



Rulemaking Comments

Committee on Regulation

Proposed Recommendation | June 16-17, 2011

1 One of the primary innovations associated with the Administrative Procedure Act
2 (“APA”) was its implementation of a comment period in which agencies solicit the views of
3 interested members of the public on proposed rules.¹ The procedure created by the APA has
4 come to be called “notice-and-comment rulemaking,” and comments have become an integral
5 part of the overall rulemaking process.

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7 In a December 2006 report titled “Interim Report on the Administrative Law, Process
8 and Procedure Project for the 21st Century,” the Subcommittee on Commercial and
9 Administrative Law of the United States House of Representatives’ Committee on the Judiciary
10 identified a number of questions related to rulemaking comments as areas of possible study by
11 the Administrative Conference.² These questions include:

- 12 • Should there be a required, or at least recommended, minimum length for a
13 comment period?
- 14 • Should agencies immediately make comments publicly available? Should they
15 permit a “reply comment” period?
- 16 • Must agencies reply to all comments, even if they take no further action on a rule for
17 years? Do comments eventually become sufficiently “stale” that they could not
18 support a final rule without further comment?

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 at 3–5 (Comm. Print 2006).



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

22 The Conference has studied these questions and other, related issues concerning the
23 “comment” portion of the notice-and-comment rulemaking process. The Conference also has a
24 concurrent project entitled “Legal Considerations in E-Rulemaking” that deals with separate
25 matters, focusing specifically on legal issues implicated by the rise of e-rulemaking.

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27 The Conference believes that the comment process established by the APA is
28 fundamentally sound. Nevertheless, certain innovations in the commenting process could
29 allow that process to promote public participation and improve rulemaking outcomes more
30 effectively. In this light, the Conference seeks to highlight a series of “best practices” designed
31 to increase the opportunities for public participation and enhance the quality of information
32 received in the commenting process. The Conference recognizes that different agencies have
33 different approaches to rulemaking and therefore recommends that individual agencies decide
34 whether and how to implement the best practices addressed.

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36 In identifying these best practices, the Conference does not intend to suggest that it has
37 exhausted the potential innovations in the commenting process. Individual agencies and the
38 Conference itself should conduct further empirical analysis of notice-and-comment rulemaking,
39 should study the effects of the proposed recommendations to the extent they are
40 implemented, and should adjust and build upon the proposed processes as appropriate.

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RECOMMENDATION

42 1. To promote optimal public participation and enhance the usefulness of public
43 comments, the eRulemaking Project Management Office should consider publishing a
44 document explaining what types of comments are most beneficial and listing best practices for
45 parties submitting comments. Individual agencies may publish supplements to the common
46 document describing the qualities of effective comments. Once developed, these documents
47 should be made publicly available by posting on the agency website, Regulations.gov, and any
48 other venue that will promote widespread availability of the information.

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50 2. Agencies should set comment periods that consider the competing interests of
51 promoting optimal public participation while ensuring that the rulemaking is conducted
52 efficiently. As a general matter, for “[s]ignificant regulatory action[s]” as defined in Executive
53 Order 12,866, agencies should use a comment period of at least 60 days. For all other
54 rulemakings, they should generally use a comment period of at least 30 days. When agencies,
55 in appropriate circumstances, set shorter comment periods, they are encouraged to provide an
56 appropriate explanation for doing so.³

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58 3. Agencies should adopt stated policies of posting public comments to the Internet
59 within a specified period after submission. Agencies should post all electronically submitted
60 comments on the Internet as well as scanning comments submitted in paper format and
61 making them available online as well.⁴

³ See also Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993) (“Congress should consider amending section 553 of the APA to . . . [s]pecify a comment period of ‘no fewer than 30 days.’”); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 18, 2011) (“To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”).

⁴ See also Office of Information & Regulatory Affairs, Memorandum for the President’s Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010) (“OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely



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63 4. The eRulemaking Project Management Office and individual agencies should
64 establish and publish policies regarding the submission of anonymous comments.

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66 5. Agencies should adopt and publish policies on late comments and should apply those
67 policies consistently within each rulemaking. Agencies should determine whether or not they
68 will accept late submissions in a given rulemaking and should announce the policy both in
69 publicly accessible forums (*e.g.*, the agency’s website, Regulations.gov) and in individual Federal
70 Register notices including requests for comments. The agency may make clear that late
71 comments are disfavored and will only be considered to the extent practicable.⁵

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73 6. Where appropriate, agencies should make use of reply comment periods or other
74 opportunities for receiving public input on submitted comments, after all comments have been
75 posted. An opportunity for public input on submitted comments can entail a reply period for
76 written comments on submitted comments, an oral hearing, or some other means for input on
77 comments received.⁶

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manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.”).

⁵ See, *e.g.*, Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5,120, 5,121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking announcing that “[c]omments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable”).

⁶ See also Administrative Conference of the United States, Recommendation 76-3, *Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking* (1976) (recommending a second comment period in proceedings in which comments or the agency’s responses thereto “present new and important issues or serious conflicts of data”); Administrative Conference of the United States, Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability* (1972) (recommending that agencies consider providing an “opportunity for parties to comment on each other’s oral or written submissions); Office of Information & Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13,563, M-11-10, at 2 (Feb. 2, 2011) (“[Executive Order 13,563] seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.”).



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79 7. Agencies should closely monitor their rulemaking dockets and, where a change in
80 circumstances warrants it, consider the use of available mechanisms such as supplemental
81 notices of proposed rulemaking to refresh records that have become stale. Comments should
82 not automatically be deemed to “expire” after a set period of time, but agencies should make
83 use of available mechanisms, such as issuing supplemental notices of proposed rulemaking, to
84 refresh the rulemaking record when the agency believes that the circumstances surrounding
85 the rulemaking have materially changed.

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87 8. Agencies should include in their statement of basis and purpose in the Federal
88 Register, to the extent practicable, the number of comments received in a rulemaking
89 proceeding.