ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

55th Plenary Session
Minutes
December 8-9, 2011

I. December 8, 2011:

a. Introduction and Opening Remarks by Chairman Paul Verkuil

The first day of the 55th Plenary Session of the Administrative Conference of the United States ("the Conference") commenced on December 8, 2011 at 2:00 p.m., at the Main Conference Room of the Commodities Futures Trading Commission (CFTC), at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C.

i. Introductory Remarks

The Conference's Executive Director, Michael McCarthy, made administrative announcements, which included noting that the Conference is a Federal Advisory Committee and that its proceedings are open to the public. Mr. McCarthy informed attendees that audio and video of the meeting were being streamed live over the Internet and that progress of the meeting could also be followed on Twitter.

Chairman Paul Verkuil called the meeting to order. Chairman Verkuil welcomed everyone and thanked the CFTC for providing the meeting space. Chairman Verkuil introduced Dan Berkovitz, General Counsel of the CFTC, who welcomed Conference members.

ii. In Memoriam

Chairman Verkuil noted the recent death of Malcolm Mason, Conference Senior Fellow, on November 1, 2011, at the age of 101. The Chairman reviewed Mr. Mason's career and noted that he was one of the longest-serving members of the Administrative Conference.

Chairman Verkuil also noted the recent death of Robert Anthony, Conference Senior Fellow and former Conference Chairman, on November 17, 2011. Chairman Verkuil asked Mr. Anthony's widow Joan and son Graham to come forward. Conference public member Randolph May read a memorial resolution from the Administrative Law and Regulatory Practice Section of the American Bar Association.

iii. Changes at the Conference

Chairman Verkuil introduced the members of the Council of the Administrative Conference. He noted that Preeta Bansal, previously Vice Chair of the Conference, had left government, but that President Obama had renamed her to the Council as a public member, and had designated Council member Thomasina Rogers as the new Vice Chair of the Conference.

The Chairman noted that Council member Michael Fitzpatrick had also recently left government, and his place on the Council was taken by Boris Bershteyn, the new General Counsel of the Office of Management and Budget. The Chairman thanked Ms. Bansal and Mr. Fitzpatrick for their assistance in restarting the Conference.

Conference Senior Fellow Jay Plager administered the oath of office to Ms. Rogers, Ms. Bansal, and Mr. Bershteyn.

Chairman Verkuil noted that the Conference's Director of Research and Policy, Jonathan Siegel, would soon be leaving the Conference and returning to his academic position, but that he had been appointed as a Conference Special Counsel. Jeff Lubbers, the Chairman announced, would take over Mr. Siegel's position on an acting basis. The Chairman also noted that the Conference's Executive Director, Michael McCarthy, would soon be moving on to a new post as Chief Counsel to the Inspector General for Tax at the Department of the Treasury. Chairman Verkuil thanked Mr. Siegel and Mr. McCarthy for their service to the Conference.

iv. Further Introductory Remarks

The Chairman noted that the Plenary Session was the culmination of considerable work by members, researchers, staff, and others. He reviewed the rules of debate and voting at the plenary.

b. Initial Business

The Assembly approved the minutes of the 54th Plenary Session by voice vote.

The Assembly approved the proposed Resolution Governing the Order of Business by voice vote.

c. Introduction to Recommendations

Conference Director of Research and Policy Jonathan Siegel thanked the membership and the staff of the Conference for their work on the recommendations. He briefly described the recommendations that the Assembly would be considering at the Plenary Session. He announced that all the recommendations came to the Assembly with the approval of the Conference's Council. He explained the process for debate and amendment of recommendations.

d. Consideration of Proposed Recommendation on Incorporation by Reference

Chairman Verkuil asked if there was any objection to adopting the manager's amendments to the recommendation. Without objection, the manager's amendments were adopted.

John Cooney, Chair of the Conference's Committee on Administration and Management, introduced the Committee's proposed recommendation on Incorporation by Reference. Emily Bremer, Attorney Advisor and in-house researcher on the project, discussed the course of her research.

Public member Phil Harter moved an amendment to the recommendation that had been proposed by Conference Senior Fellow Peter Strauss. The proposed amendment would have removed, from the recommendation, any explicit reference to the possibility that members of the public would have to pay to obtain a copy of incorporated materials. It would also have called upon the Office of the Federal Register, rather than agencies individually, to consider the definition of "reasonably available" in 5 U.S.C. § 552. After debate, the Assembly defeated the proposed amendment by voice vote.

After further discussion, the Assembly adopted the proposed recommendation, as amended by the manager's amendments, by voice vote.

The Assembly took a short recess.

e. <u>Consideration of Proposed Recommendation on International Regulatory Cooperation</u>

Russell Frisby, Chair of the Committee on Regulation, introduced the Committee's proposed recommendation on International Regulatory Cooperation. Michael McCarthy, Executive Director and in-house researcher on the recommendation, discussed the course of his research.

