



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Regulation

Minutes

April 2, 2013

Members Attending

Russell Frisby, Chair	Carl Malamud, Public Member (by telephone)	Peter Robbins, Alternate
Michelle Borzillo, Alternate	Charles Maresca, Liaison Representative	Jonathan Rose, Senior Fellow (by telephone)
Bridget Dooling, Government Member	Alan Morrison, Senior Fellow	Elana Tyrangiel, Government Member (by telephone)
Susan E. Dudley, Public Member	David Ogden, Public Member (by telephone)	Megan Wallace, Government Member
Don Elliott, Senior Fellow	Mitchell Plave, Alternate	Christy Walsh, Government Member
Meredith Fuchs, Government Member	Richard Revesz, Public Member (by telephone)	Dick Wiley, Senior Fellow (by telephone)
Phillip Howard, Public Member (by telephone)	Remington Gregg, Government Member	

ACUS Staff Attending

Paul Verkuil, Chairman	Gretchen Jacobs, Research Director	Reeve Bull, Staff Counsel
Gabrielle Guy, Paralegal	Mandy Abbott, Intern	

Invited Guests Attending

Curtis Copeland,
Consultant (Benefit-Cost Analysis project)

Wendy Wagner, Consultant (Science project) (by telephone)

Nancy Nord
Commissioner, Consumer Product Safety Commission



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The meeting commenced at 1:00 pm in the conference room of the Administrative Conference.

Meeting Opening

Chairman Frisby and ACUS Chairman Verkuil each made opening remarks. After all of the attendees introduced themselves, Chairman Frisby called for approval of the March 4, 2013 minutes. A motion was carried to approve the minutes, reserving editorial privileges to address changes Ms. Dudley had suggested.

Mr. Bull gave an overview of the Benefit-Cost Analysis project. He noted that the approach of the project is to record what independent regulatory agencies are doing in the benefit-cost analysis sphere. This information is set out in the preamble to the recommendation. The recommendations themselves fall into three general groups: 1) ways to encourage the diffusion of policies and practices relating the benefit-cost analysis; 2) highlighted analytical practices; and 3) suggestions to Congress if it decides to implement additional benefit-cost analysis requirements for independent regulatory agencies.

Comments by Commissioner Nancy Nord

Commissioner Nord of the Consumer Product Safety Commission (CPSC) praised Mr. Copeland's report and stated that economic information can lead to improved decisionmaking. She supported this statement with several examples from the CPSC. Despite her support for benefit-cost analysis, she noted that, due to the difficulties inherent in monetizing benefits, benefits are often speculative and hard to justify in light of high costs. Still, she reiterated her belief that the regulatory burdens imposed on stakeholders have been higher in the absence of benefit-cost analysis than they are when it is used. As such, she strongly endorsed Recommendation 5, but suggested adding a statement that it would be ideal for an agency to choose the least burdensome alternative that addresses the regulatory goal, or at least to require an explanation of why the least burdensome alternative was not chosen.

On the other hand, Commissioner Nord expressed concern over Recommendation 9. She stated that the way it is drafted raises the question of whether the President has the inherent authority to require adherence to executive orders. Although this is an important question that needs to be resolved, it will likely be unhelpful for ACUS to come down on one side or the other, and Recommendation 9 can be read as doing just that. In addition, she believes that benefit-cost analysis should not be limited only to major rules. The statute governing the CPSC, for example, requires that benefit-cost analysis be done for all product-specific safety standards. Since these are not necessarily major rules, Recommendation 9 could be used as a rationale for making such existing benefit-cost requirements less comprehensive.

Commissioner Nord also suggested that the recommendations could be made more effective by including some encouragement for the Office of Information and Regulatory Affairs (OIRA) to take a second look at the analyses that are being conducted. Doing so would help



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connect costs and benefits to larger priorities and would be especially beneficial for smaller agencies.

Chairman Frisby then opened the floor to general discussion of the recommendations.

Discussion of the Benefit-Cost Analysis Draft Recommendation

The committee proceeded to discuss the draft recommendations.

Discussion of the Preamble

Ms. Dudley said she felt that the introduction is too vague and suggested opening the recommendation by stating that regulatory impact analysis helps us understand the likely effects of a regulation before it is implemented and that benefit-cost analysis is often a component of that. She also expressed her desire to focus on the more recent Executive Order 12,866 rather than its predecessor, Executive Order 12,291. In addition, she flagged the portion of footnote 10 that begins “some contend,” which she believes is subject to differing interpretations. Finally, she suggested deleting the phrase “sought to correct any misconceptions regarding whether such agencies” from the first full paragraph on page 3.

