**DRAFT 4/18/2011**

**Memorandum**

To: Committee on Regulation
From: Reeve T. Bull (Staff Counsel)
Date: April 18, 2011
Re: Research on Certain Issues Raised at March 24, 2011 Meeting

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**Question 1: Does the Federal Docket Management System ("FDMS") automatically record the date of comment submission and date of posting for comments available on Regulations.gov?**

**Answer**: The system automatically records the *posting* date but not necessarily the *submission* date. Per my email discussions with Valerie Brecher-Kovacevic, who works with the FDMS system on behalf of the Environmental Protection Agency, FDMS automatically records the date that comments were *entered into the system* (either by the submitters posting them electronically or by the agency's scanning them into the system) and the date they were *posted*. The agency can then choose whether or not to display this information on the comments themselves.

As such, the agency can always easily display the date it *posted* the comment by choosing an optional field in FDMS system to do so. With respect to the date of comment *submission*, such information will be automatically recorded for comments submitted *electronically* to Regulations.gov. The agency could have an optional field configured in the FDMS system to display that information to the public. For comments submitted via means other than Regulations.gov (*e.g.*, paper submissions), an agency representative would need to note the time and date the comment was submitted and include that information with the comment when posting it. Of course, many submitters may provide at least the date (if not the exact time) the comment was submitted in the preface to the comment itself, which would minimize the burden on agencies.

Thus, Professor Balla's recommendation that the *posting* date be included in all comments made available electronically could be achieved relatively costlessly. His recommendation that agencies display the date of *submission* would be somewhat more cumbersome to implement, since it would require recordation of submission times for comments submitted by mechanisms other than Regulations.gov, but it also would likely impose a relatively minimal burden on agencies (since the agency employees receiving comments could easily be directed to record submission times and the employees scanning such comments into

Regulations.gov could easily be directed to enter those times electronically, not to mention the fact that many comments will likely already include the submission date in the preface[1]).

**Question 2: To what extent can an agency announce in advance that it will accept late comments?**

**Answer**: Agencies have the discretion to accept or reject comments submitted after the close of the comment period.[2] Agencies obviously can continue to receive paper or email submissions following the close of a comments period, and, per my discussions with Ms. Brecher-Kovacevic, it appears that agencies can also elect to extend the comments period on Regulations.gov after the initial comments period has expired (though the "comment bubble" disappears as a default at the end of the initial period, and the agency must specify the amount of additional time that the window will be held open). Policies on considering such late comments vary widely across agencies.

Agencies often formally announce that they will accept late comments in their Federal Register notices, usually with the caveat that such comments will only be considered to the extent practicable.[3] In contrast, some agencies affirmatively announce that they will *not* be able to consider late comments.[4] Other agencies are more ambiguous, stating that any comments

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[1] Indeed, the burden for recording submission times could easily be placed upon submitters of comments. The agency could simply announce in its request for comments that each submitter should note the date on which he or she submits the comment in the header. To the extent a submitter failed to do so, he or she should not be heard to complain that the agency did not post the comment sufficiently expeditiously.

[2] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 279 (4th ed. 2006); *see also* Protection of Stratospheric Ozone: New Substitute in the Motor Vehicle Air Conditioning Sector Under the Significant New Alternatives Policy (SNAP) Program, 76 Fed. Reg. 17,488 (Mar. 29, 2011) (EPA final rule in which the agency responds to various issues raised by late comments).

[3] *See, e.g.*, Special Conditions: Embraer S.A.; Model EMB 500; Single-Place Side-Facing Seat Dynamic Test Requirements, 76 Fed. Reg. 17,332, 17,332 (Mar. 29, 2011) (Department of Transportation request for comments announcing that "[w]e will consider comments filed late if it is possible to do so without incurring expense or delay"); 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."); Reducing Regulatory Burden; Retrospective Review Under Executive Order 13563, 76 Fed. Reg. 13,526, 13,526 (Mar. 14, 2011) (Department of Homeland Security request for comments announcing that "[l]ate-filed comments will be considered to the extent practicable"); Intent to Prepare an Environmental Impact Statement for the Port of Gulfport Expansion Project, Harrison County, MS (Department of the Army Permit Number SAM-2009-1768-DMY), 76 Fed. Reg. 13,363, 13,364 (Mar. 11, 2011) (Department of Defense notice of intent stating that "[l]ate comments will be considered to the extent practicable").

[4] *See, e.g.*, 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

received after the deadline will be marked "late" and need not be considered (which presumably implies that the agency might consider the comments but that it is not bound to do so).[5] Still other agencies provide that comments submitted too late for the action at issue will be considered as informal suggestions for future action.[6] Finally, some agencies announce in later Federal Register notices that late comments already received by the agency will be considered.[7] Presumably, agencies that provide no stated policy on late comments in their Federal Register notices either do not accept late comments or simply lack any formal standard on whether or not to do so.[8]

Given the disparity of agency practices regarding announcement of the acceptance *vel non* of late comments, and the fact that not all agencies necessarily announce policies regarding late comments,[9] the Committee on Regulation may want to consider recommending that agencies announce whether or not they will accept late comments in their Federal Register notices. Doing so should not impose an onerous burden on agencies, for including brief policy statements on late comments in Federal Register notices is quite straightforward and may ultimately save time by establishing in advance how the agency will treat late comments. Those agencies that decide to accept late comments also should not face too heavy a burden inasmuch as all agencies that accept late comments appear to do so only "to the extent practicable."

