

Regulatory Analysis Requirements

Comments on Proposed Recommendations

Carol Ann Siciliano

U.S. Environmental Protection Agency

5/29/12

Suggested Managers' Amendments:

Lines 65-66: Can this concept be expressed positively? Perhaps something like this:

OIRA should notify agencies . . . “and inform the agencies that they need only prepare one analysis to satisfy both requirements.”

Line 65: [If the Managers decline the comment above] Replace “they” with “the agencies” (because I found “they” to be ambiguous in a sentence with two actors).

Line 85: insert hyphen in “crosscutting”

For Discussion at Plenary

Lines 78-83 (Recommendation 7): I recommend deleting Recommendation 7 in its entirety.

Explanation: Recommendation #7 is unnecessary because Circular A-4, as written, already provides agencies with the flexibility to use different analyses based on the situation. OMB need not amend the Circular. Indeed, by making this recommendation, ACUS will imply that the current Circular is insufficiently limber to achieve our goal.

OMB Circular A-4 provides guidance that allows agencies to identify "an appropriate analytical approach to use," particularly with regard to estimating costs and benefits. Agencies may tailor the method of regulatory analysis to the type of rule at issue without any change to OMB Circular A-4.

Amending Circular A-4 to specify the type of regulatory analysis required for each type of rule may make regulatory analysis requirements more rigid and limit agency ability to choose among analytic approaches for particular rules.

I am open to other solutions to this issue, including other ways to convey our point, as long as the new text does not involve amending Circular A-4 as currently presented.

Midnight Rules
Comments on Proposed Recommendations
Carol Ann Siciliano
U.S. Environmental Protection Agency
5/29/12

Suggested Managers' Amendments:

Line 10: Insert “development” in place of “consideration.”

Explanation: “consideration” seems like a passive word that belies the huge amount of activity that occurs before publication of proposed & final rules.

Line 12: Insert “outgoing” in front of “administrations.”

Lines 18-20: I propose this edit in order to make ACUS’s point more precisely:

“Nonetheless, **the timing of such rulemaking efforts** ~~midnight rulemaking~~ can put a new administration in the awkward position of having to review a substantial group of rules and other actions to ensure ~~quality and~~ consistency with its policies.”

I also propose deleting “quality and” because consistency is the big issue. I’ve never heard of a rule pulled back because an administration agreed with its policy view but thought the record was weak or that it was written poorly.

Line 20: Insert “number” in place of “group.”

Line 21: Insert “outgoing” in front of “administrations.”

Line 22: Insert “outgoing” in front of “administrations.” [Optional, if you think the “outgoing” in line 23 is sufficient.]

Line 23: Insert “outgoing” in front of the word “President’s.”

Explanation: This change makes it clear that that we are talking about a president whose term is ending, not a president who is running for reelection (or has been reelected).

Line 24: Insert “outgoing” in front of “administration’s” and delete “incumbent”

Line 28, et seq.: Insert “new” in place of “incoming” (see my comment for Line 70 below).

Line 29: Replace “remedy” with “address”

Explanation: “remedy” is both a common noun and a less common verb; in this clause, it is preceded by what appears to be a noun phrase “rule and remedy,” which might initially confuse the reader.

Lines 31-32: Delete “the delaying effect of,” as follows:

“such rules are not the focus of this Recommendation because they can be modified or amended without ~~the delaying effect of~~ notice and comment procedures. 32

Explanation: “Delaying effect” tends to be a pejorative. ACUS does not want to appear to criticize notice & comment procedures, and I don’t think we mean to do so.

Line 34: Insert “outgoing” in place of “incumbent.” [please make this change throughout]

Lines 35 & 36: Insert “new” in place of “incoming.” See comment 70 below.

Line 36: Insert “outgoing” in place of “incumbent.”

Line 42: Insert “statutory” in place of “congressional.”

Line 48: Insert “outgoing” in place of “incumbent.”

Line 50: Insert “This Recommendation” in place of “It.”

Lines 53, 54, 57: Insert “outgoing” in place of “incumbent.”

Lines 60, 63, 65, 68: Insert “outgoing” in place of “incumbent.”

