CommentWorks) and the Federal Communications Commission, which has its own electronic comment filing system (*http://fjallfoss.fcc.gov/ecfs/*).

[5] This report follows up on previous work of the Administrative Conference. On October 19, 1995, Professor Henry H. Perritt, Jr. delivered a report entitled ''Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication.'' Although never published, the Perritt Report continues to be a helpful resource and is available at: *http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm.*

[6] The Conference has a concurrent recommendation which focuses on issues relating to the comments phase of the notice-and-comment process independent of the innovations introduced by e-Rulemaking. *See* Administrative Conference of the United States, Recommendation 2011–2, *Rulemaking Comments.*

[7] *See also* Exec. Order No. 13,563, § 2(b), 76 FR 3,821 (Jan. 18, 2011) (requiring agencies to provide timely online access to ''relevant scientific and technical findings'' in the rulemaking docket on regulations.gov).

The Judicial Conference should consider steps to facilitate these efforts.

Complying With Recordkeeping Requirements in e-Rulemaking

7. In implementing their responsibilities under the Federal Records Act, agencies should ensure their records schedules include records generated during e-Rulemaking.

Administrative Conference Recommendation 2011–2

Rulemaking Comments

Adopted June 16, 2011

One of the primary innovations associated with the Administrative Procedure Act (''APA'') was its implementation of a comment period in which agencies solicit the views of interested members of the public on proposed rules.[1] The procedure created by the APA has come to be called ''notice-and-comment rulemaking,'' and comments have become an integral part of the overall rulemaking process.

In a December 2006 report titled ''Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century,'' the Subcommittee on Commercial and Administrative Law of the United States House of Representatives' Committee on the Judiciary identified a number of questions related to rulemaking comments as areas of possible study by the Administrative Conference.[2] These questions include:

- Should there be a required, or at least recommended, minimum length for a comment period?
- Should agencies immediately make comments publicly available? Should they permit a ''reply comment'' period?
- Must agencies reply to all comments, even if they take no further action on a rule for years? Do comments eventually become sufficiently ''stale'' that they could not support a final rule without further comment?
- Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?
- What effects do comments actually have on agency rules?

The Conference has studied these questions and other, related issues concerning the ''comment'' portion of the notice-and-comment rulemaking process. The Conference also has a concurrent recommendation that deals with separate matters, focusing specifically on legal issues implicated by the rise of e-rulemaking. See Administrative Conference of the United States, Recommendation 2011–1, Legal Considerations in e-Rulemaking.

The Conference believes that the comment process established by the APA is fundamentally sound. Nevertheless, certain innovations in the commenting process could allow that process to promote public participation and improve rulemaking outcomes more effectively. In this light, the Conference seeks to highlight a series of ''best practices'' designed to increase the opportunities for public participation and enhance the quality of information received in the commenting process. The Conference recognizes that different agencies have different approaches to rulemaking and therefore recommends that individual agencies decide whether and how to implement the best practices addressed.

In identifying these best practices, the Conference does not intend to suggest that it has exhausted the potential innovations in the commenting process. Individual agencies and the Conference itself should conduct further empirical analysis of notice-and-comment rulemaking, should study the effects of the proposed recommendations to the extent they are implemented, and should adjust and build upon the proposed processes as appropriate.

Recommendation

1. To promote optimal public participation and enhance the usefulness of public comments, the eRulemaking Project Management Office should consider publishing a document explaining what types of comments are most beneficial and listing best practices for parties submitting comments. Individual agencies may publish supplements to the common document describing the qualities of effective comments. Once developed, these documents should be made publicly available by posting on the agency Web site, Regulations.gov, and any other venue that will promote widespread availability of the information.

2. Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. As a general matter, for ''[s]ignificant regulatory action[s]'' as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.[3]

3. Agencies should adopt stated policies of posting public comments to the Internet within a specified period after submission. Agencies should post all electronically submitted comments on the Internet and should also scan and post all comments submitted in paper format.[4]

4. The eRulemaking Project Management Office and individual agencies should establish and publish policies regarding the submission of anonymous comments.

5. Agencies should adopt and publish policies on late comments and should apply those policies consistently within each rulemaking. Agencies should determine whether or not they will accept late submissions in a given rulemaking and should announce the policy both in publicly accessible forums (*e.g.,* the agency's Web site, Regulations.gov) and in individual **Federal Register** notices including requests for comments. The agency may make clear that late comments are disfavored and will only be considered to the extent practicable.[5]

6. Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.[6]

7. Although agencies should not automatically deem rulemaking comments to have become stale after any fixed period of time, agencies should closely monitor their rulemaking dockets, and, where an agency believes the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale, consider the use of available

[1] 5 U.S.C. 553; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 Duke L.J. 511, 514 (1989) (describing the ''notice-and-comment procedures for rulemaking'' under the APA as ''probably the most significant innovation of the legislation'').

[2] Subcomm. on Commercial & Admin. Law of the Comm. on the Judiciary, 109th Cong., Interim Rep. on the Admin. Law, Process and Procedure Project for the 21st Century at 3–5 (Comm. Print 2006).

[3] *See also* Administrative Conference of the United States, Recommendation 93–4, *Improving the Environment for Agency Rulemaking* (1993) (''Congress should consider amending section 553 of the APA to * * * [s]pecify a comment period of 'no fewer than 30 days.' ''); Exec. Order No. 13,563, 76 FR 3,821, 3,821–22 (Jan. 18, 2011) (''To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.'').

