



## Committee on Regulation

Minutes

March 24, 2011

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### Members Attending

H. Russell Frisby, Jr. (Chair)	Susan E. Dudley	David W. Ogden
Sidney Rocke (alternate for Michael Bardee (FERC))	Robert A. Anthony Sandy Comenetz	Richard Osterman Peter L. Strauss (by phone)

### ACUS Staff Attending

Jonathan R. Siegel <i>Director of Research &amp; Policy</i>	Reeve T. Bull <i>Staff Counsel</i>
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### Invited Guests Attending

Steven J. Balla  
*Consultant*

### **Preliminary Matters**

The meeting commenced at 2:00 p.m. in the Conference Room of the Administrative Conference of the United States (“ACUS”). Committee Chair H. Russell Frisby, Jr. opened the meeting and invited ACUS Director of Research & Policy Jonathan R. Siegel to offer introductory remarks. Mr. Siegel noted that rulemaking has always been a significant area of research for ACUS and that the particular project before the Committee dealt with five issues identified by a Subcommittee of the House of Representatives as areas of study for ACUS. Mr. Siegel also noted that some overlap exists between the report Associate Professor Steven R. Balla prepared for the Committee on Regulation and the report Bridget C.E. Dooling prepared for the Committee on Rulemaking, stating that any overlap would be handled by only one committee’s addressing each overlapping issue. Finally, Mr. Siegel went over a list of administrative matters.

Mr. Frisby noted that the Committee aims to complete its work by May 5, so that the Council can consider the Committee’s recommendation at its May 12 meeting and the full Conference can consider the same at its June 16–17 Plenary Session. Mr. Frisby proposed that all attendees at the meeting (including members of the general public) be permitted to speak during the meeting, and no Committee member objected. Mr. Frisby then invited Mr. Balla to present a brief overview of his report. Mr. Balla highlighted the major research findings and



recommendations of his report. During this presentation, he noted that his recommendation that agencies should not feel bound to require any minimum amount of time for public commenting conflicts with ACUS Recommendation 93-4, which suggested that the Administrative Procedure Act (“APA”) be amended to require a 30-day minimum comment period, and with Executive Order 12866, which recommended a 60 day minimum comment period (though agencies have discretion to use shorter comment periods under the Executive Order).

### **General Discussion of Balla Report and Recommendations**

Mr. Frisby invited attendees to express any global views regarding the Balla recommendation. Mr. Strauss stated that the report should have placed greater focus on data supplied by commenters. Mr. Osterman noted that, in his experience, agencies carefully consider comments submitted and that comments containing specific legal and policy arguments are the most effective. Mr. Balla noted that studies focusing on large samples of comments tend to suggest that they have at least some impact on final rules. Mr. Lubbers expressed some surprise that Mr. Balla’s report had concluded that the median number of comments submitted per agency action is relatively small (on the order of approximately 12). Mr. Frisby noted that he too was surprised by this finding and that many of the comments submitted in the actions that receive thousands of responses are relatively unhelpful. As such, he feels that agencies’ providing guidance on submitting useful comments would be beneficial. Mr. Balla responded to Mr. Lubbers and Mr. Frisby’s concerns about the numbers of comments by noting that more important rulemakings typically do have response rates far exceeding the median number of comments identified in the report. Ms. Dudley noted that the same may be true of the comment period: more important actions likely feature longer comment periods.

Mr. Tozzi asked Mr. Balla to clarify the purpose of his ninth recommendation, which deals with analysis of stakeholder behavior. Mr. Balla replied that stakeholders’ actions are relevant to the optimal structure for the commenting process; for instance, if a large number of commenters wait until the last day to file comments, agencies may want to separate any “reply” comment period from the initial comment period to allow reply commenters time to review initial comments. Mr. Balla agreed, however, that the ninth “recommendation” was more in the nature of a call for additional research of stakeholder actions than a specific recommendation to a branch of government. Mr. Lubbers and Ms. Dudley agreed that studying the timing of comment submission would be an appropriate topic of further research. Mr. Frisby stated that commenters’ delaying submission of comments until the last day is not so much a matter of procrastination as a matter of strategic timing. Mr. Lubbers noted that agency policies on late comments may be another potential topic for further research.



### **Recommendation One – Minimum Comment Period**

Mr. Frisby stated that the Committee would next consider Mr. Balla's individual recommendations, starting with the first recommendation. Mr. Siegel noted that adopting Mr. Balla's first recommendation, which recommends against any required minimum duration for comment periods, would require retraction of the recommended 30-day comment period in ACUS Recommendation 93-4. He asked Mr. Balla if he investigated why agencies use comment periods shorter than 30 days. Mr. Balla noted that agencies occasionally use shorter comment periods when they likely would be exempt from the notice-and-comment requirement anyhow, and that imposing a 30-day minimum period may actually deter voluntary use of notice-and-comment proceedings. Mr. Frisby and Mr. Lubbers expressed some concern with Mr. Balla's first recommendation, noting that agencies might establish unreasonably short comment periods if they are not at least encouraged to adhere to some minimum duration for such periods. Mr. Roche asserted that agencies generally tailor the length of their comment periods to the importance of the rulemaking at issue. Mr. Osterman expressed similar sentiments, noting that the APA has existed for some time without a minimum comment period and that an unreasonably short comment period makes an agency action more susceptible to challenge on judicial review. Ms. Dudley noted that the Office of Management and Budget often is reluctant to allow agencies to use comment periods shorter than 30 days. Public attendee Richard Otis stated that new technologies may allow comment periods to be shorter than they would otherwise need to be. Mr. Frisby suggested that the ACUS staff prepare alternative formulations of the first recommendation for consideration by the Committee at its next meeting.

