



Recommendation 76-3

Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking

(Adopted June 3-4, 1976)

The Conference's Recommendation 72-5 stated that in rulemaking of general applicability involving substantive rules "Congress ordinarily should not impose mandatory procedural requirements other than those required by 5 U.S.C. § 553," and that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact." Paragraph 5 of the Recommendation recognized that agencies nevertheless may sometimes appropriately utilize such procedures for resolving issues of specific fact, and it counseled that in rulemaking proceedings of general applicability "each agency should decide in the light of the circumstances of particular proceedings whether or not to provide procedural protections going beyond" the notice-and-comment requirements of section 553, "such as opportunity for oral argument, agency consultation with an advisory committee, opportunity for parties to comment on each other's written or oral submissions, a public-meeting type of hearing, or trial-type hearing for issues of specific fact."

The present Recommendation enlarges upon paragraph 5 of Recommendation 72-5 by further specifying for agency consideration certain procedures going beyond notice-and-comment, and by describing some of the "circumstances of particular proceedings" that should move agencies to consider such additional procedures.

The Recommendation grows out of a study of decisions, primarily of the Court of Appeals for the District of Columbia Circuit, in which rulemaking proceedings have been remanded to agencies for additional procedures, and of the responses of the affected agencies. The Recommendation implies no view as to whether those decisions were authorized by the Constitution or relevant statutes. The Recommendation is premised, however, on the view that one can learn from the insights of judges, who on the basis of their study of records reflecting "the circumstances of particular proceedings," perceived a need for procedures in addition to notice and the opportunity for comment, and from the experience of agencies required to provide such additional procedures.



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1. Agencies should afford interested persons the opportunity to participate as effectively as possible in notice-and-comment rulemaking proceedings. Therefore, in order to enlarge the opportunity for public participation and increase its effectiveness, agencies in appropriate circumstances should utilize procedures such as the following, which go beyond a single notice and opportunity to comment and supplement or particularize those listed as examples in Recommendation 72-5.¹

a. Providing from the outset for the possibility of two cycles of notice-and-comment (i) when the agency anticipates that the issues raised by the rulemaking will be unusually complex, or (ii) when it is in the public interest to utilize the initial notice of proposed rulemaking to give only a general description of the subjects and issues involved in the proceeding and to invite public comment upon these subjects and issues; provided that at the conclusion of the first cycle the agency may take any action within its powers. In addition an agency may at any time announce, as by an "advance notice of proposed rulemaking," that it intends to issue a notice of rulemaking, and in such announcement solicit comments and suggestions with respect to the contents of such notice.

b. Providing for a second cycle of notice-and-comment or by notice providing an opportunity for additional comment in any proceeding when comments filed in the proceeding, or the agency's response to such comments, present new and important issues or serious conflicts of data. An agency should consider the desirability of responding to comments as a means of exposing the agency's tentative views in order to enhance the usefulness of further comments by the public.

c. Incorporating in the notice of a notice-and-comment cycle a summation of the agency's current attitudes toward critical issues in the proceeding and a description of the data on which the agency relies, indicating where the data may be inspected.

¹ This Recommendation is addressed solely to agency process prior to the final promulgation of a rule. In addition, the agency statement of the basis and purpose of the rule incorporated in the rule when it is adopted should be clear and complete and should fully and fairly inform the public as to the basis and purpose of the rule.



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d. Providing an explanation of the tests and other procedures followed by the agency and the significance the agency has attached to them, and allowing opportunity for comment thereon.²

e. Holding conferences open to the public, on adequate notice, when an opportunity for all interested groups (such as agency staff, directly affected persons, agency policymakers and public interest groups) to question one another would be effective in resolving, narrowing or clarifying the disputed issues.

f. Hearing argument and other oral presentation, when the presiding agency official or officials may ask questions, including questions submitted by interested persons.

Important circumstances tending to suggest the desirability of using such procedural devices are that: (1) the scientific, technical or other data relevant to the proposed rule are complex; (2) the problem posed is so open-ended that an agency may profit from receiving diverse public views before publishing a proposed rule for final comment; and (3) the costs that errors in the rule may impose, including health, welfare and environmental losses imposed on the public and pecuniary expenses imposed on the affected industries and consumers of their products, are significant.

2. In rulemaking proceedings subject to notice-and-comment requirements agencies should give interested persons an opportunity to indicate issues of specific fact as to which they contend that cross-examination should be considered by the agency to be appropriate. Cross-examination, where permitted, should be strictly limited as to subject and duration.

3. An agency should employ any of the devices specified in paragraph 1 or permit cross-examination only to the extent that it believes that the anticipated costs (including those related to increasing the time involved and the deployment of additional agency resources) are offset by anticipated gains in the quality of the rule and the extent to which the rulemaking procedure will be perceived as having been fair.

² This may be accomplished, for example, in a public notice or by technical reports issued or relied upon by the agency and incorporated by reference in the proceeding.



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Citations:

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