[4] *See also* Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010) (''OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.'').

[5] *See, e.g.,* Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5,120, 5,121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking announcing that ''[c]omments received after the comment closing date will be included in the DOCKET, and we will consider late comments to the extent practicable'').

[6] *See also* Administrative Conference of the United States, Recommendation 76–3, *Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking* (1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto ''present new and important issues or serious conflicts of data''); Administrative Conference of the United States, Recommendation 72–5, *Procedures for the Adoption of Rules of General Applicability* (1972) (recommending that agencies consider providing an ''opportunity for parties to comment on each other's oral or written submissions); Office of Information & Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13,563, M–11–10, at 2 (Feb. 2, 2011) (''[Executive Order 13,563] seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.'').

mechanisms such as supplemental notices of proposed rulemaking to refresh the rulemaking record.

Administrative Conference Recommendation 2011–3

Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information

Adopted June 17, 2011

The Conference believes that it is important to ensure that services provided by government contractors—particularly those services that are similar to those performed by government employees—are performed with integrity and that the public interest is protected. In that light, the Conference recommends that the Federal Acquisition Regulatory Council (''FAR Council'') promulgate model language in the Federal Acquisition Regulation (''FAR'') [1] for agency contracting officers to use when negotiating or administering contracts that pose particular risks of government contractor employee personal conflicts of interest or misuse of non-public information. In order to ensure that, in its effort to protect the public interest, this recommendation does not create excessive compliance burdens for contractors or unnecessary monitoring costs for agencies, the Conference is limiting its recommendation to those areas that it has identified as the top priorities—contractor employees who perform certain activities identified as posing a high risk of personal conflicts of interest or misuse of non-public information.

Background

In recent years, the Federal government has increasingly relied upon private contractors to perform services previously provided in-house by civil servants.[2] Despite this expansion in the use of government contractors, there continues to be a substantial disparity between the ethics rules regulating government employees and those applicable to government contractor employees. Whereas an array of statutes and regulations creates an extensive ethics regime for government employees, the rules currently applicable to contractor employees vary significantly by agency.

Government employees are subject to various statutes and regulations that create a comprehensive ethics regime governing, among other things, their financial interests, use of government resources, outside activities, and activities in which they may engage after leaving government.[3] By contrast, the compliance standards applicable to contractor employees are much less comprehensive and can vary significantly from contract to contract. A handful of statutes apply to contractor employees and prohibit their offering bribes or illegal gratuities,[4] serving as foreign agents,[5] disclosing procurement information,[6] or offering or receiving kickbacks.[7] The FAR requires contracting officers to identify organizational conflicts of interest (in which the *contractor* has a corporate interest that may bias its judgment or the advice it provides to the government) and either address or waive such conflicts.[8] The FAR also requires that contracting firms that have entered into one or more government contracts valued in excess of $5 million and requiring 120 days or more to perform have in place ''codes of business ethics and conduct.'' [9] A handful of agencies have adopted ethics regulations supplementing the FAR,[10] and still other agencies impose additional ethics requirements by contract.[11]

Finally, certain contracting firms, most notably some performing work for the Department of Defense, have voluntarily adopted internal ethics codes, some of which provide fairly detailed rules relating to such important ethical issues as personal conflicts of interest, confidentiality, gifts and gratuities, protection of government property, and other major ethical areas, and that establish internal disciplinary processes for employee violations of such codes.[12] Nevertheless, the corporate codes do not generally require that unethical conduct that is not otherwise illegal or unlawful be reported to the contracting agency.[13] Furthermore, though the corporate codes provide certain protections for the government,[14] they generally only require contractor employees to protect against personal conflicts with their *employer's* interest rather than the *government's* interest.[15] Finally, many contractors (particularly those outside of the defense setting) do not have internal ethics codes.

Scope of the Problem

By dint of their work for and as part of the government, contractors performing certain services, particularly those that can influence government decisions or have access to non-public information, are in a position of public trust and responsibility for the protection of public resources, as is the government itself. It is therefore critical that their employees behave with the same high degree of integrity as government employees and do not exploit positions of public trust for improper personal gain. Whether or not there is any widespread pattern of ethical abuses, the existence of significant ethical risks can erode public confidence in the government procurement process and in the government itself. Accordingly, it is entirely appropriate to hold those contractors and their employees to a high ethical standard of conduct.

[1] The FAR is a set of uniform policies and procedures that all executive agencies must use in procurements from sources outside of the government. 48 CFR 1.101. All executive agencies must comply with the FAR when purchasing from contractors, though individual agencies can also adopt agency-specific supplements to the FAR by regulation or provide additional requirements in individual contracts. *See, e.g.,* 48 CFR ch. 2 (Defense Federal Acquisition Regulation Supplement for the Department of Defense). The FAR Council consists of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services. *See* 41 U.S.C. 1102, 1302.

[2] Specifically, Federal spending on service contracts increased by 85% in inflation adjusted dollars between 1983 and 2007. Kathleen Clark, *Ethics for an Outsourced Government* Table 3 (forthcoming), *available at http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics.* Over the same period, the number of executive branch employees declined by 18%. Id. In this light, the relative significance of the contractor workforce vis-à-vis the Federal employee workforce has increased substantially in the last few decades.

