

Committee on Regulation
April 25, 2011 Committee Meeting
Comment of Professor Peter Strauss

Hi Reeve --

In case I do not get to join the conversation in time for this, I thought I should send my reactions to the draft recommendation. On the whole, I find them so mild that I wonder if they are worth making. In any event, they are properly identified by the introduction as a set of "best practices," and for that reason I believe the Recommendation should be entitled "Best Practices for Rulemaking Comments," and the introduction should drop even the slightest suggestion of command. Rather than "... the recommendations leave agencies with appropriate discretion ...," it should say "... the listing of 'best practices' recognizes agency discretion ... ," and similar changes should be made throughout.

- 1) Advice to the public concerning comment practices
- 2) Length of comment period
- 3) Posting of comments
- 4) Anonymous comments
- 5) Treatment of Late Comments
- 6) Reply comments
- 7) Treatment of protracted rulemakings

You'll notice that these are in a different numerical order, roughly corresponding to the order in which these issues would arise in a rulemaking. In my judgment, such an order would aid comprehension; and the order also make dramatic some issues that are not addressed -- in particular, the posting of [agency] supporting materials and OIRA interventions. Agency posting of supporting materials is required to inform rulemaking comments. OIRA comments are a particularly important type of rulemaking comment. The failure to treat issues such as these is part of what I find disappointing in this recommendation. As currently worded, I would urge its rejection; but the following suggests revisions that would make it more acceptable in my judgment.

Particulars, in the order of your draft:

- 1) I'd cast my lot with 1", which is appropriately put forward as a "best

practice." But then the text of the recommendation should be on the order of "Best agency practice is to adopt minimum comment periods ...

2) Similarly, the recommendation should be on the order of "Best practice is for agencies to post public comments to the Internet at the earliest time consistent with any necessity for screening, in order to facilitate appropriate response, and to publish with each comment the dates of its submission and posting." The following quoted passages are to the same end.

3) "Best practice, where not inconsistent with needs for immediate action, is for agencies to facilitate opportunities for commenters to respond to the comments of others, as by providing a publicized brief period for reply comments once posting of comments to the Internet is complete. [Whether or not reply comments are specifically provided for, best practice is for agencies to adopt a policy respecting late-filed comments, publicize it appropriately, and then adhere to it.]"

Note that the discussion here does not tie the reply period to the completion of the on-line docket, as it should.

4) "When post-comment rulemaking consideration has been unusually prolonged, best practice is for agencies to consider such mechanisms as supplemental notices, to permit the refreshing of the rulemaking record.

5) "Best practice is for agencies to establish and publish prominently on their websites policies regarding the submission of anonymous comments. The managers of regulations.gov might consider whether a general policy on this matter is appropriate for its site, and how to give notice of any such agency policies there.

Publish where? There are at least two places where publication ought to happen, and if ACUS is going to suggest publication it should address both.

6) Why? This unexplained recommendation does not persuade me.

7) "The Administrative Conference recommends that the managers of regulations.gov develop, in consultation with the most active rulemaking agencies and with the guidance of OIRA, suggestions regarding the characteristics of effective comments. Best practice would be for agencies

to display these suggestions prominently on their own rulemaking websites, with such amendments as their particular circumstances may suggest."

This is not a "let a hundred flowers bloom" setting, and I would oppose the recommendation as written. While some agencies might wish to vary such general guidance on this question as could be centrally produced, it would ultimately be confusing to have different guidance given at each agency website -- and in any event less frequent rulemakers will do best with a template, unaltered. ACUS could produce the template, too, and I even suppose it should -- but it could not do that in time for the June plenary. Bear in mind, also, that commenters may come to the agency either from regulations.gov or from the agency's own website. So advice needs to be in both places. Regulations.gov advice could easily enough add "You may wish to check the website of the agency proposing the rule on which you wish to comment for additional guidance."

8) In my judgment, this should not be a separate recommendation, and if anything more needs to be said than is in #3, it should be added there. See the bracketed phrase at the end of #3. Once again, however, attention should be paid to the bifurcated routes by which commenters may find out about such policies, and the possible need of regulations.gov to publicize them and accommodate to them.