



## 58th Plenary Session

Minutes

June 13-14, 2013

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### **I. June 13, 2013**

#### **a. Call to Order and Opening Remarks by Chairman Paul Verkuil**

The first day of the 58th Plenary Session of the Administrative Conference of the United States (“Conference” or “ACUS”) commenced on June 13, 2013, at approximately 2:00 p.m., in the Main Conference Room of the Commodity Futures Trading Commission (CFTC), at Three Lafayette Centre, 1155 21<sup>st</sup> Street, NW, Washington, D.C.

Chairman Paul Verkuil called the meeting to order. He welcomed all the Conference members and attendees and thanked the CFTC for providing the meeting space. He also noted three recent openings on the Council and thanked those who recently left the Council for their service.

Chairman Verkuil remarked about the ability of members to participate in the Plenary Session either on-line or by phone. He cautioned, however, that these methods of participation should be used only for extraordinary circumstances and members should make every effort to attend the session in-person.

Chairman Verkuil highlighted the Conference’s major activities since the last Plenary Session. He noted that the American Bar Association House of Delegates passed two resolutions in February based on Conference recommendations: Recommendations 2012-6, Reform of 28 U.S.C. Section 1500, and 2011-3, Compliance Standards for Government Contractor Employees. He also described efforts of staff to build momentum for recommendations 2012-7, Agency Use of Third-Party Programs to Assess Regulatory Compliance, and 2011-5, Incorporation by Reference. Chairman Verkuil recounted his trip to China, which included exchanging ideas on administrative procedure. He also gave an update on the popularity of the *Sourcebook of United States Executive Agencies* and his chairmanship of the Council of Independent Regulatory Agencies.

#### **b. Remarks by Jerry Mashaw on His New Book, *The Lost One Hundred Years of American Administrative Law***



Chairman Verkuil introduced Plenary Session speaker, ACUS Public Member, and Yale Law Professor Jerry Mashaw, praising him for his work on ACUS's prior Social Security Administration ("SSA") disability recommendation in the 1970s and his current book, *The Lost One Hundred Years of American Administrative Law*. Mr. Mashaw then described the book's contents and purpose, noting that our conventional understanding that there was virtually no use of administrative law in the United States prior to the late 19th century is inaccurate. Mr. Mashaw described briefly the history of several executive branch institutions and their use of administrative law.

Chairman Verkuil concluded his remarks with a review of the rules for debate and voting at the Plenary Session and commented that this event is the culmination of considerable work by members, researchers, staff, and others.

**c. Initial Business**

The Assembly adopted the minutes of the 57th Plenary Session and approved the proposed Resolution Governing the Order of Business by voice vote.

**d. Consideration of Proposed Recommendation on Improving Consistency in Social Security Disability Adjudication**

Chairman Verkuil introduced Gretchen Jacobs, the Conference's Research Director, to provide a description of the recommendation. Ms. Jacobs stated that the recommendations came to the Plenary Session with the approval of the Conference's Council. She described the procedures for the debate and amendment of recommendations.

Ms. Jacobs explained the history of ACUS' prior recommendations addressing SSA's processing and adjudication of disability claims. She introduced the authors of the three reports that accompanied the recommendation—Dean Harold Krent from the IIT Chicago-Kent College of Law and Professor Scott Morris from the IIT College of Psychology— as well as Chairman of the Committee on Adjudication, John Vittone, and Staff Counsel to the committee, Amber Williams. Mr. Krent explained that the project was an analysis of how to modify or change the adjudicative structure in order to minimize the inconsistencies among administrative law judge ("ALJ") determinations. Mr. Morris summarized the results of the key findings from his statistical analysis. Mr. Krent explained the three suggestions that the committee was proposing regarding the structure of the ALJ determination process, as well as three proposed suggestions focusing on the role of the Appeals Council. Ms. Williams summarized the findings in the treating physicians report. Mr. Vittone summarized the process that led to the recommendation and thanked all those involved in that process.