[3] *Id.* at 7.

[4] 18 U.S.C. 201(b)–(c).

[5] *Id.* § 219.

[6] 41 U.S.C. § 2102.

[7] *Id.* §§ 8701–07 (prohibiting kickbacks to contractors, subcontractors, and their employees).

[8] 48 CFR 9.500 *et seq.* The FAR provision applies only to organizational conflicts of interest, wherein the *firm itself* possesses such business interests, and not to personal conflicts of interest, wherein one of the *firm's employees* has a business or financial interest that could influence his or her decisionmaking in performing a contract.

[9] *Id.* §§ 3.1000–04. These codes must ensure that the firm has adequate systems for detecting, preventing, and reporting illegal conduct and violations of the civil False Claims Act and that it ''[o]therwise promote[s] an organizational culture that encourages ethical conduct.'' *Id.* § 52.203–13. The FAR does not dictate, however, what types of potential ethical misconduct the internal corporate codes must address.

[10] Agencies that have adopted ethics regimes supplementing those contained in the FAR include the Department of Energy, Department of Health and Human Services, Department of the Treasury, Environmental Protection Agency, Nuclear Regulatory Commission, and United States Agency for International Development. Clark, *supra* note 2, Table VII. These supplemental regimes are not comprehensive, however, and generally apply only to specific types of contracts. By contrast, the Federal Deposit Insurance Corporation, though it is not covered by the FAR, has implemented a comprehensive ethics system that applies to all of its contractor employees. *Id.; see also* 12 CFR 366.0 *et seq.*

[11] *See, e.g.,* USAID Acquisition Regulation 148, available at *http://www.usaid.gov/policy/ads/300/aidar.pdf.*

[12] See generally Def. Indus. Initiative on Bus. Ethics & Conduct, Public Accountability Report (2009), *available at http://www.dii.org/files/annual-report-2008.pdf.* Many of the most extensive internal codes are implemented by companies that are members of the Defense Industry Initiative (''DII''), which includes 95 defense contractors that agree to implement such ethics codes and comply with certain values in maintaining an ethical workplace. Contractor employees can be disciplined internally for violating their company's ethics code, and companies commit to disclose violations of the law and ''instances of significant employee misconduct'' to the contracting agency. *Id.* at 49.

[13] *See id.* at 49–50 (contractors are only *required* to report those violations covered by FAR § 52.203–13).

[14] *See id.* at 33 (noting that DII member company codes require them to protect government property).

[15] *See id.* at 34 (''Employees are prohibited from having personal, business, or financial interests that are incompatible with their responsibility to their employer.''); *see also* U.S. Gov't Accountability Office, GAO–08–169, Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 3 (2008) (''Most of the contractor firms have policies requiring their employees to avoid a range of potential interests—such as owning stock in competitors—that conflict with the *firm's* interest. However, only three of these contractors' policies directly require their employees to disclose potential personal conflicts of interest with respect to their work at DOD so they can be screened and mitigated by the firms.'').

As noted above, a significant disparity currently exists between the ethical standards applicable to government employees, which are comprehensive and consist predominantly of specific rules, and those applicable to contractor employees, which are largely developed and applied on an ad hoc basis and involve significantly vaguer standards.[16] Many contractors have undertaken laudable efforts to promote a culture of compliance through the implementation of company-specific ethics standards,[17] but not every contractor has such internal standards. The Conference believes that adoption of contractor ethics standards applicable to certain high-risk activities would protect the public interest and promote integrity in government contracting. In addition, the Conference aims to promote public confidence in the system of government contracting and in the integrity of the government.

Of course, the mere existence of a disparity between government employee and contractor ethics standards is not itself conclusive evidence that contractor employee ethics standards should be expanded. Indeed, simply applying the rules governing the ethics of government employees (particularly those dealing with financial disclosures to guard against personal conflicts of interest) directly to contractors could create excessive and unnecessary compliance burdens for contractors and monitoring costs for agencies.[18] To address this concern, the Conference has focused on the most significant ethical risks that arise in government contracts as well as the activities most likely to implicate those risks. Specifically, the Conference has identified contractor employees' personal conflicts of interest and use of non-public information as two areas calling for greater measures to prevent misconduct. Of course, those are not necessarily the only risks in the current system, and individual agencies have chosen or may hereafter choose to impose ethics requirements in other areas as well. The Conference, however, believes those two identified areas warrant more comprehensive measures to prevent misconduct. The Conference believes those two identified areas call for ethics standards, although agencies should be mindful of risks requiring more particularized treatment that may be present in their specific contexts.