Mr. Elliott also expressed concerns about the tone of the preamble. He agreed with Commissioner Nord that the recommendation should not venture into prejudging the conceptual issue of the President’s authority. He reiterated Ms. Dudley’s observations regarding footnote 10, noting that although it is important to mention that there are no written opinions from the Office of Legal Counsel, the language needs to be precise.

Discussion of Recommendation 1

Ms. Wallace questioned the meaning of “economic analysis guidance.” Mr. Copeland stated that this is a generic term often used by agencies to refer to a variety of economic analytical techniques, including but not limited to benefit-cost analysis, that they are required to do by statute. Mr. Morrison suggested clarifying that this term refers to guidance in the preparation of the analysis. Ms. Wallace suggested replacing “economic impact analysis” with “regulatory impact analysis” since the latter is a more comprehensive term. Mr. Copeland expressed concern, and Chairman Frisby agreed, that the term “regulatory impact analysis” can carry connotations beyond the scope of what is addressed in the report. Chairman Frisby noted that in light of this line of discussion, it would be beneficial to define in the preamble what the recommendation means by “benefit-cost analysis.” He suggested referring the matter to the Committee on Style, as well as the possibility of combining Recommendation 1 with Recommendation 3.

Ms. Dudley then asked whether Mr. Copeland’s research had identified any agencies that are prohibited from conducting benefit-cost analysis. He stated that some agencies, like the



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Nuclear Regulatory Commission, are prohibited from considering costs as part of certain decisions. Mr. Narang, a public attendee from Public Citizen, then suggested adding language regarding judicial deference.

Discussion of Recommendation 2

Mr. Elliott began by raising concerns that the recommendation appears to assume economic analysis is limited to the rulemaking process. Mr. Morrison and Ms. Fuchs pointed out that the recommendation repeatedly refers to rules. Ms. Walsh stated her support for limiting the recommendation to rulemaking, primarily because it was the focus of Mr. Copeland's report. Ms. Dudley stated her desire to maintain the "proposed and final" language in the recommendation

Discussion of Recommendation 3

Mr. Morrison questioned the inclusion of the parenthetical stating "perhaps using memoranda of understanding to document the nature of the relationship" after OIRA. Mr. Copeland said that it was designed to address a situation that has occurred in the past, and Ms. Fuchs noted that it is important to emphasize the consultative, rather than reviewing, nature of OIRA's relationship with independent regulatory agencies. Mr. Morrison noted that the parenthetical tends to raise more questions than it answers, at which point the Committee agreed to remove it.

Discussion of Recommendation 4

Mr. Copeland elaborated on the objective of this recommendation. He stated that several agencies in the study repeatedly identified the Paperwork Reduction Act (PRA) as an impediment to preparing benefit-cost analysis expeditiously. Ms. Dooling expressed concern over the implication in the recommendation that the PRA is a barrier to collecting information and that the data collected pursuant to the recommendation should not have to go through the same process as any other data collected by the government. Chairman Frisby pointed out that that is not an inevitable conclusion of the recommendation, and Mr. Elliott suggested that this issue is a matter of tone.

Discussion of Recommendation 5

Commissioner Nord suggested that agencies that do not choose the most cost-effective alternative to a given problem should be required to explain the basis of their decision. Chairman Frisby reiterated the difficulty of quantifying some costs and benefits.

Discussion of Recommendation 6

There was some discussion regarding what is meant by "pre-statutory analytical basis." Ms. Dudley explained that pre- and post-statutory baselines allow agencies to make clear what the effects of their regulations will be. Mr. Morrison suggested that there may be an assumption



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that an agency is only going to act one time, but there are many instances where agencies regulate the same activity multiple times. Mr. Rostker pointed out that agencies are often reluctant to include in their analyses things over which they have little control. He also proposed moving the sentence regarding purpose to the beginning of the recommendation. Chairman Frisby agreed to direct this issue to the Committee on Style.

Discussion of Recommendation 7

There was some discussion about removing the last sentence of the recommendation. An objection was raised to doing so on the basis of certain agencies' having to collect proprietary information. Chairman Frisby questioned whether the Freedom of Information Act (FOIA) would protect this information. Mr. Morrison suggested adding the phrase "as permitted by law."

Discussion of Recommendation 8

Mr. Morrison questioned what was meant by "transfer payments" and suggested adding an explanation of the concept and its relevance to the preamble.