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"[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").

[5] *See, e.g.*, Proposed Settlement Agreement, Clean Air Act Citizen Suit, 76 Fed. Reg. 17,416, 17,417 (Mar. 29, 2011) ("Comments received after the close of the comment period will be marked 'late.' EPA is not required to consider these late comments.").

[6] *See, e.g.*, Consumer Information; Program for Child Restraint Systems, 76 Fed. Reg. 10,637, 10,656 (Feb. 25, 2011) (Department of Transportation request for comments announcing that "[i]f Docket Management receives a comment too late for us to consider in developing a final decision, we will consider that comment as an informal suggestion for future action").

[7] *See, e.g.*, Generic Drug User Fee; Notice of Public Meeting; Reopening of the Comment Period, 76 Fed. Reg. 4,119, 4,119 (Jan. 24, 2011) ("FDA is reopening the comment period to permit public consideration of late-received comments and to provide an opportunity for all interested parties to provide information and share views on the matter."); Notice of Limited Reopening of Rulemaking Record, 56 Fed. Reg. 47,348, 47,348 (Sept. 18, 1991) ("Since OSHA is reopening the record, the Agency at this time also will allow public comment on the other evidence and comments that were submitted to the record after it had closed . . ., which were filed in the rulemaking docket as late comments and were not subject to public comment.").

[8] I did not find any notice in which an agency laid forth a specific "grace period" (*e.g.*, stating that May 1 is the deadline but noting that all comments received on or before May 15 will still be considered).

[9] In my research, I looked through all Federal Register notices making mention of "late comments" since the start of 2011. The Department of Transportation had, by far, the largest number of notices. Other agencies that included formal policies on late comments in their Federal Register notices included the Department of Energy, Department of Homeland Security, Department of Defense, Environmental Protection Agency, Department of Health and Human Services, and Department of Labor. Though the list is not necessarily comprehensive, it appears that only a handful of agencies have a practice of addressing late comments in their requests for comments.

**Question 3: To what extent would Professor Balla's recommendations conflict with prior recommendations of the Conference (particularly Recommendations 93-4 and 76-3)?**

**Answer**: The two lists below address aspects of prior recommendations that relate to Professor Balla's report, including: (a) a list of prior recommendations that conflict with Professor Balla's recommendations in some manner and (b) a list of relevant prior recommendations that either accord with Professor Balla's recommendations or at least are not inconsistent with them.

**Past Recommendations that Conflict with Professor Balla's Recommendations—**

- Recommendation IV.B of 93-4 provides that "Congress should consider amending section 553 of the APA to . . . . specify a comment period of 'no fewer than at least 30 days' (§ 553(c)), provided that a good cause provision allowing shorter comment periods or no comment period is incorporated." This is inconsistent with Professor Balla's first recommendation, which proposes that the comment period should not have any minimum duration.

  Of course, Recommendation 93-4 appears to be more concerned with justifying periods *longer* than 30 days than with ensuring that such periods last for *at least* 30 days, stating that "[t]his would relieve agencies of the need to justify comments that were 30 days or longer," but it nonetheless unambiguously states that "[t]he thirty-day period is intended as a minimum." Of course, the committee could largely reconcile Recommendation 93-4 with Professor Balla's approach by modifying Balla's first recommendation to suggest a minimum period of 30 days but implementing a fairly liberal "good cause" exception that would allow agencies to avoid the 30 day requirement whenever they had a need to do so. Alternatively, the committee could accept Balla's recommendation and state that, though a 30 day comment period may be appropriate in many cases, the Conference no longer believes that the APA should be revised to require such a minimum period.

**Past Recommendations that Do Not Conflict with Professor Balla's Recommendations—**

- Recommendation 5 of 72-5 provides that "[e]ach agency should decide in the light of the circumstances of particular proceedings whether or not to provide procedural protections going beyond those of section 553, such as . . . [an] opportunity for parties to comment on each other's written or oral submissions." Recommendation 76-3 reiterates and approves of this recommendation in its preamble. These past recommendations are fully consistent with Professor Balla's second recommendation, which merely "encourage[s]" agencies to make "*appropriate* use of reply comment periods" (emphasis added). Like

the past recommendations, Professor Balla's recommendation provides complete discretion to agencies in determining whether to implement a reply comment period.

- Recommendation 1.b of 76-3 describes a general process by which agencies could allow two cycles of notice-and-comment or extend the original comment period "when comments filed in the proceeding, or the agency's response to such comments, present new and important issues or serious conflicts of data." The recommendation also suggests that agencies should respond to the initial round of comments in order to expose the agency's tentative views and thereby enhance the value of later-submitted comments. This process is, as a general matter, consonant with Professor Balla's second recommendation, which "encourage[s]" agencies to "make appropriate use of reply comment periods." Though 76-3 proposes additional comment periods in a specific set of circumstances, *i.e.*, when new and important issues or data conflicts emerge, it does not necessarily imply that reply comment periods are inappropriate when such circumstances do not exist.