

Brief Report on Economically Significant Rules and the Duration of Comment Periods

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During the March 24, 2011 meeting of the Committee on Regulation of the Administrative Conference of the United States (ACUS), there was an extended discussion of the association, or lack thereof, between the substantive importance of proposed rules and the duration of the comment periods associated with agency proposals. Is it the case, for example, that rules of the highest significance are ordinarily assigned comment periods of 30 days or longer in duration? In general, to what extent do agencies provide for comment periods of substantial duration when soliciting public feedback on actions of the greatest magnitude and impact?

This association between rule significance and comment period duration is salient for a number of reasons. In my consultant report, I have recommended that there should not be a required minimum duration of comment periods. One expressed concern in response to this recommendation is that such an approach leaves open the possibility that agencies might exercise discretion over the duration of comment periods in ways that are in some respects problematic. For example, proposals that are likely to be met with substantial opposition might be assigned comment periods of relatively brief durations, thereby limiting public input in the very instances in which such input is potentially of great consequence. In addition, in a previous recommendation, ACUS had called for amending the Administrative Procedure Act to prohibit, under most circumstances, comment periods of less than 30 days in duration. Although past recommendations are not necessarily determinative of current ACUS decisions, such existing statements presumably carry substantial weight in ongoing discussions.

After the March 24, 2011 meeting, I was asked by ACUS staff to return to the sample of comment periods that I had assembled during the preparation of my report. For each of these comment periods, I had collected information about the number of days that the prospective agency actions were open for public input. My specific charge was to explore the nature of the association, if any, between the substantive importance of the actions at hand and the durations of the assembled comment periods.

During the course of the research that has since followed, I identified a small number of the proposed actions in the sample as economically significant. I then compared the duration of the comment periods for these economically significant actions with the durations for all of the other prospective actions that did not meet this classification. Although this comparison is severely limited in nature and scope, it offers an initial glimpse into the connection between rule importance and comment period duration.

Perhaps the most general way to juxtapose the comment periods of economically significant actions with the comment periods of other types of actions is to compare their respective mean durations. The average duration of the comment periods for proposed actions that are economically significant is 45.1 days. The average duration of the comment periods for all other types of actions is 38.7. Overall, then, economically significant rules have comment periods that average nearly one week longer in duration than the comment periods for other types of prospective agency actions.

As an additional means of comparison, I examined the respective prevalence across the two sets of actions of comment periods of less than 30 days in duration. For actions that are not economically significant, nearly one-quarter of the proposals have comment periods of less than 30 days in duration. Although there are instances in which economically significant rules have comment periods of such short durations, such occurrences are relatively uncommon.

Furthermore, when such short comment periods occur in the context of economically significant actions, there are circumstances surrounding the actions that can perhaps help account for agency decisions regarding comment period duration. On August 3, 2010, for example, the Environmental Protection Agency (EPA) published an economically significant proposed rule on oil spill prevention and established a two-week comment period. The reason provided by the EPA for such a short comment period was that the proposal being published on that particular day served to further extend the compliance date by which facilities must prepare, amend, and implement Spill Prevention, Control, and Countermeasure plans. In other words, although the overall action being taken by the EPA was indeed economically significant, the proposal itself had previously been exposed to public scrutiny through earlier comment periods.

To be clear, the data that have been brought to bear in this post-consultant-report research on the issue of rule importance and comment period duration are extremely limited and are by no means necessarily generalizable to the rulemaking process in general. Simply put, the aim here has been to provide an initial sense of the extent to which economically significant actions are afforded comment periods of substantial duration, in comparison to actions not meeting this classification.

With these limitations in mind, I would suggest that robust oversight of agency practices in the setting of comment period durations, by Congress and the White House Office of Information and Regulatory Affairs, can serve as institutional constraints on potential abuses, should the report's recommendation that there not be a required minimum duration of comment periods be adopted by the Committee on Regulation and by ACUS in general.