Personal Conflicts of Interest and Misuse of Certain Non-Public Information

The most common ethical risks currently addressed in specific agency supplements to the FAR (as well as in contractors' own internal codes of conduct) include personal conflicts of interest, gifts, misuse of government property, and misuse of non-public information.[19] Of these major ethical risks, existing criminal laws regulate contractors' offering or receipt of gifts and misuse of government property. With respect to gifts, criminal bribery laws would prohibit a contractor employee's *offering* anything of value to a Federal employee to obtain favorable treatment,[20] and the Anti-Kickback Act would prohibit a contractor employee from *accepting* gifts from a potential sub-contractor or other party that are aimed at improperly obtaining favorable treatment under the contract.[21] With respect to misuse of property, traditional criminal laws against larceny and embezzlement would prohibit a contractor employee's misappropriating public property, and Federal criminal law prohibits a contractor employee's misusing or abusing government property.[22]

On the other hand, a contractor employee is less likely to face sanctions under existing laws if he or she acts despite a personal conflict of interest or exploits non-public information for personal gain. Though the Anti-Kickback Act would prevent a contractor employee's directing business to a third party in exchange for an actual payment,[23] nothing under current law would prevent a contractor employee from directing business towards a company in which he or she owns stock (i.e., a personal conflict of interest). Similarly, though insider trading laws would apply if a contractor employee bought securities based upon information learned from government contracts,[24] nothing under current law would prevent a contractor employee from purchasing other items, such as land that will appreciate upon announcement of construction of a military base, on the basis of information learned while performing his or her contractual duties.

In this light, various governmental entities that have studied issues of contractor ethics have singled out preventing personal conflicts of interest and misuse of non-public information as areas that need to be strengthened.[25] By focusing on these two areas of risk, the Conference does not intend to discourage agencies from adopting additional ethics requirements regarding procurement activities by regulations or contract. Indeed, some agencies may choose to adopt rules regulating ethical risks such as contractor employee receipt of gifts or misuse of property as an additional prophylactic measure, notwithstanding the existence of criminal penalties covering similar conduct. Rather, the Conference believes that personal conflicts of interest and protection of non-public information are two areas for which greater measures to prevent misconduct are particularly appropriate, and it therefore recommends targeted measures designed to address those risks. The recommendation would serve as a floor upon which agencies could build and would not be intended to deter adoption of a more expansive ethics regime, either individually or through the FAR Council, to the extent the agencies find it appropriate.

''High Risk'' Contracts

PCI-Risk Contracts: The Conference has sought to identify those types of activities most likely to create risks of personal

[16] There are pending FAR rules relating to protection of non-public information, 76 FR 23,236 (Apr. 26, 2011), and preventing personal conflicts of interest for contractor employees performing acquisition activities closely related to inherently governmental functions, 74 FR 58,584 (Nov. 13, 2009), but these proposed rules are not yet adopted and also cover only some of the topics addressed in this recommendation.

[17] *See generally* Def. Indus. Initiative on Bus. Ethics & Conduct, supra note 12.

[18] Report of the Acquisition Advisory Panel 418 (Jan. 2007). Various agencies have extended certain aspects of the ethics standards applicable to government employees to contractor employees, *see, e.g.,* 12 CFR 366.0 *et seq.* (FDIC contractor regulations), and their decision to do so has not necessarily created excessive compliance or monitoring costs. Nevertheless, extending *all* government employee ethics rules to *all* contractor employees serving all agencies, without consideration of the specific ethical risks presented, would likely impose costs that are excessive in relation to the benefits received. Accordingly, the Conference believes that the FAR Council and individual agencies should proceed carefully in ensuring that any expansion of the current ethics regime is cost-effective, while at the same time protecting the government's interests.

[19] *See id.;* Kathleen Clark, *supra* note 2, Table VII; Marilyn Glynn, *Public Integrity & the Multi-Sector Workforce,* 52 Wayne L. Rev. 1433, 1436–38 (2006); Def. Indus. Initiative on Bus. Ethics & Conduct, *supra* note 12, at 29–60.

[20] 18 U.S.C. 201(c).

[21] 41 U.S.C. 8702. Of course, in light of the severity of criminal sanctions, many instances of misconduct are likely to go unpunished under the current regime. For instance, resource constraints may make it unlikely that a United States Attorney would prosecute a contractor employee for accepting a lavish meal from a prospective sub-contractor. Nevertheless, the mere threat of criminal prosecution may deter potential misconduct.

[22] 18 U.S.C. 641; *Morissette* v. *United States,* 342 U.S. 246, 272 (1952). In addition, agencies often stipulate by contract that government property may not be used for personal benefit (*e.g.,* a contractor employee's using government computers for personal use). Glynn, *supra* note 19, at 1437.

[23] 41 U.S.C. 8702.

[24] *Dirks* v. *Sec. Exch. Comm'n,* 463 U.S. 646, 655 n.14 (1983); 17 CFR 240.10b5–2(b).

[25] *See, e.g.,* Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 FR 58,584, 58,588–89 (proposed Nov. 13, 2009) (setting forth proposed FAR rules regulating personal conflicts of interest and use of non-public information for private gain in the case of contractors performing acquisition activities closely related to inherently governmental functions); Glynn, *supra* note 19, at 1436–37 (article by general counsel of the Office of Government Ethics recommending, inter alia, extending ethics rules to include contractor employee conflicts of interest and misuse of non-public information); U.S. Gov't Accountability Office, supra note 15, at 31 (''We recommend * * * personal conflict of interest contract clause safeguards for defense contractor employees that are similar to those required for DOD's Federal employees.''); U.S. Gov't Accountability Office, GAO–10–693, Stronger Safeguards Needed for Contractor Access to Sensitive Information 30 (2010) (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors' accessing sensitive information and on ''establishing a requirement for prompt notification to appropriate agency officials of a contractor's unauthorized disclosure or misuse of sensitive information''); Office of Gov't Ethics, Report to the President & to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment 38–39 (2006) (noting ''expressions of concern'' the Office has received regarding personal conflicts of interest and highlighting the possibility of agencies' including contract clauses to deal with such issues); Report of the Acquisition Advisory Panel, *supra* note 18, at 423–25 (concluding that additional safeguards were necessary in order to protect against contractor employee personal conflicts of interest and misuse of confidential or proprietary information).