Chairman Verkuil asked if there was any objection to adopting the manager's amendments to the recommendation. Without objection, the manager's amendments were adopted.

Council member Ron Cass proposed an amendment on behalf of himself, the Council, and public member Susan Dudley. The amendment proposed to change several parts of the recommendation to state that agencies should engage in international regulatory cooperation when doing so would further their own missions or promote trade and competitiveness without detracting from their missions; it proposed that agencies should consider sharing responsibilities with foreign authorities that maintain "high quality and appropriate" standards (rather than standards "that are no less effective than United States equivalents"); and it proposed other small changes. In the course of discussion, the phrase "high quality and appropriate" was changed to "high quality and effective" by friendly amendment. After discussion, the Cass amendment was adopted by voice vote.

Public member Patti Goldman proposed an amendment to delete Recommendation 10. After discussion, this amendment was defeated by voice vote.

Government member Carol Ann Siciliano moved to insert the words "accountability under the law, clearly defined roles and lines of authority, fair and responsive dispute resolution procedures," into Recommendation 8. In the course of discussion, the phrase "and dispute resolution" was also added as an insert to Recommendation 4(c) as a friendly amendment. A suggestion that the items in Recommendation 8 be set out as numbered sub-paragraphs was referred to the Committee on Style. The amendment was adopted by voice vote.

Government member Carol Ann Siciliano moved to strike the phrase "may be essential" and replace it with "can help" in the preamble. This amendment was accepted by the committee chair without objection.

Government member Carol Ann Siciliano questioned the last sentence of Recommendation 2. After discussion, the sentence was changed, by unanimous consent, to, "Absent conflict with their legal authority or missions, agencies should give appropriate consideration to the international implications of regulatory activities."

Government member Steven Burns moved to replace "risk-based" with "risk-informed" in Recommendation 8. After discussion, this amendment was adopted by voice vote.

Government member Carol Ann Siciliano moved to replace "mandate" with "authority" in line 197. This amendment was adopted by unanimous consent.

A representative from the Department of State, attending on behalf of Government member Harold Koh, was granted unanimous consent to speak. She asked that the opening phrase in footnote 2 of the recommendation read "Agencies should comply with 22 C.F.R. § 181.4 in its entirety, requiring, among other things, agencies to consult . . ." This proposal was referred to the Committee on Style.

The entire recommendation, as amended, was adopted by voice vote.

f. Presentation of the Walter Gellhorn Award

Chairman Verkuil announced that the Conference would present the first Walter Gellhorn Innovation Award, named for longtime Council member Walter Gellhorn. He introduced Mr. Gellhorn's daughter Gay Gellhorn and thanked her for granting permission to use her father's name for the award.

Council member Thomasina Rogers and Senior Fellow Peter Strauss each delivered remarks in remembrance of Mr. Gellhorn.

Chairman Verkuil introduced General Counsel Shawne McGibbon, who explained that the Walter Gellhorn Award was part of the Conference's Model Agency project, and that it would be an annual award for an innovative agency practice that saved appropriated funds, reduced costs, created efficiencies, reduced unnecessary duplication, increased transparency,

enhanced customer service, or enhanced public participation in the regulatory process. Ms. McGibbon announced that the panel of judges for the award consisted of Sheila Bair, John Dilulio, Jr., Robert Hahn, David Lewis, and Norm Ornstein.

The Chairman awarded a certificate of Honorable Mention to the National Telecommunications and Information Administration, for the posting of grant award documents and reports online.

The Chairman awarded a certificate of Honorable Mention to the Occupational Safety and Health Administration, for its standards improvement project.

The Chairman awarded the 2011 Walter Gellhorn Award to the Office of Federal Register, for its FederalRegister.gov program. Raymond Mosley, Executive Director of the Office of Federal Register, accepted the award.

The Assembly adjourned until the following morning.

II. December 9, 2011

a. Introduction and Opening Remarks by Chairman Paul Verkuil

The second day of the 55th Plenary Session of the Administrative Conference of the United States ("the Conference") commenced on December 9, 2011 at 9:00 a.m., at the Main Conference Room of the Commodities Futures Trading Commission (CFTC), at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C.

i. Introductory Remarks

Executive Director McCarthy made administrative announcements and called on Chairman Verkuil to bring the session to order. Chairman Verkuil noted that the Assembly was still in order, considering he had not adjourned the previous day.

b. Consideration of Proposed Recommendation on the Federal Advisory Committee Act

Jody Freeman, Chair of the Committee on Collaborative Governance, introduced the Committee's proposed recommendation on the Federal Advisory Committee Act. Reeve Bull, Attorney Advisor and in-house researcher on the project, discussed the course of his research.