Hearing no objections to the manager's amendments, Chairman Verkuil stated that they were accepted and proceeded to open the floor for debate on five amendments suggested by Senior Fellow Alan Morrison. Mr. Morrison's first amendment was approved by voice vote. Mr. Vittone did not see the need for the second amendment, and Mr. Morrison agreed to withdraw it. Mr. Krent, Public Member Michael Herz, Government Member Glenn Sklar, and Mr. Morrison engaged in a dialogue about re-wording the third amendment. It was decided that the Committee on Style would find a way to adjust the language in order to address any concerns, while allowing the point of the amendment to be maintained. Mr. Morrison's suggested amendment relating to publishing "bad" decisions failed to pass by voice vote.

Public Member Cynthia Farina voiced her concern that the word "consider" was not used appropriately, leading to a decision that the concern would be taken up by the Committee on Style.

Senior Fellow Paul Kamenar questioned whether the recommended six-factor test related to the treating physician rule recommendation would create more inconsistencies in ALJ rulings. Mr. Krent and Ms. Jacobs explained that while the test may not necessarily decrease the inconsistencies, the test addresses different problems with the process.

Mr. Mashaw questioned whether the committee looked at the recommendations he worked on in 1978 to have a three-ALJ panel instead of a single ALJ. Mr. Sklar responded that very recently there has been a dramatic decrease in the number of outlier results from ALJs, which had been the primary purpose for the increase to three ALJs proposed by Mr. Mashaw in 1978.

The entire recommendation was adopted by voice vote, after which the Assembly took a short recess.

e. **Consideration of Proposed Recommendation on Benefit-Cost Analysis at Independent Regulatory Agencies**

Ms. Jacobs introduced the proposed recommendation on benefit-cost analysis at independent regulatory agencies. Curtis Copeland, who served as the consultant on the project, discussed the details of his research and summarized his report.

H. Russell Frisby, Chairman of the Committee on Regulation, gave an overview of the recommendation and emphasized that agency independence was taken into account.



Chairman Verkuil asked if there were any objections to adopting the manager's amendments. Without objection, the manager's amendments were adopted by voice vote. Chairman Verkuil then opened the floor to debate on the recommendation.

Commissioner Robert Adler of the Consumer Product Safety Commission praised the report but questioned the cost-effectiveness of benefit-cost analysis. Senior Fellow Sally Katzen then suggested a minor phrasing change that was accepted by Mr. Frisby.

Eugene Scalia, Public Member, pointed out language that took the preamble into "disputed legal terrain." Mr. Copeland replied that the language as stated represented the view of the Government Accountability Office. Senior Fellow Don Elliott suggested a change that addressed Mr. Scalia's concern. Mr. Morrison and Public Member Ron Levin proposed alternative wording. Public Member Randy May made a motion to make Mr. Elliott's suggested change; Council Member Ron Cass and Mr. Frisby voiced their support.

Mr. Scalia and Mr. Frisby then briefly debated the merits of having agencies make their benefit-cost analyses available for public comment.

Public Member Nina Mendelson voiced concern over a recommendation that agencies conduct benefit-cost analysis on actions that are statutorily mandated, as it would quickly drain agency resources. Mr. Frisby, Mr. Copeland, and Mr. Elliott explained the merits of this practice.

Government Member Rebecca Fenneman said the recommendation asking Congress to "consider" giving agencies the necessary resources is not assertive enough. Mr. Herz agreed. Government Member Bob Schiff asked for a clarification that was quickly addressed. Public Member Richard Pierce converted Ms. Fenneman's earlier statement into a motion. Government Member Bridget Dooling argued for removing the language entirely because the Conference might find itself debating such language in many future plenary sessions. Public Member Jim Tozzi and Mr. May agreed with Ms. Dooling. Ms. Katzen suggested changing "should consider" to "should recognize." Chairman Verkuil found consensus for the Conference to adopt Ms. Katzen's change.

In reference to Paragraph 9 of the recommendation, Mr. Levin suggested that "establish" be replaced with "establish or endorse." Mr. Frisby agreed.

