

Committee on Regulation

April 25, 2011 Committee Meeting

Comment of ACUS Special Counsel Jeff Lubbers

Hi Reeve—Unfortunately the Regulation Committee meeting conflicts with my (last) class, so I won't be able to attend, but I thought I would give you my comments in writing.

First of all, I think you did a great job of preparing all the documents for the meeting.

Here goes:

Preamble:

Second line—I suggest adding the word “written” before “views.”

Recommendation 1: Nice job of setting out the alternatives. I think I prefer 1'

In any event, there is a slight problem with the drafting of 1.—The bolded line in the first alternative could be read as saying agencies should not have minimum comment periods in their rulemakings. I think it would be better read to say something like: “Neither Congress nor the President should require an across-the-board minimum comment period in rulemaking.”

As for 1''—I think it is a bit too complicated and it presumes the continued existence of the E.O. 12,866 definition.

As for 1' I think I prefer option A—though it is always dicey to open up the APA for amendments. In option B I would leave out “of course” and maybe substitute “; however . . .”

In whichever one that is chosen it may be necessary to drop a footnote to 93-4 and 95-4.

Recommendation 2:

In the second non-bolded line, instead of “when comments will be posted” I would say “how soon comments will be posted.” This wording issue also leads me to ask whether it is worth saying something about “how long” comments will remain posted as well. I suspect agencies have divergent practices on this. I hope comments will be available long after the rulemaking is completed.

Also instead of “currently” how about “as contemporaneously with their submission as possible”?

Recommendation 3:

The first non-bolded sentence seems a bit ambiguous to me. Are you saying agencies should consider promulgating a general policy on reply comments that they should consider this on a rule-by-rule basis?

Recommendation 5:

Maybe this is implied, but how about “are or are not appropriate”?

Recommendation 8:

Concerning agency acceptance of late-filed comments, this is perhaps my most substantive comment. I’ve always been troubled by the possibility that agencies might accept some late comments (e.g., the ones they agree with) and not others. Therefore I would suggest adding something like the following to Recommendation 8:

“However, when considering whether to consider late-filed comments in a particular rulemaking, agencies should take care not to do so in a selective manner, unless the selection is based on neutral considerations such as the date received.”

I also don’t think you need footnote 7. These examples are useful, but are so transitory that they will be dated quickly. The background “report” for this recommendation will presumably consist of Prof. Balla's report (perhaps revised to include his latest memo) and your memo—which will have these citations.

Feel free to circulate this to the committee and bring them up at the appropriate time in the meeting

Good luck!

Jeff