Chairman Verkuil asked if there was any objection to adopting the manager's amendments to the recommendation. Without objection, the manager's amendments were adopted.

Council member Preeta Bansal proposed two amendments on behalf of the council. The first amendment involved removing subpart b of Recommendation 11, which concerned subjecting potential advisory committee members to public comment. The second amendment involved striking the last sentence in Recommendation 2, concerning the types of balance factors that should go into the composition of advisory committees. In the course of discussion, the phrase "may solicit" in Recommendation 11(a) was changed to "should solicit" by friendly amendment. A suggestion that "and/or" be changed to "and" was defeated. A suggestion that the first and second sentences of Recommendation 11(a) should be merged, and that the sentence should state that agencies should invite nominations for potential committee members from expert communities and/or group, was referred to the Committee on Style. The two Bansal amendments were adopted by voice vote.

Council member Boris Bershteyn moved to insert "consider eliminating" in place of "eliminating" in Recommendation 4, regarding the cap on the number of discretionary advisory committees established by Executive Order 12,838 and Circular A-135. After extensive discussion, this amendment was defeated by voice vote.

Government member Kris Durmer filed an amendment to strike Recommendation 1 and reinsert the version of Recommendation 1 from the October 14th draft. After discussion, this amendment was defeated by voice vote. A suggestion to reorder the Recommendations so that Recommendation 1 would be placed in a less prominent position was referred to the Committee on Style.

The entire recommendation, as amended, was adopted by voice vote.

The Assembly took a ten minute recess.

c. Consideration of Proposed Recommendation on Agency Innovations in e-Rulemaking

Robert Rivkin, Chair of the Committee on Rulemaking introduced the Committee's proposed recommendation on Innovations in e-Rulemaking. Consultant Cary Coglianese discussed his research on the project.

Chairman Verkuil asked if there was any objection to adopting the manager's amendments to the recommendation. Without objection, the manager's amendments were adopted.

Public member Michael Herz proposed an amendment to the recommendation that involved adding a footnote to Recommendation 1, in order to clarify the scope of the term "rulemaking" throughout the proposed recommendation. Senior fellow Peter Strauss suggested inserting the phrase "that have appeared in the uniform agenda of federal regulations" in the list of types of rulemakings in the Herz amendment. After discussion, the amendment was adopted

by voice vote, with the specific language of the footnote to be referred to the Committee on Style.

Public member Michael Herz proposed an amendment to Recommendation 2 which would extend notice of pending rulemakings in the one-stop location to include, not only rulemakings that are currently open for comment, but also rulemakings that are "expected to be open for comment in the foreseeable future or in the near future." After discussion, public member Michael Herz withdrew this amendment.

Public member Michael Herz moved to insert an additional sentence into Recommendation 7 that would provide that, as agencies are putting together their systematic protocols to enable the online storage and retrieval of materials from completed rulemaking, they should, to the extent feasible, ensure that website visitors using out-of-date URLs are automatically redirected to the current location of the material sought. This amendment was adopted by voice vote.

Senior fellow Paul Kamenar commented that the scope of rulemaking activity that should be accessible on agency websites should be broadened. He suggested amending Recommendation 7 to include more than "completed and pending rulemaking." In response to the Kamenar amendment, Public member Allison Zieve proposed that Recommendation 2 should include reference to rulemakings where the comment period is closed, but the rule is not final yet. Committee Chair Robert Rivkin suggested changing the phrase "for all of its rulemakings currently open for comment" in Recommendation 2, to "for all of its pending rulemakings." Consultant Cary Coglianese suggested specifying that agencies should highlight those rulemakings that are open for comment, so that rulemakings that are open for comment are not hidden in a data dump of pending rulemakings. This amendment was adopted by voice vote.

Public member Jim Chen suggested that the proposed recommendation should refer to the term "presence on the web, including the mobile web" instead of "website." Committee Chair Robert Rivkin suggested incorporating the Chen suggestion into Recommendation 1. Three votes were taken on the Chen amendment, in which the outcomes were too narrow to determine. Chairman Verkuil referred the Chen suggestion to the Committee on Style.

The entire recommendation, as amended, was adopted by voice vote.

d. Closing Remarks and Adjournment

Chairman Verkuil thanked the staff and introduced Director of Research and Policy John Siegel to present pending projects.

Director of Research and Policy Jonathan Siegel announced that that this would be his farewell address. He noted the progress the Conference had made since it emerged from hibernation and thanked those he had worked closely with. He then highlighted several pending

projects, including: Immigration Adjudication, Adjudication in the Social Security Administration, Science in the Administrative Process, Examination of the Paperwork Reduction Act, Review or Rulemaking Analysis Requirements, and Midnight Rules.

Chairman Verkuil adjourned the Assembly shortly after 11:30 a.m.