Discussion of Recommendation 9

Ms. Dudley questioned the need for this recommendation at all and suggested deleting it. Ms. Dooling then expressed concern about ACUS making recommendations pertaining to funding. Mr. Narang, however, voiced support for ACUS's proposing funding, particularly in light of the tight budgets agencies are currently facing. As this is not the first time that ACUS has dealt with the issue of recommending funding, Chairman Frisby suggested examining how funding recommendations have been handled in the past and resuming the discussion of this recommendation thereafter.

In order to facilitate discussion of the science recommendation, Chairman Frisby suspended discussion of the benefit-cost analysis recommendation until a new draft could be circulated.

Discussion of the Science in the Administrative Process Draft Recommendation

Mr. Bull noted that the recommendation has been redrafted and comments have been circulated. Chairman Frisby then opened the floor for additional comments. Ms. Dudley expressed concern that the current language suggested that science should comport with politics, which she did not think was true, and agreed to submit proposed changes to the language.

Discussion of the Preamble

Mr. Bull gave an overview of the comments submitted by the National Institute for Standards and Technology (NIST), including a note that the term "natural science" does not include mathematics and the risk that people will use the recommendation to express a policy,



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rather than scientific, disagreement with agencies' decisions. Ms. Siciliano suggested deleting the term "right," which appears in the heading and twice in the report, and using "attribution" instead.

Discussion of Recommendation 1

The American Chemistry Council's comments suggested substituting "decision documents" for "rule," since not every agency decision will be a rule. Ms. Siciliano suggested including proposed and final decision documents, a proposal with which the Committee members agreed. She also expressed a preference for using "information" over "research," as the former is a broader term, and for replacing "can be compared against" with "is supported by" in regards to the scientific record. She suggested deleting "design" from the title, and agreed to submit line edits in conformity with this suggestion.

Discussion of Recommendation 3

NIST suggested that providing a list of the scientific literature reviewed is inadequate without an explanation of the materiality of the sources. There was some discussion of deleting the word "list," but concerns were raised that the cost and burden of actually providing these materials would likely prove infeasible. The Committee also considered replacing "verify" with "reproduce and verify," as well as whether agencies would have to provide funding and materials for these verification purposes. Ms. Siciliano expressed concern about the parenthetical provision in the recommendation—namely, how it would be implemented and whether something can be considered material if it is in the record even if the agency disagrees with it. Chairman Frisby observed, however, that the Environmental Protection Agency's (EPA) record is much more complete than many other agencies, so this is more of a concern for the EPA than other agencies. There was also some discussion regarding whether agencies would be able to exclude information from the list just because the agency itself decides that it is not material. The main concern raised was how to capture materials that are relevant even if they do not comport with the agency's decision without including everything that anyone could possibly consider relevant. There was much discussion regarding the meaning of "considered" in the preamble, but Mr. Elliott noted that what goes in the administrative record is beyond the scope of the recommendation.

Discussion of Recommendation 4

Ms. Siciliano suggested taking out the word "will" to make the recommendation seem less mandatory. There was some discussion regarding what constitutes a "checkpoint," and whether to define it in the preamble, though Ms. Siciliano noted that it is a term that EPA scientists understand.



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Discussion of Recommendation 5

There was some concern that uncertainty analysis is too limiting. Ms. Siciliano then took issue with the use of the term “options.”

Discussion of Recommendation 7

In the comments it submitted, NIST questioned what sort of document would be involved in this recommendation, and Ms. Dudley pointed out that NIST’s primary concern seemed to be the blurring of lines between science and policy. Ms. Siciliano noted that EPA employees are already allowed to publish and suggested striking “allowed and.”

Discussion of Recommendation 8

Mr. Gregg noted that agencies are in the best position to assess what their innovations are and suggested that the Office of Science and Technology Policy should serve primarily a coordinating role.

Discussion of Recommendation 9

Ms. Siciliano suggested replacing “revisions” with “actions,” or perhaps changing the recommendation to read “actions, including revisions.”

Discussion of Recommendation 10

Ms. Wagner emphasized the need to make very clear whether this recommendation is intended to apply to publicly or privately funded studies, as well as who has the right to publish. Ms. Siciliano voiced her preference for using the second sentence regarding data contacts instead of the first sentence, since they seem to be saying largely the same thing, but there is greater specificity in the second sentence. Ms. Siciliano did, however, wish to retain the “to the extent practicable” language from the first sentence. Mr. Morrison noted that agencies have a lot of data that is not publicly available, and he wondered whether this information should be included in the preamble and explained. Mr. Elliott then suggested adding “scientific” before “research” and specifically including privately funded studies in the recommendation.

Meeting Closing

The Committee agreed to adjourn. ACUS Chairman Verkuil thanked the committee for their work, and Chairman Frisby concluded the meeting shortly before 4:30 pm.