conflicts of interest, situations in which a contractor employee may have some interest that may bias his or her judgment. Several statutes and regulations prohibit contractors from performing ''inherently governmental functions,'' which are defined as functions ''so intimately related to the public interest'' as to require performance by government employees.[26] The FAR also contains a list of activities that ''approach'' being classified as ''inherently governmental functions.'' [27] As a recent proposed policy letter from the Office of Federal Procurement Policy recognizes, contractors performing activities that are similar to ''inherently governmental functions'' should be subject to close scrutiny, given that the work that they perform is near the heart of the traditional role of the Federal government.[28] Several of the functions listed as ''approach[ing] * * * inherently governmental functions'' involve activities wherein the contractor either advises in agency policymaking or participates in procurement functions, which raise particular risks of employee personal conflicts of interest. Other activities identified as raising particular risks of employee personal conflicts of interest include ''advisory and assistance services'' and ''management and operating'' functions.[29]

The FAR contains provisions identifying activities that ''approach'' being ''inherently governmental functions,'' [30] feature ''advisory and assistance services,''[31] or involve ''management and operating'' functions.[32] Many of these activities, such as those in which a contractor employee performs tasks that can influence government action, including the expenditure of agency funds, may pose a significant risk of personal conflicts of interest. Several contracting tasks, by their nature, elevate the risk of such conflicts. Those include substantive (as compared to administrative or process-oriented) contract work (hereinafter referred to as ''PCI-Risk'' contracts [33]) such as:

- Developing agency policy or regulations.
- Providing alternative dispute resolution services on contractual matters; legal advice involving interpretation of statutes or regulations; significant substantive input relevant to agency decision-making; or professional advice for improving the effectiveness of Federal management processes and procedures.
- Serving as the primary authority for managing or administering a project or operating a facility.
- Preparing budgets, and organizing and planning agency activities.
- Supporting substantive acquisition planning [34] or research and development activities.
- Evaluating another contractor's performance or contract proposal.
- Assisting in the development of a statement of work or in contract management.
- Participating as a technical advisor to a source selection board or as a member of a source evaluation board (i.e., boards designed to select or evaluate bids or proposals for procurement contracts).

Information-Risk Contracts: Existing regulations also do not comprehensively protect against contractor employees' disclosure or misuse of non-public governmental, business, or personal information learned while performing government contracts.[35] As with personal conflicts of interest, specific activities pose a grave risk of contractor disclosure or misuse of non-public information, which include (hereinafter referred to as ''Information-Risk'' contracts [36]):

- Contracts in which certain employees will receive access to information relating to an agency's deliberative processes, management operations, or staff that is not generally released to the public.
- Contracts in which certain employees will have access to certain business-related information, including trade secrets, non-public financial information, or other non-public information that could be exploited for financial gain.[37]
- Contracts in which certain employees will have access to personally identifying or other non-public personal information, such as social security numbers, bank account numbers, or medical records.[38]

Recommendation

1. The Federal Acquisition Regulatory Council (''FAR Council'') should promulgate model language for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information.[39] Current law does not adequately regulate against the risks of contractor employee personal conflicts of interest and misuse of non-public information. On occasion certain agencies impose additional ethics requirements by supplemental regulation or contract. In addition, certain contractors, especially large companies, have adopted and enforced internal ethics codes. Nevertheless, coverage varies significantly from agency to agency and contract to contract. In order to bring consistency to this process and ensure that the government's interests are adequately protected, the FAR Council should draft model language in the Federal Acquisition Regulation (''FAR'') for agency contracting officers to use, with modifications appropriate to the nature of the contractual services and risks presented, when soliciting and negotiating contracts that are particularly likely to raise issues of personal conflicts of interest or misuse of non-public information.

2. The model FAR provisions or clauses should apply to PCI-Risk and Information-Risk Contracts.[40] The proposed FAR

[26] Federal Activities Inventory Reform Act of 1998, Public Law 105–270, § 5(2)(A), 112 Stat. 2382, 2384; 48 CFR 2.101; OMB, Circular A–76, Performance of Commercial Activities, Attachment A § B.1.a. Though each of these authorities uses slightly different wording in defining ''inherently governmental function,'' the differences are apparently of no legal significance. Office of Management & Budget, Work Reserved for Performance by Federal Government Employees, 75 FR 16,188, 16,190 (proposed Mar. 31, 2010).

[27] 48 CFR 7.503(d).

[28] Work Reserved for Performance by Federal Government Employees, 75 FR at 16,193–94.

[29] Report of the Acquisition Advisory Panel, *supra* note 18, at 411.

[30] 48 CFR 7.503(d).

[31] *Id.* § 2.101.

[32] *Id.* § 17.601.

[33] The Conference believes that these activities are particularly likely to pose a risk of personal conflicts of interest. To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate contracts for such activities.

