



## Committee on Rulemaking

Minutes

November 14, 2011

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### Members Attending

Robert Rivkin (Chair)	George Madison	Lon Smith
Esa Sferra-Bonistalli	Robert Shapiro (by phone)	Cynthia Farina (by phone)
Nina Mendelson (by phone)	Jerry Mashaw (by phone)	Randy May
Elizabeth McFadden		

### ACUS Staff Attending

Paul Verkuil (ACUS Chairman)	Jon Siegel (Director of Research and Policy)	Emily Bremer (Staff Counsel)
Funmi Olorunnipa (Project Advisor)		

### Invited Guests Attending

Jack Beermann (Consultant, by Skype)	Curtis Copeland (Consultant)
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The meeting commenced at 10:00 am in the Administrative Conference's conference room. Following introductions, the minutes of the Committee's previous meeting were approved by voice vote. The Committee decided to allow public comment at the end of each project's presentation.

Mr. Siegel explained that the purpose of the meeting is to give the Committee an opportunity to give early feedback to two consultants who have begun research. He then introduced Professor Jack Beermann, the consultant on the Midnight Rules project, to discuss his research and project outline.

Professor Beermann explained that midnight rules are an ongoing and difficult problem. His interviews, approximately half completed, all suggest that there is an increase in midnight regulations, but the phenomenon may not be problematic. Even if the Conference does not come out with a strong recommendation, however, the report will be of great interest because of the notoriety of the issue. Professor Beermann discussed the definition of midnight rules, the potential problems and concerns raised by their issuance, and how he planned to measure the quality of midnight rules. He noted that the last administration attempted to avoid midnight rulemaking, and while the effort largely failed, it may provide an instructive precedent. Finally, Professor Beermann solicited suggestions for potential recommendations. Suspending rulemaking in the midnight period is probably unrealistic and may not serve any purpose. He



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

does think, however, that imposing new interagency consultation requirements and the like in the midnight period makes little sense. A recommendation against that particular form of midnight rulemaking may make sense.

Mr. Tozzi suggested the study should look at what an incoming administration can do because there is a lot of confusion on that point. What has been done and what is legally sound? There's material out there, but it's not readily available or consolidated. Professor Beermann said he intends to look at past practice and provide this information.

Ms. Sferra-Bonistalli asked whether Professor Beermann was counting Federal Register pages or rules to determine whether there has been an increase in midnight rulemaking. She also asked whether he was looking at when rules were completed, rather than just when they were published. Professor Beermann said he was considering when rules were completed, even when they had been on the agenda for a while. He also explained that the publication issue has been addressed in available research. He will be looking closely at the data to evaluate which midnight rules are objectionable and which are not. Mr. Siegel and Ms. Sferra-Bonistalli discussed the difficulty of defining midnight rules and identifying the problem with them.

Mr. May looked to the second full paragraph on page four of Professor Beermann's outline, about midnight deregulation, asking what would make it a "special case." Professor Beermann explained he has previously written that midnight deregulation might be easier to accomplish with little transparency. There was a lot of such rulemaking at the end of the Bush Administration. He thought it important to include the issue in the study, although he does not expect to come to a strong conclusion about it.

Professor Mendelson suggested a multi-factored approach to evaluating midnight rules, considering durability, significance, and the time taken to develop a rule. Professor Beermann liked the idea, but noted that each measure has its own problems. Professor Mendelson then suggested that one might have to evaluate the substantive quality of a rule to evaluate the practice of midnight rules. Professor Beermann was sympathetic, but thought it would be impossible to do that objectively.

Mr. Shapiro asked whether there had been any research into whether rulemaking activity speeds up in the fourth year of an administration, due to the uncertainty of whether the incumbent will remain in office. Anecdotally, it seems to happen, but are there any studies of it? Professor Beermann explained that Ann Joseph O'Connell traces the number of rules in every year, though she was focused mainly on Congressional transitions. He noted that there is sufficient data to evaluate the issue. It seems to show more activity in the eighth over the fourth year, though the fourth year analysis is not really within the definition of the Conference project.

Mr. Madison thought the Committee should hold off on suggesting with recommendations until a problem is identified. He also thought that assessing durability might



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

be deceptively complicated. Rules may be withdrawn for a variety of reasons unrelated to quality. Mr. Siegel explained that a determination that midnight rules are not a problem would be a valuable contribution. Mr. Tozzi thought it would also be useful to give agencies more detailed guidance on midnight issues—i.e., when CRA deadline begins to run. Ms. Sferra-Bonistalli asked if there was a way to evaluate durability that would filter out some of the non-substantive reasons for the timing of rules. Professor Beermann explained that he chose a control period that was feasible and would provide sufficient information to explain what's happening at the margin.

Professor Mashaw asked for further discussion of why midnight rules on interagency consultation are a particular problem. Professor Beermann could not conceive of a good reason to impose such requirements when the administration will never labor under them. Why not let the incoming administration determine those rules for itself? If there is a good reason for it, Professor Beermann would like to hear it. Mr. Tozzi said such rules may be very important. Professor Mendelson added that the outgoing administration may have been operating under the regime, and may want to embed it.

Mr. Copeland asked whether Professor Beermann was going to include in his study congressional and judicial tools to push back against midnight rules. Professor Beermann replied that, yes, he was going to include them.