In reference to footnote 15, Ms. Dooling proposed striking a parenthetical mentioning generic or fast-track clearance. Mr. Copeland asked Ms. Dooling some clarifying questions. Mr. Schiff pointed out that the parenthetical described a past Conference recommendation. Mr.



Tozzi and

Public Member Michael Fitzpatrick stated that the past recommendation should be examined. Public Member John Cooney explained that the past recommendation did not suggest the clearances would be available, only that the Office of Management and Budget (“OMB”) begin to “develop things like this.” Chairman Verkuil found consensus for the Conference to strike the language.

Chairman Verkuil called for a vote on the recommendation. The recommendation was adopted by voice vote. The Assembly then adjourned until the following morning.

## **II. June 14, 2013**

The second day of the 58th Plenary Session of the Conference commenced on June 14, 2013, at approximately 9:00 a.m., in the Main Conference Room of the CFTC, at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C.

### **a. Call to Order**

Chairman Verkuil opened the day’s meeting by welcoming the attendees back to the Plenary Session and calling the session to order.

### **b. ACUS Project Updates**

Ms. Jacobs presented updates on new ACUS projects that are expected to be presented at the 59th Plenary Session in December 2013: Social Media in Rulemaking; Remand Without Vacatur; the Government in the Sunshine Act; and a study of the Government Performance and Results Act Modernization Act. Ms. Jacobs also stated that ACUS is exploring the SSA representative payee program. Finally, Ms. Jacobs gave brief updates on upcoming ACUS workshops on Social Media in Rulemaking and the Federal Records Act, Executive Director Matthew Wiener’s participation in two panels at the Federal Administrative Law Judges Conference, and Staff Counsel Reeve Bull’s participation in a New York University symposium on international regulatory cooperation.

### **c. Consideration of Proposed Recommendation on Science in the Administrative Process**

Ms. Jacobs introduced the proposed recommendation, explaining that this project fulfilled a core ACUS statutory mission of working to “improve the use of science in the regulatory process.” Using case studies of the Environmental Protection Agency (“EPA”), the Fish and Wildlife Service, and the Nuclear Regulatory Commission, consultant Wendy Wagner explored



agency explanations for scientific decisionmaking, disclosure of data and conflicts of interest, and attribution for agency personnel who contribute significantly to technical or scientific reports. Ms. Jacobs noted that the recommendation does not and could not cover all aspects of agencies' use of science in the administrative process as it is too broad an area and suggested that there may be follow-up projects in the near future.

Ms. Wagner explained that the project's starting point was the idea that there is something about science-intensive regulations that deserves a focused study: science essentially provides the major constraints on the kind of plausible decisions agencies can make. This presents two challenges: first are the challenges associated with transparency in science-intensive rules, and second is the reliance of these rules on scientific information that may or may not be entirely reliable. She explained that science-intensive rules are a high-risk zone where the intensity and frequency of transparency problems and difficulty in ensuring reliability is at an all-time high.

Ms. Wagner explained that she and the committee saw extraordinary variation and that there is no "one size fits all" approach. Instead, she examined the variety of processes and picked out the best practices. The recommendations were divided into two sets: practices that are going well and should be spotlighted, and processes that had encountered impediments, particularly in terms of transparency.

Mr. Frisby explained that the recommendations fit into two clear categories: first, recommendations that highlight innovative practices that some agencies have already begun using; second, recommendations offering a series of proposals to bring greater congruity to the treatment of publicly and privately funded research. Additionally, there were several transparency recommendations.

Mr. Bull introduced the manager's amendments. Modifications were made based on Government Member Carol Ann Siciliano's comment that the adjective "regulatory" in Recommendation 5, line 95, was too narrow a term and should be dropped, and Mr. Fitzpatrick's proposal to keep the word "literature" in footnote 9 instead of changing it to "references." The manager's amendments as modified were accepted by voice vote.

Judge Stephen Williams expressed his desire to exhort agencies to express critical passages in terms that an intelligent layperson could understand. Ms. Wagner suggested citing the National Ambient Air Quality Standards policy assessment as a model for that, though Mr. Elliott disagreed.