[34] The FAR Council has issued a proposed rule that would establish personal conflict of interest standards for contractor employees performing acquisition activities closely associated with inherently governmental functions. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 FR at 58,588. To the extent it is ultimately implemented, this rule would obviate the need for any additional FAR contract clause with respect to these contracts.

[35] U.S. Gov't Accountability Office, Stronger Safeguards Needed for Contractor Access to Sensitive Information, *supra* note 25, at 30 (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors' accessing sensitive information and on ''establishing a requirement for prompt notification to appropriate agency officials of a contractor's unauthorized disclosure or misuse of sensitive information'').

[36] The Conference believes that these activities are particularly likely to pose a risk of disclosure or misuse of non-public information. This recommendation does not define the term ''non-public information;'' the FAR Council would be responsible for drafting language more precisely defining the types of information and services covered. In doing so, the FAR Council could choose to draw on existing definitions created for similar purposes. *See, e.g.,* 5 CFR 2635.703 (defining ''nonpublic information'' and prohibiting government employees from misusing such information, including information routinely withheld under 5 U.S.C. § 552(b) (FOIA exemptions)); U.S. Gov't Accountability Office, Stronger Safeguards Needed for Contractor Access to Sensitive Information, *supra* note 25, at 4–5 (defining a category of information that requires safeguards against unauthorized disclosure). To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate such activities through appropriate solicitation provisions or contract clauses.

[37] For instance, if an employee of a contractor performing auditing functions for the government were to learn that a large manufacturing firm intends to open a new plant in coming months, the employee could purchase property near the plant and reap a substantial financial windfall. The contemplated regime would require that the contractor train employees privy to such information on their obligations to keep the information confidential and to avoid transacting business on the basis of such information, penalize employees who violate such obligations, and report any employee violations to the contracting agency.

[38] U.S. Gov't Accountability Office, Stronger Safeguards Needed for Contractor Access to Sensitive Information, *supra* note 24, at 6.

[39] The Conference takes no position on whether the contractual language adopted in individual contracts should ''flow down'' to sub-contractors and other persons besides prime contractors performing work on government contracts. That issue is best left to the discretion of the FAR Council.

[40] The draft language would appear in part 52 of the FAR and would consist of draft solicitation provisions (which are used in soliciting contracts) and contract clauses (which are integrated into negotiated contracts). The use of the plural forms ''provisions'' and ''clauses'' is not intended to exclude the possibility that the FAR Council could implement the recommendations with a single

provisions or clauses would apply only to PCI-Risk and Information-Risk contracts (or solicitations for such contracts). At the same time, contracting agencies should remain free to incorporate contract language (or to promulgate agency-specific supplemental regulations) dealing with other ethical risks they deem important whether or not the contract at issue qualifies as a PCI-Risk or Information-Risk contract. Thus, the model FAR provisions or clauses adopted in response to this recommendation would serve as a floor upon which agencies could build if they deemed it appropriate, but would not supplant existing programs that now provide or may in the future provide more demanding or expansive ethical protections.

3. Agencies should have the discretion whether to use or modify the model FAR provisions or clauses. An agency contracting officer would have the option to use the model FAR provisions or clauses when soliciting and/or contracting for activities falling into the PCI-Risk or Information-Risk categories. Because the provisions or clauses would be optional, the contracting agency would enjoy the discretion to modify the FAR language on a case-by-case basis to fit the circumstances, and to decide to forego including any such language if it deems that the particular contract at issue is unlikely to pose a significant risk of personal conflicts of interest or misuse of non-public information by contractor personnel. Nevertheless, the FAR Council should encourage contracting officers to use the model FAR language when applicable.

4. The FAR should include model provisions or clauses for use in PCI-Risk procurements. The FAR Council should encourage agencies to include these model provisions or clauses in contracting actions involving PCI–Risk procurements.

The proposed FAR provisions or clauses should require the contractor to certify [41] that none of its employees who is in a position to influence government actions [42] has a conflict of interest or that conflicted employees will be screened from performing work under any contract. Once a contractor is selected, the contract itself should include a clause requiring the contractor to train employees on recognizing conflicts, to implement a system for employees who can influence government action to report conflicts to the contractor, to screen any conflicted employees from contract performance, to report to the agency periodically on its efforts to protect against employee conflicts, and to disclose to the agency any instances of employee misconduct (as well as disciplinary action taken against any offending employee). A contractor's failure to implement an adequate system for employee conflict certification, to disclose or correct instances of employee misconduct, or to take appropriate disciplinary measures against employees who commit misconduct may be grounds for contract termination. In addition, a contractor that repeatedly proves incapable or unwilling to honor such contractual obligations may be subject to suspension or debarment in appropriate circumstances.

5. The FAR should include model provisions or clauses for use in Information-Risk procurements. The FAR Council should encourage agencies to include these model provisions or clauses in contracting actions involving Information-Risk procurements.

The FAR language should require the contractor to ensure that its employees who have access to certain non-public information identified as posing an information risk are made aware of their duties to maintain the secrecy of such information and to avoid using it for personal gain. To the extent an employee breaches either of these obligations, the contractor should be responsible for reporting the breach to the government, minimizing the effects of the breach, and, where appropriate, disciplining the offending employee. A contractor's failure to observe these contractual requirements may be grounds for contract termination. In addition, a contractor that proves repeatedly incapable or unwilling to fulfill its duties may be subject to suspension or debarment in appropriate circumstances.