Richard Belzer, a public attendee from Regulatory Checkbook, was concerned about the definition of “midnight rule,” suggesting that it should be based on a deficiency of process occurring late in the process. This would capture its usual pejorative character of the term. A non-pejorative definition rules out a problem. He also was concerned that durability may not be a good measure—it's hard to know whether durability is good or bad. Professor Beermann did not disagree, but thought it important to define the phenomenon objectively, and then examine whether it poses a problem. Otherwise, the conclusion is in the definition. He further agreed that durability is a poor proxy, but thought it was better than the alternatives. He said that his report would address both issues.

Mr. Siegel introduced the Regulatory Analysis project. He noted that the outline is ambitious and suggested that the Committee's input would be helpful if it identified priorities. Mr. Copeland then discussed his project outline, which was based on the Request for Proposals. He agreed that priorities are needed, because some individual components of the outline could be independent studies. He understands the primary focus as identifying analytic requirements and examining how to make the process more efficient.

Mr. May thought it would be useful to identify where analytic requirements overlap and determine whether it would be possible and efficient to consolidate them. Mr. Copeland asked whether he should focus on cross-cutting requirements, especially since agencies report they are more concerned about agency-specific requirements. Mr. May agreed that cross-cutting and



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

agency-specific requirements are different issues. Mr. Copeland said that, even when the two requirements overlap, they may serve different purposes or use different metrics.

Ms. McFadden thought it might make a small difference if the requirements were consolidated, but she agreed with Mr. Copeland that agencies are already doing some of that. Ms. Sferra-Bonistalli also agreed.

Mr. Copeland asked a threshold question: what is an analytic requirement? Chairman Verkuil added that the issue of judicial review may be of particular import in light of the D.C. Circuit's recent decisions reversing SEC rules for failure to conduct sufficient analysis. Independent agencies may be taking oversight requirements more seriously. Mr. Copeland noted that the case involved an SEC-specific requirement—was it analytic? Seems the court thought so.

Ms. Sferra-Bonistalli noted that Executive Order 13563 has put a renewed focus on analytic requirements, especially cost-benefit analysis. She asked whether there might be ways to change processes to make analytic analyses more efficient. Mr. May suggested the study should consider whether process changes would impose a burden on the public, as well as whether gains in efficiency might come at the cost of quality.

Ms. Sferra-Bonistalli asked if retrospective review would be included. Mr. Copeland said no, because that does not impose independent analytic requirements.

Mr. Tozzi observed that, if we are concerned about ossification, consolidating requirements is insufficient. Shouldn't we be trying to eliminate requirements? He also thought that the study should consider ways agencies opt out of requirements. Mr. Copeland agreed this needed to be a substantial consideration in the study. GAO did a good study in 2009, in which they found that there were really only three requirements agencies really paid attention to and could not just dispose of with boilerplate—EO 12866, the Paperwork Reduction Act, and the Regulatory Flexibility Act. We have to consider whether the insertion of boilerplate really slows down the rulemaking process. We must also consider whether agencies would do some of the analyses in the absence of the requirements—the marginally additional burden imposed by the requirements is what needs to be identified.

Mr. Rivkin asked why it is so difficult to quantify the time and money spent complying with analytic requirements. Mr. Copeland replied that several studies have found that agencies and regulated parties simply do not keep track of the necessary data. Mr. Rivkin asked why agencies couldn't do it on an ad hoc basis. Mr. Madison thought that might be both difficult and inaccurate. Mr. Rivkin agreed. Chairman Verkuil thought Mr. Rivkin's question was a good one and suggested that a discussion of it should be in the report.

Mr. Siegel asked whether there might be a way to evaluate the accuracy of agencies' ex ante analyses. Mr. Copeland explained that several studies have found that both costs and



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

benefits tend to be overstated, but he was not sure what methodology was used. He emphasized that actual data was necessary, but nearly impossible to find.

Dr. Belzer observed that costs are harder to estimate because they are forgone benefits. Mr. Copeland agreed and further stated that qualitative benefits may be difficult or impossible to measure.

Mr. Copeland asked whether the Committee agreed that analytic requirements are those that utilize data. Mr. Rivkin said it was a good practical definition. Mr. May thought it would be appropriate for Mr. Copeland to focus on cross-cutting requirements. Mr. Copeland largely agreed, but thought that agency-specific requirements could not be wholly ignored. Mr. Rivkin thought cross-cutting requirements should be the focus. Ms. Sferra-Bonistalli largely agreed, but thought some examples of agency-specific requirements would be helpful. The consensus appeared to be that the focus should be cross-cutting requirements, but with an acknowledgement of the role of agency-specific requirements.

Mr. Belzer noted that Mr. Copeland will have to identify a baseline. The incremental effect will be different for an agency subject to specific requirements. But considering that would yield only anecdotal information. Mr. Sussman suggested the report should consider differences among agencies. Some are non-regulatory.

Mr. Copeland proposed trimming out three of the issues identified as “Specific Research Questions” on pages one to two of the outline. These included questions three (costs and benefits of carrying out analytic requirements), four (the extent to which agencies comply with statutory and executive requirements to perform analyses), five (the accuracy of agencies’ ex ante estimates of costs and benefits), and seven (whether the results of the analyses are used in regulatory decision making). Mr. Copeland said he would, however, record what he hears about the costs of complying with analytic requirements. There were no objections to this approach.

The meeting adjourned at 11:58 am.