Line 68: Insert “After the election,” in place of “Post-election” – because “post-election” can also be read as an adjective describing “administrations.” (If my insert is rejected, at least please delete the hyphen in “post-election.”)

And, insert “continue the practice of sharing” in place of “share”

~~“Post-election,~~ **“After the election,** incumbent administrations should **continue the practice of sharing** ~~share~~-appropriate information ...”

Line 70 et seq.: The term “incoming” is imprecise (and potentially misleading). We are referring to the newly sworn-in President, not to the transition team. “Incoming” means “on the way in,” not “already here.” Please change this term throughout the document to something else, like “new administration.”

Line 74: Stylistic request to delete the phrase “the comment period should enable the public to express” and replace it with this: “The public **should be invited** to express”

Line 81: Insert “outgoing” in place of “incumbent.”

For Discussion at Plenary (unless deemed to be Managers' Amendments):

Comment 1:

Line 7: Insert “far” in place of “likely” – because that is what the study (and ACUS) concludes.

Comment 2:

Lines 13-15: The clause currently reads:

“while there are isolated cases of midnight rules that may have been timed to avoid accountability or that represent efforts to extend the incumbent administration’s policies into the future,”

This is a weighty accusation for ACUS to make (especially the “avoid accountability” part). Please provide examples in the preamble (or, at least, the number of instances identified in the report and the years when they occurred). Otherwise, please delete the clause.

“The Conference’s study found that ~~while there are isolated cases of midnight rules that may have been timed to avoid accountability or that represent efforts to extend the incumbent administration’s policies into the future, most~~ **the vast majority** of the rules appear to be the result of finishing tasks that have been inevitably delayed or derailed by the transition in presidencies.”

Comment 3:

Lines 15-16: I have several comments about this clause and suggest language (below):

“most of the rules appear to be the result of finishing tasks that have been inevitably delayed or derailed by the transition in presidencies.”

1. I request that the word “most” (i.e., greater than 50%) be replaced with the phrase “the vast majority,” because if we have only “isolated cases” of alleged misbehavior, the “vast majority” of actions are fine.
2. “inevitably delayed” is ok, but I think we can provide more objective text, which I suggest below.
3. We have an opportunity here to state briefly some of the reasons for “midnight” rulemaking. I propose a revision (provided below).
4. The following phrase seems out of context to me (and I don’t understand it): “derailed by the transition in presidencies.”

My comment: midnight rules by definition take place during the transition in presidencies. They are not “derailed” by the transition; to the contrary, critics assert that these actions actually are accelerated during and because of the transition. So, this clause seems out of place in this sentence.

I propose deleting that clause in its entirety.

~~“most of the rules appear to be the result of finishing tasks that have been inevitably delayed or~~ **related to the rulemaking process that were initiated well before the Presidential transition period or that are the result of deadlines outside the agency’s control (such as year-end statutory or court-ordered deadlines).**”
~~derailed by the transition in presidencies.”~~

Comment 4:

Line 17: I don’t think “ordinary procrastination” is fair. I request that “ordinary procrastination” be deleted and replaced with the phrase noted in **red** below, so that the sentence reads:

“Accordingly, it appears that the increase in rulemaking at the end of an administration likely results primarily from ~~ordinary procrastination and external delays, or simply~~ a natural desire to complete projects before departing, **taking into account the complicated subject matter, extensive public outreach, and limited resources that may have slowed the projects initially.**”

Comment 5:

Line 27: Delete “without careful consideration” because – objectively speaking -- ACUS is not in a position to know whether an agency “considered” a midnight rule “carefully.” The sentence stands on its own without that final clause.

~~“Second, there is some concern about the quality of rules that may have been rushed through the rulemaking process without careful consideration.”~~

Comment 6:

Lines 47-49: The phrase “curbing problematic rulemaking” suggests that midnight rules truly are a problem. Instead, what ACUS is doing here – very helpfully – is suggesting best practices. Let’s say that.

“Accordingly, this Recommendation proposes reforms aimed at addressing midnight rulemaking that focus on **suggesting best practices for** ~~curbing problematic rulemaking by incumbent~~ **outgoing** administrations and enhancing the ability of incoming administrations to review midnight rules.”

