



Committee on Regulation

Minutes

April 25, 2011

Members Attending

H. Russell Frisby, Jr. (Chair)	Michael Bardee	Sandy Comenetz
Richard Osterman	Robert A. Anthony (phone)	Cheryl A. Falvey (phone)
Gillian E. Metzger (phone)	Richard E. Wiley (phone)	David W. Ogden (phone)
James Ming Chen (phone)	Peter L. Strauss (phone)	

ACUS Staff Attending

Paul R. Verkuil <i>Chairman</i>	Jonathan R. Siegel <i>Director of Research & Policy</i>	Reeve T. Bull <i>Staff Counsel</i>
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Invited Guests Attending

Steven J. Balla (Consultant)	Peter Robbins (Commerce)	David Frederickson (SEC) (phone)
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General Matters

Committee Chair Russell Frisby opened the meeting at 2:05 p.m. The Committee approved the minutes from the March 24, 2011 meeting. Mr. Siegel noted that Professor Balla and Mr. Bull had conducted research requested by the Committee at the March 24 meeting and that they would briefly describe their research. He also noted that the Committee would consider several comments submitted by Conference members and a proposed amendment from the Conference's staff at the meeting.

Research Presentations

Mr. Balla provided a brief overview of his research since the March 24 meeting, noting that he compared the comment period lengths for economically significant rulemakings to those for all other rulemakings and concluded that, as a general matter, economically significant rulemakings are associated with at least slightly longer comment periods and that comment periods of below 30 days are quite rare for such rulemakings (but somewhat common for all other rulemakings). He cautioned, however, that his findings were based on a relatively limited sample of rulemakings.

Mr. Bull then provided a brief overview of his research since the March 24 meeting. With respect to the question of whether the Federal Docket Management System ("FDMS") automatically records comment submission and posting dates, he noted that FDMS automatically records the posting date but not necessarily the submission date, which agency employees would



need to note for comments submitted via means other than Regulations.gov. With respect to the question of how agencies handle late comments, he stated that agency policies on acceptance of late comments vary, with most agencies that consider late comments announcing in the Federal Register that they will accept such comments “to the extent practicable.” With respect to the question of whether the Committee’s draft recommendation would conflict with past recommendations of the Conference, he noted that recommending the absence of a minimum comment period would conflict with Recommendation 93-4, which recommended that the Administrative Procedure Act (“APA”) be amended to require a 30 day comment period. He noted that recommending a reply comment period, however, would be fully consistent with Recommendations 72-5 and 76-3, which encourage appropriate use of second comment periods.

Minimum Comment Periods

Mr. Frisby proposed that the recommendations be considered seriatim, starting with three alternative formulations of the first recommendation (1, 1’, and 1’”). Mr. Anthony proposed that the Committee adopt 1’” with the following revisions: (a) the final sentence of 1 (which provides that agencies should balance promoting public participation with efficiently completing rulemakings) would replace the first (bolded) sentence of 1’” and (b) the recommendation should require agencies to make a specific finding giving reasons for any departure from the recommended minimum comment periods (hereafter “Anthony Amendment”). Ms. Metzger inquired as to whether recommendation 1 and all other recommendations should be characterized as “best practices” rather than activities that the Conference specifically urges agencies to undertake. Mr. Siegel noted that the agencies would have discretion in how to implement the various recommendations under the current draft. Messrs. Anthony and Frisby noted that all Conference recommendations are essentially statements of “best practices.”

Mr. Osterman proposed that the last sentence of current recommendation 1 should serve as the entire recommendation (hereafter “Osterman Amendment”). Mr. Wiley agreed with this approach. Mr. Frisby expressed concern that issuing such a recommendation would encourage agencies to use comment periods shorter than 30 days (since 30 days is popularly understood to be an informal minimum comment period). He further noted that the recommendation would add very little value if it simply provided that agencies should use whatever comment period they find appropriate. Mr. Frisby suggested an informal poll to determine whether the Committee favored the Anthony Amendment or Osterman Amendment. Mr. Anthony, Mr. Bardee, Ms. Metzger, Mr. Ogden, and Mr. Frisby voted in favor of the Anthony Amendment. Ms. Comenetz, Ms. Falvey, Mr. Osterman, Mr. Wiley, and Mr. Chen voted in favor of the Osterman Amendment. In light of the even split in the vote, Mr. Frisby suggested reserving further discussion of the first recommendation for the end of the meeting.