Mr.

Mashaw asked whether science was limited to natural sciences for purposes of the project. Ms. Wagner explained that the idea was to start with natural sciences and then later extrapolate to the other sciences.

Ms. Farina proposed striking all or part of footnote 1 as it creates three categories of science: natural sciences, social sciences, and then a middle ground. If necessary, it should be limited to natural sciences, but Ms. Farina was hesitant to privilege certain sciences over others. Mr. Cass, Chairman Verkuil, and Mr. Morrison all agreed that the report was limited and therefore the footnote should not be removed. Mr. Morrison did suggest, however, amending the footnote to explain that the project applied only to hard sciences. Mr. Elliott agreed with the idea of an amendment, proposing to note that “science” refers only to “natural sciences,” but going no further. Public Member James Chen agreed.

Mr. Fitzpatrick referred the Conference back to the Holdren Memorandum from December 17, 2010, highlighting that it used the term “scientific and technological” throughout, but seemed to reference only scientific and highly technical endeavors like engineering. It seemed to be clear the report did not address areas like economics and sociology.

Liaison Representative Esa Sferra-Bonistalli and Mr. Frisby agreed that there should be language explaining that “science” refers only to natural sciences. Chairman Verkuil wrapped up this discussion by noting that a period would be inserted after “allied fields” and that the Committee on Style would ensure a definition of “science” consistent with the discussion was included.

Ms. Siciliano proposed modifying the text of paragraph 3 at page 5, line 79, striking “reproduce or verify,” and inserting “confirm.” Mr. Tozzi disagreed as “reproduce” was an integral part of OMB guidelines. Mr. Morrison suggested that instead of “confirm,” “assess” be inserted. After further debate, it was agreed that “reproduce or verify” would be replaced with “reproduce or assess.”

Ms. Siciliano proposed deleting the last clause in the sentence on page 7, lines 126, and 127, which read: “and assign less weight to such research when appropriate.” She expressed concern that research comes from many stakeholders and agencies often do not have access to the data supplied to them; thus, this decision could be very difficult. Ms. Wagner agreed that it was a good suggestion, and the amendment passed by voice vote.

Public Member Allison Zieve offered amendments on behalf of Public Member Gary Bass, who was unable to attend. Mr. Bass had proposed amending Recommendation 10 to provide that data should be disclosed in a machine-readable format when feasible. Mr. Cass



opposed this.

Mr. Fitzpatrick noted he had no objection to encouraging agencies to use a machine-readable format when practicable, but he cautioned the Conference to include this in a way that does not modify the recommendation to relate only to machine-readable formats.

Ms. Wagner suggested considering this through the Data Access Act, but Mr. Frisby was hesitant because the committee had not discussed it. Ms. Dooling suggested using the May 9, 2013 Executive Order, “Making Open and Machine Readable the New Default for Government Information,” as a citation. She noted she would follow up with the Conference and send staff the number of this recent Executive Order. Ms. Fenneman opposed the amendment and referred to the Freedom of Information Act, which does not impose a machine-readable requirement on agencies for information they already possess. Chairman Verkuil called for a voice vote, and Ms. Zieve’s amendment passed.

Chairman Verkuil called for a voice vote on the entire recommendation, as amended. The recommendation passed.

**d. Consideration of Proposed Recommendation on Administrative Record in Informal Rulemaking**

Ms. Jacobs introduced the recommendation concerning the administrative record in informal rulemaking. She noted that ACUS previously touched on this subject twenty years ago in 1993 and nearly forty years ago in 1974. Ms. Jacobs explained that the recommendation synthesizes and updates the Conference’s prior recommendations and is grounded on empirical research from surveys of federal agencies’ rulemaking practices, as well as a review of existing agency guidance. She thanked the agencies that participated in the survey. Ms. Jacobs also thanked Leland Beck, who served as the consultant for the project, and Staff Counsel Stephanie Tatham for her work with the Committee on Judicial Review.

