



DRAFT ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-__

“RULEMAKING COMMENTS”

Draft Preamble

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?
- Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?
- What effects do comments actually have on agency rules?³

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,” Recommendation 2011-__, that deals

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 (Comm. Print 2006).

³ *Id.* at 3–5.



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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. By considering those innovations, agencies can both increase the opportunities for public participation and enhance the quality of information they receive in the commenting process. The Conference's recommendations seek to highlight certain "best practices" that agencies may wish to use in receiving and using comments. At the same time, recognizing the difference in different agencies' approaches to rulemaking, the recommendations leave agencies with appropriate discretion in deciding whether and how to implement the suggested best practices.

In identifying these 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.

Draft Recommendations

[NB: As suggested in the March 24 meeting, ACUS staff has structured the first recommendation to include several alternative formulations. At the April 25 meeting, the Committee should consider these options and decide upon the one that best reflects the consensus of the group. The possibilities are labeled 1 (completely discretionary approach), 1' (minimum duration approach), and 1'' (variation by type of rulemaking approach).]

1. **Agencies should not be required to keep open the comment period for any minimum number of days.** Since the appropriate length of a comment period may vary substantially based upon the circumstances of the rulemaking, agencies should not be subject to any universal minimum comment period. Nevertheless, they should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently.⁴

1'. **Agencies should set a minimum comment period of [30] days.** [NB: Option 1' is further sub-divided into two sub-options: (a) Congress would mandate a [30] day comment period or (b) agencies should consider a [30] day comment period but would not be legally

⁴ The Conference recognizes that this recommendation is inconsistent with part IV.B of Recommendation 93-4, which recommended that Congress amend the APA to require a comment period of "no fewer than 30 days." Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993). Though a 30 day or longer comment period will be appropriate in many cases, the Conference no longer recommends a minimum duration for *all* rulemaking comment periods.



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bound to provide that amount of time.] [Option A: Congress should amend the APA to require a comment period of “no fewer than [30] days” but should include an exception for utilizing shorter comment periods in appropriate circumstances.] [Option B: As a best practice, agencies should generally allow [30] days for public comments in rulemakings.] [Option A: An agency can implement a comment period of shorter duration by making a finding⁵ that] [Option B: Of course, agencies should not be bound by the [30] day minimum period if circumstances justify a period of shorter duration, which is likely to be appropriate when] the proposed rulemaking is relatively insignificant (financially or otherwise) or routine, unlikely to generate much public interest, or sufficiently urgent that a [30] day comment period would be impractical.

1’’. **Agencies should adopt minimum comment periods of varying durations based upon the importance and complexity of the rulemaking at issue.** [The staff has proposed a simple tiered system in which “[s]ignificant regulatory action[s]” receive a longer comment period than other actions, but the Committee can use any factor(s) it chooses for deciding the appropriate minimum comment periods. The recommendation is written as an optional “best practice” for agencies, but it could be easily modified to recommend that the APA be amended to require a tiered set of minimum comment periods.] As a general matter, for “[s]ignificant regulatory action[s]” as defined in Executive Order 12,866, 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. Agencies should, however, be able to set shorter comment periods in appropriate circumstances, such as where a proposed rule is relatively insignificant (financially or otherwise) or routine, unlikely to generate much public interest, or sufficiently urgent that a [60 or 30] day comment period would be impractical.

2. **Agencies should adopt stated policies of posting public comments to the Internet within a specified period after submission. When posting comments, agencies should publish the dates of submission and posting.** Agencies should consider posting all electronically submitted comments on the Internet as well as scanning comments submitted in paper format and making them available online as well. Agencies should adopt written policies setting specific periods for when comments will be posted and should make their best efforts to comply with their policies. The policies should provide for comments to be posted currently, rather than waiting until the end of the comment period to post. When posting the comments, agencies should display the date the comment was received and the date it was posted⁶ in order

⁵ The standard for implementing a shorter comment period should not be equivalent to the “good cause” standard for doing away with commenting entirely set forth in section 553(b) of the APA. As a general matter, the standard for implementing a truncated comment period should be easier to satisfy than the standard for dispensing with the comment period.

⁶ For comments submitted electronically on “Regulations.gov,” the Federal Document Management System (“FDMS”) automatically records the time and date of submission and posting, and the agency can direct the system to display that information. For comments submitted via other means, FDMS automatically records the date of posting, but the agency would need to note the date the comment was submitted.



to give the public a sense of the typical lag time between a comment's submission and its posting.

3. **Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments.** Agencies should consider whether the increased accuracy that a reply process can create is worth the time expenditure it would impose and make use thereof as appropriate. An opportunity for public input on submitted comments should generally occur after the initial commenting period has expired, and it can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.

4. **Agencies should closely monitor their rulemaking dockets and, where a considerable period of time has elapsed since the opening of a rulemaking, 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.

5. **Agencies should establish and publish policies regarding the submission of anonymous comments.** Agencies should assess when, if ever, permitting anonymous comments would serve their rulemaking efforts and publish guidance on when anonymous comments are appropriate.

6. **Agencies should report in the Federal Register, as accurately as possible, the number of comments received in a rulemaking proceeding.**

7. **Agencies should develop and publicize statements regarding the characteristics of effective comments.** To promote optimal public participation and enhance the usefulness of the comments they receive, agencies should consider publishing a document explaining what comments are most beneficial and listing best practices for parties submitting comments. Once developed, this document should be made publicly available by posting on the agency website, Regulations.gov, and any other venue that the agency believes will promote widespread availability of the information.

8. **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 stated policy may retain



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flexibility by, for example, stating that the agency will consider late comments to the extent practicable.⁷

⁷ *See, e.g.*, Notice of Availability of the Draft Environmental Impact Statement and Public Hearing Notice for the Texas Clean Energy Project, Near Odessa, Ector County, TX, 76 Fed. Reg. 15,968, 15,969 (Mar. 22, 2011) (“DOE will consider all comments postmarked or received during the public comment period in preparing the final EIS and will consider late comments to the extent practicable.”); *see also* Public Workshop and Hearing for Rear Visibility; Federal Motor Vehicle Safety Standard, Rearview Mirrors, Federal Motor Vehicle Safety Standard, Low-Speed Vehicles; Phase-in Reporting Requirements, 76 Fed. Reg. 11,417, 11,418 (Mar. 2, 2011) (Department of Transportation notice of proposed rulemaking announcing that “[t]o minimize the interval between the issuance of the final rule and the original statutory deadline, the agency does not expect to be able to consider any late comments”).