Posting Comments to the Internet and Displaying Submission and Posting Dates

Mr. Frisby moved the discussion to the second recommendation. Mr. Siegel noted that displaying comments' submission and posting dates would create an incentive for comments to be posted quickly and inform the public on the typical lag time between comment submission and posting. Messrs. Frisby, Osterman, and Anthony expressed concern that requiring posting of such information would impose an unnecessary burden on agencies. Ms. Metzger and Mr. Frisby expressed support for recommending that comments be posted to the Internet quickly after they are received. Mr. Frisby proposed that the references to displaying comment submission and posting dates be deleted, and the Committee agreed with this approach. Mr. Frisby then moved the discussion to the recommendation on timely posting of comments. Mr. Siegel stated that this recommendation would facilitate commenters' using currently posted comments to inform their comments. Ms. Comenetz noted that the recommendation may not add much value, given that it does not suggest any timeline by which comments must be posted. Mr. Anthony proposed that all material in the second recommendation other than the first (bolded) sentence and third sentence be deleted, to which the Committee agreed.

Reply Periods

Mr. Strauss recommended amending the third recommendation to provide that any reply period must occur after all comments have been submitted. He suggested adding the phrase "after all comments have been posted" at the end of the first (bolded) sentence of the third recommendation, deleting the second sentence, and deleting the words "should generally occur after the initial commenting period has expired" from the third sentence. The Committee agreed to Mr. Strauss's proposed revisions. Messrs. Anthony and Strauss suggested that the subject matter of reply comments should be limited to issues raised by the initial comments. Mr. Siegel noted that it would be difficult to police whether reply commenters followed this requirement. Mr. Frisby suggested that limiting the subject matter of reply comments would encourage motions to strike and preclude consideration of additional subject matter that was not known at the time of the initial comment period. Mr. Strauss noted that the current recommendation states that replies will be "on comments received," and therefore such an amendment may be unnecessary.

Supplementing the Record in Prolonged Rulemakings

Mr. Frisby invited the Committee's comments on the fourth recommendation. Mr. Anthony proposed removing the bolding from the first sentence. Mr. Frisby proposed removing the bolding from all recommendations, to which the Committee consented.



Anonymous Comments

Mr. Frisby moved the discussion to the fifth recommendation. Mr. Anthony suggested that the recommendation should consider the Trade Secret Act's effect on inclusion of confidential information in comments. Mr. Siegel noted that the Committee on Rulemaking was dealing with the issue of confidential information and that the original recommendation on protecting that information in rulemaking comments had been removed. Mr. Strauss suggested that the recommendation should add a reference to Regulations.gov: the eRulemaking Project Management Office ("PMO") should develop a common policy available on Regulations.gov that individual agencies could supplement as appropriate. The Committee agreed with Mr. Strauss's revision. Mr. Siegel proposed that the second sentence of the fifth recommendation be deleted to address Messrs. Eisner and Lubbers' concerns about the recommendation's implying a bias against anonymous comments. The Committee agreed with this revision.

Reporting Number of Comments Received

Mr. Strauss suggested that the sixth recommendation appeared to be intended only to aid academic research. Mr. Siegel noted that the information could also be useful to gauge the overall level of interest in any given rulemaking. Mr. Frisby stated that an agency should not be required to make a special announcement of the number of comments received. Mr. Strauss suggested that the recommendation be amended to state that the number of comments should be contained in the "statement of basis and purpose to the extent practicable." The Committee agreed with Mr. Strauss's amendment.

Publishing Guidance on Effective Comments

Mr. Strauss proposed that the seventh recommendation be amended to state that the PMO would develop a common policy on effective comments that agencies could supplement as desired. He suggested that the amendment would promote efficiency and avoid imposing an undue burden on agencies that seldom engage in rulemaking (by obviating the need for their developing an agency-specific document). The Committee agreed to Mr. Strauss's amendment.

Late Comments

With respect to the eighth recommendation, Mr. Strauss suggested that the last sentence should be replaced with an assertion that agencies may make clear that late comments are disfavored and will only be considered to the extent practicable. The Committee agreed with Mr. Strauss's proposed revision.

Final Amendments

Mr. Frisby returned the discussion to the first recommendation. Mr. Strauss expressed support for the Anthony amendment. Mr. Wiley suggested that the difference of opinion could perhaps be resolved by adopting the Anthony Amendment but making clear that agencies can



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depart from the recommended minimum comment periods in appropriate circumstances. Mr. Anthony proposed replacing the last sentence of 1” with “When agencies set shorter comment periods, in appropriate circumstances, agencies are encouraged to provide an appropriate explanation for doing so.” The Committee agreed with this amendment.

Mr. Strauss stated that the recommendations should be characterized as “best practices” rather than specific suggestions to agencies. Mr. Frisby suggested that the Preamble could be revised to clarify that all recommendations are intended as “best practices,” to which the Committee agreed. Mr. Strauss proposed that the comments be re-ordered to reflect the order in which the various issues arise in a typical rulemaking. The Committee agreed to this revision. Mr. Siegel recommended that the Committee delegate to Mr. Frisby the ability to approve the Conference staff’s implementation of all amendments and any other additional minor changes. The Committee agreed with this approach. Mr. Frisby then adjourned the meeting.