



Rulemaking Comments

Committee on Regulation

Proposed Recommendation | June 16-17, 2011

One of the primary innovations associated with the Administrative Procedure Act (“APA”) was its implementation of a comment period in which agencies solicit the views of interested members of the public on proposed rules.¹ The procedure created by the APA has come to be called “notice-and-comment rulemaking,” and comments have become an integral part of the overall rulemaking process.

In a December 2006 report titled “Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century,” the Subcommittee on Commercial and Administrative Law of the United States House of Representatives’ Committee on the Judiciary identified a number of questions related to rulemaking comments as areas of possible study by the Administrative Conference.² These questions include:

- Should there be a required, or at least recommended, minimum length for a comment period?
- Should agencies immediately make comments publicly available? Should they permit a “reply comment” period?
- Must agencies reply to all comments, even if they take no further action on a rule for years? Do comments eventually become sufficiently “stale” that they could not support a final rule without further comment?

¹ 5 U.S.C. § 553; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (describing the “notice-and-comment procedures for rulemaking” under the APA as “probably the most significant innovation of the legislation”).

² SUBCOMM. ON COMMERCIAL & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMIN. LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY at 3–5 (Comm. Print 2006).



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- Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?
- What effects do comments actually have on agency rules?

The Conference has studied these questions and other, related issues concerning the “comment” portion of the notice-and-comment rulemaking process. The Conference also has a concurrent project entitled “Legal Considerations in E-Rulemaking” that deals with separate matters, focusing specifically on legal issues implicated by the rise of e-rulemaking.

The Conference believes that the comment process established by the APA is fundamentally sound. Nevertheless, certain innovations in the commenting process could allow that process to promote public participation and improve rulemaking outcomes more effectively. In this light, the Conference seeks to highlight a series of “best practices” designed to increase the opportunities for public participation and enhance the quality of information received in the commenting process. The Conference recognizes that different agencies have different approaches to rulemaking and therefore recommends that individual agencies decide whether and how to implement the best practices addressed.

In identifying these best practices, the Conference does not intend to suggest that it has exhausted the potential innovations in the commenting process. Individual agencies and the Conference itself should conduct further empirical analysis of notice-and-comment rulemaking, should study the effects of the proposed recommendations to the extent they are implemented, and should adjust and build upon the proposed processes as appropriate.



RECOMMENDATION

1. To promote optimal public participation and enhance the usefulness of public comments, the eRulemaking Project Management Office should consider publishing a document explaining what types of comments are most beneficial and listing best practices for parties submitting comments. Individual agencies may publish supplements to the common document describing the qualities of effective comments. Once developed, these documents should be made publicly available by posting on the agency website, Regulations.gov, and any other venue that will promote widespread availability of the information.

2. Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. ~~As a general matter, for “[s]ignificant regulatory action[s]” as defined discussed in Executive Order 12,866, as supplemented by Executive Order 13,563, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days.~~ When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.³

3. Agencies should adopt stated policies of posting public comments to the Internet within a specified period after submission. Agencies should post all electronically submitted comments on the Internet ~~as well as scanning comments submitted in paper format and~~

Comment [JS1]: Proposed amendment by: Ivan Fong

³ See also Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993) (“Congress should consider amending section 553 of the APA to . . . [s]pecify a comment period of ‘no fewer than 30 days.’”); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 18, 2011) (“To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”).



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~~making them available online as well and should also scan and post all comments submitted in paper format.~~⁴

Comment [JS2]: Manager's amendment

~~4. The eRulemaking Project Management Office and individual agencies should establish and publish policies regarding the submission of anonymous comments.~~

Comment [JS3]: Proposed amendment by: Alan Morrison

5. Agencies should adopt and publish policies on late comments and should apply those policies consistently within each rulemaking. Agencies should determine whether or not they will accept late submissions in a given rulemaking and should announce the policy both in publicly accessible forums (e.g., the agency's website, Regulations.gov) and in individual Federal Register notices including requests for comments. The agency may make clear that late comments are disfavored and will only be considered to the extent practicable.⁵

6. Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.⁶

⁴ See also Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010) (“OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.”).

⁵ See, e.g., Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5,120, 5,121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking announcing that “[c]omments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable”).

⁶ See also Administrative Conference of the United States, Recommendation 76-3, *Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking* (1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto “present new and important issues or serious conflicts of data”); Administrative Conference of the United States, Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability* (1972) (recommending that agencies consider providing an “opportunity for parties to comment on each other's oral or written submissions); Office of Information & Regulatory Affairs,



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7. Agencies should closely monitor their rulemaking dockets and, where a change in circumstances warrants it, consider the use of available mechanisms such as supplemental notices of proposed rulemaking to refresh records that have become stale. Comments should not automatically be deemed to “expire” after a set period of time, but agencies should make use of available mechanisms, such as issuing supplemental notices of proposed rulemaking, to refresh the rulemaking record when the agency believes that the circumstances surrounding the rulemaking have materially changed. Although agencies should not automatically deem rulemaking comments to have become stale after any fixed period of time, agencies should closely monitor their rulemaking dockets, and, where an agency believes the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale, consider the use of available mechanisms such as supplemental notices of proposed rulemaking to refresh the rulemaking record.

Comment [JS4]: Manager’s amendment, proposed by ACUS staff, based on two similar proposed amendments by Ivan Fong and Carol Ann Siciliano

8. Agencies should include in their statement of basis and purpose in the Federal Register, to the extent practicable, the number of comments received or the number of commenters, in a rulemaking proceeding.

Comment [JS5]: Proposed amendment by: Ivan Fong

Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13,563, M-11-10, at 2 (Feb. 2, 2011) (“[Executive Order 13,563] seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.”).