Mr. Beck provided an overview of his report and detailed agency responses to the survey. He emphasized that the premise of the study was the Administrative Procedure Act’s (“APA”) “whole record rule,” which provides that a court should review the whole record that was before an agency. Mr. Beck noted the differences in terminology used in his report to describe the “administrative record,” “rulemaking record,” and “public rulemaking docket.” He stressed that the documents available in the public rulemaking docket may differ widely between agencies due to agency policies and whether records are kept on paper or electronically. Mr. Beck identified three agencies that have developed particularly helpful guidance setting forth their practices for administrative and rulemaking records: National Oceanographic and Atmospheric Administration, EPA, and Patent and Trademark Office.



Mr.

Levin, Chairman of the Committee on Judicial Review, thanked Mr. Beck and the ACUS staff for their work on the project. He provided an overview of the recommendation and explained that the committee spent a considerable amount of time discussing what it means for an agency to “consider” a document during rulemaking. The committee ultimately decided that “consider” should be used without elaboration in the recommendation proper and explained in a more nuanced way in the preamble. Mr. Levin stated that the recommendation urges agencies to develop their own policies regarding sensitive documents, including whether to index or identify privileged or protected materials that are withheld from the administrative record. Finally, he discussed the recommendations on judicial review, concerning the presumption of regularity afforded to agency preparations of the administrative record and circumstances that permit or require record supplementation or completion.

Chairman Verkuil opened the floor for consideration of manager’s amendments, which were adopted after a brief discussion of wording in paragraphs 2 and 3.

Mr. Morrison suggested deleting footnote 17 and moving the text to the beginning of footnote 18. This suggestion was withdrawn given concerns that moving the footnote would change the meaning of the sentence.

Ms. Siciliano offered an amendment to change the wording of the recommendation to allow agencies to exclude from the public rulemaking docket any documents that the law allows agencies to exclude at their discretion. Mr. Levin responded that the committee believed “privilege” encompassed the material logically referred to in the recommendation. Ms. Siciliano expressed concern that “privilege” is too narrow for EPA and noted that EPA may exclude pre-decisional documents or other files from the rulemaking docket without asserting privilege. Council Member Mariano-Florentino Cuéllar suggested changing the wording of the amendment to reflect that agencies can invoke any exclusion allowed by law. The amendment was adopted by voice vote.

Ms. Siciliano offered another amendment to insert the words “appropriate legal standards” into paragraph 3 of the recommendation. This amendment was adopted by voice vote.

Ms. Siciliano offered another amendment concerning indexing public rulemaking dockets and suggested that agencies should index what the public sees, rather than internal documents that the public never has access to. Mr. Levin noted the prevailing view in committee discussions was that the rulemaking record should be indexed insofar as practicable, including the documents not available for public access. Mr. Beck explained that electronic recordkeeping



makes indexing less burdensome and aids in subsequent preparation of the administrative record. The amendment to confine indexes to public rulemaking dockets was adopted by voice vote.

Senior Fellow Judge John Walker Jr. emphasized that for the purposes of judicial review under the APA, which provides that courts are to get the whole record, it is important for the court to have not only the contents of the administrative record but also those items withheld from the record based on privilege. He suggested an amendment to index all documents for the purposes of judicial review, including those files withheld by the agency under a privilege. Several government members expressed concern about the scope of indexing by agencies that would be required. The amendment was rejected by voice vote. At Judge Walker's suggestion, the Conference agreed to amend paragraph 10 to state that agency policies regarding treatment of protected or privileged materials should address indexing.

Mr. Elliott suggested an amendment to reconsider a sentence in the preamble explanation of what it means to consider materials. Ms. Zieve expressed concern that the sentence raised more questions than answers and suggested deleting the sentence. The amendment was adopted by a show of hands using voting cards.

The entire recommendation was adopted by voice vote.

**e. Closing Remarks and Adjournment**

Chairman Verkuil thanked the ACUS staff and Assembly members for their participation. He announced that the 59th Plenary Session will be held December 5-6, 2013. He then declared the 58th Plenary Session adjourned.