6. Agencies not covered by the FAR also should consider using or modifying the model FAR provisions or clauses when negotiating contracts for activities falling in either of the ''high risk'' categories. Agencies and government instrumentalities not covered by the FAR should nevertheless familiarize themselves with the FAR language promulgated in response to this recommendation. To the extent that they plan to enter into contracts for activities listed in the PCI-Risk or Information-Risk categories, they should consider employing or, if necessary, modifying these solicitation provisions and/or contract clauses.

provision or clause. See the Preamble for the definition of ''PCI-Risk'' and ''Information-Risk'' contracts.

[41] The FAR should include a certification requirement rather than a disclosure process in order to minimize the burden on contractors. In order to fully perform their contractual obligations, contractors should be required to train their key personnel on recognizing and disclosing personal conflicts of interest. In the case of an anticipated conflict, a contractor employee should disclose the issue to the contractor, who must screen the employee from performing under the contract. The contractor should be responsible for disciplining employees who fail to disclose conflicts or honor a screening policy, and for disclosing such violations to the government.

[42] Every employee performing under the contract need not certify that he or she does not possess conflicting financial interests. For instance, in the case of a contractor assisting in the development of agency policy (a function falling within one of the ''high risk'' categories), employees performing administrative or other non-discretionary (particularly ministerial) tasks, such as those making copies of the report that the contractor will submit, need not perform such a certification.

Administrative Conference Recommendation 2011–4

Agency Use of Video Hearings: Best Practices and Possibilities for Expansion

Adopted June 17, 2011

Since the early 1990s, video teleconferencing technology (''VTC'') has been explored by various entities in the public and private sectors for its potential use in administrative hearings and other adjudicatory proceedings.[1] In the last 10 years, advances in technology and carrier services coupled with reduced personnel and increased travel costs have made the use of VTC more attractive to local, state and Federal governments. The rise in the use of VTC by Federal and state courts has also been noted by academics.[2] Similarly, in the past 10 years, there has been an increase in the use of video hearings by Federal agencies with high volume caseloads. Since pilot programs for video hearings at agencies first began in the early 1990s, VTC technology has become more advanced, more readily available and less expensive.

Certain Federal agencies, such as the Social Security Administration's Office of Disability Adjudication and Review (''ODAR''), the Department of Veteran Affairs' Board of Veteran Appeals (''BVA'') and the Department of Justice's Executive Office for Immigration Review (''EOIR'') have taken advantage of VTC for various adjudicatory proceedings. For example, in 2010, ODAR conducted a total of 120,624 video hearings, and a cost-benefit analysis conducted for the agency by outside consultants found that ODAR's current use of video hearings saves the agency a projected estimated amount of approximately $59 million dollars annually and $596 million dollars over a 10-year period. A study by the agency has also determined that the use of VTC has no effect on the outcome of cases.

Other agencies, such as the Railroad Retirement Board, the United States Postal Service, the Department of Health and Human Services' Office of Medicare Hearings and Appeals, specifically have regulations allowing for the use of video teleconferencing.[3] Similarly, agencies such as the U.S. Merit Systems Protection Board and the Commerce Trademark Trial and Appeal Board use VTC to conduct administrative hearings and other adjudicatory proceedings as a matter of practice under the broad statutory and/or regulatory discretion given to them.[4]

Despite the fact that some agencies within the Federal government have been using VTC to conduct mass adjudications for years, other agencies have yet to employ such technology. This may be because the use of VTC for administrative hearings is not without controversy. Some applaud the use of VTC by administrative agencies because it offers potential efficiency benefits, such as

[1] *See, e.g.,* Robert Anderson, *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future,* 66 S. Cal. L. Rev. 1762, 1770 (1993).

[2] *See, e.g.,* Richard K. Sherwin, Neal Feigenson, & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law,* 12 B.U. J. Sci. & Tech. L. 227, 229 (2006); Cathy Catterson, *Changes in Appellate Caseload and Its Processing,* 48 Ariz. L. Rev. 287, 295 (2006); Fredric Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High Technology Courtrooms,* (State Justice Inst. 1999), *reprinted in* 50 S.C. L. Rev. 799, 801 (2000).

[3] *See, e.g.,* 20 CFR 260.5; 39 CFR 966.9; and 42 CFR 405.

[4] *See, e.g.,* 5 U.S.C. 1204(a)(1) and 37 CFR 2.129(a).

reducing the need for travel and the costs associated with it, reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as well as increasing access for parties.[5] Critics, however, have suggested that hearings and other adjudicatory proceedings conducted by video may hamper communication between a party and the decision-maker; may hamper communication between parties and their attorneys or representatives; and/or may hamper a decision-maker's ability to make credibility determinations.[6]

Recognizing both the praise for and critique of the use of VTC in administrative hearings and other adjudicatory proceedings, the Administrative Conference issues this Recommendation regarding the use of VTC in Federal agencies with high volume caseloads. The Conference has a long standing commitment to the values inherent in the agency adjudicatory process: Efficiency, fairness and acceptability/satisfaction.[7] These values should drive decisions to use VTC. Therefore, this Recommendation suggests that agencies should use VTC only after conducting an analysis of the costs and benefits of VTC use and determining that such use would improve efficiency (i.e., timeliness and costs of adjudications) and would not impair the fairness of the proceedings or the participants' satisfaction with them. In addition, this Recommendation supports the Conference's statutory mandate of making improvements to the regulatory and adjudicatory process by improving the effectiveness and fairness of applicable laws. *See generally* Administrative Conference Act, 5 U.S.C §§ 591–596.