Comment 7:

Lines 49-50: I request that the definition of “midnight rule” be changed as follows:

“It defines ‘midnight rules’ as those promulgated **by an outgoing administration after the Presidential election.**” ~~in the last 90 days of a presidential term.”~~

Explanation: When we count back from January 20, ninety days takes us to October – before the Presidential election of a President seeking a second term. I believe the Committee does not intend to capture pre-Election activity; rather, we intend to capture activity *after Election Day when the President is on his/her way out the door*. This edit is also consistent with our Recommendation 2 (line 59), which appropriately uses the election as the magic date.

Lines 60-62: Please make edit to conform to my suggestion for Lines 49-50:

“When incumbent administrations issue a significant “midnight” rule—meaning one issued **by an outgoing administration after the Presidential election** ~~in the last 90 days of a presidential term~~— they should explain the timing of the rule in the preamble of the final rule (and, if feasible, in the preamble of the proposed rule).”

Comment 8:

Line 62: Please add the following text at the end of Recommendation 3. [Feel free to edit it to make it tighter]:

The outgoing administration should also consider selecting an effective date that falls 90 days or more into the new administration so as to ensure that the new administration has an opportunity to review the final action before it takes effect and, if desired, withdraw it after notice and comment.

Comment 9:

Lines 80 to 88 (Recommendation 7): See my edits below, based on the following comments.

1. “Suspend” implies no end date. (See Orzag memo. He’s right!) “Delay” is the word agencies use to change the effective date to a date-certain.” [Please make this change in FN 5 too.]
2. I propose inserting “without notice and comment” in order to give meaning to the concluding clause (if permitted by law). Otherwise, the APA freely allows agencies to delay effective dates of rules if N&C is used; the only constraint we appear to be talking about is some constraint established by the agency’s organic statute (and that’s an unlikely prospect that ACUS need not address).

We need to be clear what we are talking about here. Therefore, I believe it’s important to state plainly that we are talking about dispensing with N&C in these situations when the APA so authorizes.

3. Even apart from my comment in (1) above, “suspension” is imprecise here. We’re talking about the act to suspend/delay a rule without N&C, not the suspension/delay decision itself. Therefore, “action” better describes what we’re talking about.
4. Agencies do not issue “suspension orders” with respect to their own rules.

“Where **When** the imminence of the effective date of a midnight rule precludes full adherence to the process described in paragraph six, the **outgoing incoming** administration should consider **delaying suspending** the effective date of the rule, **without notice and comment if necessary**, for up to 60 days to facilitate its review, if such **an action a suspension** is permitted by law.⁵ Before deciding whether to **delay the effective date enter such a suspension order**, however, the administration should, where feasible, allow at least a short comment period regarding the desirability of **delaying the effective date. such a suspension**. If the administration cannot provide a **pre-suspension** comment period **before delaying the effective date of the rule**, it should instead offer the public a subsequent opportunity to comment on **when, if ever, the rule should take effect whether the suspension should be continued** and whether the rule itself should be amended or rescinded.”

Comments on Proposed Immigration Removal Adjudication

Carol Ann Siciliano

U.S. Environmental Protection Agency

5/29/12

Suggested Managers' Amendments

Line 20: consider replacing the word “components” with the phrase “component agencies.”

Line 25: Are there any studies about the problems facing DHS component agencies? If so, include here. Also, the paragraph introduces the DHS component agencies and then goes back to EOIR. This is confusing.

Line 38: (1) delete apostrophe after “components”; and (2) change “components” to “agencies” in order to prepare the reader for the use of this term in Line 60.

Line 52: delete the acronym “LOP” because it is not used again.

Line 56: Comment: I did not understand what immigration courts EOIR would be monitoring, and I didn't see an explanation in the preamble. I would like to see a sentence in the preamble explaining what and where the “immigration courts” are (in DOJ? DHS? Both? Elsewhere?). If a preamble sentence is added, Line 56 would be fine as it.

Perhaps the preamble could also explain the relationship between EOIR and the DHS courts. I don't understand why the recommendations are aimed only at EOIR and not to DHS too.

Line 60: which courts?

Line 73: insert a comma after “management practices”

Lines 77-79: I don't understand this paragraph. Are words missing? If no words are missing, what does it mean to “identify” a conference?

Line 152: can this concept be expressed positively (“should adopt” or something)?

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