Accordingly, this Recommendation is directed at those agencies with high volume caseloads that do not currently use VTC as a regular practice in administrative hearings and/or other adjudicatory proceedings and that may benefit from the use of it to improve efficiency and/or reduce costs. Agencies with high volume caseloads are likely to receive the most benefit and/or cost savings from the use of VTC. However, the Conference encourages all agencies (including those with lower volume caseloads) to consider whether the use of VTC would be beneficial as a way to improve efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of proceedings. This Recommendation sets forth some non-exclusive criteria that agencies should consider. For those agencies that determine that the use of VTC would be beneficial, this Recommendation also sets forth best practices provided in part by agencies currently using VTC.

Recommendation

1. Federal agencies with high volume caseloads should consider using video teleconferencing technology (''VTC'') to conduct administrative hearings and other aspects of adjudicatory proceedings. Agencies with lower volume caseloads may also benefit from this recommendation.

2. Federal agencies with high volume caseloads should consider the following non-exclusive criteria when determining whether to use video teleconferencing technology in administrative hearings and other adjudicatory proceedings:

(a) Whether an agency's use of VTC is legally permissible under its organic legislation and other laws;

(b) Whether the nature and type of administrative hearings and other adjudicatory proceedings conducted by the agency are conducive to the use of VTC;

(c) Whether VTC can be used without affecting the outcome of cases heard by the agency;

(d) Whether the agency's budget would allow for investment in appropriate and secure technology given the costs of VTC;

(e) Whether the use of VTC would create cost savings, such as savings associated with reductions in personnel travel and with increased productivity resulting from reductions in personnel time spent on travel;

(f) Whether the use of VTC would result in a reduction of the amount of wait time for an administrative hearing;

(g) Whether users of VTC, such as administrative law judges, hearing officers and other court staff, parties, witnesses and attorneys (or other party representatives), would find the use of such technology beneficial;

(h) Whether the agency's facilities and administration, both national and regional (if applicable), can be equipped to handle the technology and administration required for use of VTC;

(i) Whether the use of VTC would adversely affect the representation of a party at an administrative hearing or other adjudicatory proceeding; and

(j) Whether the communication between the various individuals present at a hearing or proceeding (including parties, witnesses, judges, hearing officers and other agency staff, translators and attorneys (or other party representatives)) would be adversely affected.

3. Federal agencies with high volume caseloads that decide to use video teleconferencing technology to conduct administrative hearings and other adjudicatory proceedings should consider the following best practices:

(a) Use VTC on a voluntary basis and allow a party to have an in-person hearing or proceeding if the party chooses to do so.

(b) Periodically evaluate the use of VTC to make sure that the use is outcome-neutral (i.e., does not affect the decision rendered) and that the use is meeting the needs of its users.

(c) Solicit feedback and comments (possibly through notice-and-comment rulemaking) about VTC from those who would use it regularly (e.g., administrative law judges, hearing officers and other administrative staff, parties, witnesses and attorneys (or other party representatives)).

(d) Begin the use of VTC with a pilot program and then evaluate the pilot program before moving to wider use.

(e) Structure training at the outset of implementation of VTC use and have technical support available for troubleshooting and implementation questions.

(f) Consult the staff of the Administrative Conference of the United States and/or officials at other agencies that have used VTC for best practices, guidance, advice, and the possibilities for shared resources and collaboration.

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[5] See Meghan Dunn & Rebecca Norwick, Federal Judicial Center Report of a Survey of Videoconferencing in the Court of Appeals (2006), pp. 1–2, *available at http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf.*

[6] *See* American Bar Association's Commission on Immigration Report entitled ''*Reforming the Immigration System*'' (2010), pp. 2–26–2–27.

[7] *See* Roger C. Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 591–93 (1972) (Professor Cramton is a former Chairman of the Conference); *see also* Paul R. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976) (describing the values of efficiency, fairness and satisfaction) (Mr. Verkuil is the current Chairman of the Conference). The balancing of these procedural values was undertaken in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976).

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–LS–11–0065]

Plan for Estimating Daily Livestock Slaughter Under Federal Inspection; Request for Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), this document announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget, for an extension of the currently approved information collection used to compile and generate the Federally Inspected Estimated Daily Slaughter Report.

DATES: Comments must be received by October 11, 2011.

ADDRESSES: Comments should be submitted electronically at *http://www.regulations.gov.* Comments may also be submitted to Jennifer Porter, Deputy Director, Livestock and Grain Market News Division, Livestock and Seed Program, Agricultural Marketing Service, U.S. Department of Agriculture; Stop 0252; 1400 Independence Avenue SW.; Room 2619–S; Washington, DC 20250–0252. All comments should reference document number AMS–LS–11–0065 and note the date and page number of this issue of the **Federal Register**.

Submitted comments will be available for public inspection at *http://www.regulations.gov* or at the above address during regular business hours. Comments submitted in response to this