### **Recommendation Two – Reply Comment Periods**

Mr. Frisby expressed his support for Mr. Balla's second recommendation, which encourages agencies to make appropriate use of reply comment periods. Mr. Lubbers noted that questions can emerge regarding the subject matter to which the reply comments are responding (*e.g.*, whether they respond to other comments, a list of questions put forth by the agency, etc.). Mr. Siegel stated that the reply period works most effectively when it is separated from the original period (rather than occurring at the end of the original period, since many commenters delay their comments until the end). Ms. Dudley suggested that further research on why certain agencies use reply comment periods and others do not would be useful. Public attendee Sarah Shortall noted that in-person hearings can sometimes substitute for reply periods. Mr. Frisby suggested that the recommendation state that reply periods are not necessarily appropriate in all cases. Mr. Osterman suggested that a supplemental notice of proposed rulemaking can often be more helpful than a reply comment period in that it allows the agency to specify the type of information it is seeking. Mr. Lubbers stated that a reply period could perhaps serve as one possible application of ACUS's Recommendation 76-3, which recommends two cycles of comments. Ms. Shortall suggested that the recommendation might be modified to account for



the fact that the public can express its views on rulemaking comments via means other than a formal reply comment period (*e.g.*, a hearing or web forum).

### **Recommendations Three and Four – Online Posting of Comments**

Mr. Frisby moved the discussion to Mr. Balla’s third and fourth recommendations, which encourage agencies to record on Regulations.gov the dates comments were submitted and posted (third) and to establish stated policies on posting comments within a certain amount of time after submission (fourth). He stated that he found delays in comment posting problematic. Mr. Siegel noted that Mr. Balla’s fourth recommendation overlaps with Ms. Dooling’s suggestion that agencies “auto-post” comments received electronically, with Mr. Balla recommending more discretion for agencies in when to post comments than does Ms. Dooling. He also recommended strengthening the fourth recommendation to suggest that agencies should post comments expeditiously. With respect to the third recommendation, he asked whether Regulations.gov automatically recorded submission and posting dates. Mr. Otis suggested that Regulations.gov indeed recorded such dates; the agency simply must direct the system to display that information. Mr. Osterman noted that posting all comments can be labor intensive when the number submitted is large and a significant percentage of the comments are in paper form. Mr. Frisby noted that the third recommendation may impose an unnecessary burden on agencies: if the purpose of encouraging date recordation is to expedite the process of posting comments, the same ends could be accomplished more efficiently simply by directing agencies to post comments as quickly as possible. Mr. Siegel proposed that the third recommendation might be limited to electronically submitted comments. Mr. Tozzi suggested that imposing an additional burden on agencies without additional funding would be problematic. Mr. Frisby suggested that ACUS staff research whether submission and posting dates could be cost-effectively displayed and that the Committee discuss recommendations three and four at its next meeting.

### **Recommendation Five – “Refreshing” the Rulemaking Record**

Mr. Frisby expressed support for Mr. Balla’s fifth recommendation, which encourages agencies to “refresh” rulemaking records that have become “stale” through the use of supplemental notices of proposed rulemaking and other available means. Mr. Osterman noted that “stale” records are more likely to be successfully challenged on judicial review. Mr. Frisby noted that the Committee appeared to approve of the fifth recommendation.

### **Recommendations Six and Seven – Anonymous and Confidential Comments**

Mr. Frisby moved to Mr. Balla’s sixth and seventh recommendations, which encourage agencies to establish and announce policies on anonymous comments (sixth) and those containing confidential information (seventh). Mr. Siegel noted that Mr. Balla’s recommendations overlap with but do not contradict Ms. Dooling’s report, which recommends that comment submitters check a box if their comments contain confidential information. Mr.



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expressed strong support for agencies' publicizing whatever anonymity/confidentiality policies they adopt. Mr. Frisby recommended making clear that both recommendations six and seven promote agencies' publicizing their policies (as recommendation seven did not mention publicization in Mr. Balla's report).

### **Recommendations Eight through Eleven – Promoting Effective Comments**

Mr. Frisby moved the discussion to Mr. Balla's remaining recommendations. Mr. Lubbers expressed support for the eighth recommendation, which encourages agencies to publish the "precise number of comments that are submitted during the comment periods," but recommended omitting the word "precise." Mr. Siegel agreed, noting that an approximate number should be more than sufficient when the number of comments submitted is large. He also asked whether the Committee agreed that recommendations nine (which recommends analysis of stakeholder behavior) and eleven (which recommends that ACUS conduct empirical analyses of rulemaking) could both be addressed together. The Committee appeared to agree with this approach. Mr. Frisby expressed support for the tenth recommendation, which encourages agencies to develop and publicize statements about the nature of effective comments.

### **Next Steps for Committee**

The Committee then discussed a number of matters related to the overall structure of the recommendation and the next steps for the process. Mr. Lubbers suggested that some recommendation be made regarding the treatment of late comments. Mr. Frisby agreed, stating that agencies should accept late comments if accompanied by an appropriate explanation. Mr. Anthony noted that recommendation eleven should be addressed in the Preamble as a possible area of further research, since it would be odd for ACUS to make a recommendation to itself. Mr. Siegel agreed with this approach and suggested that recommendation eleven be modified to remove any reference to ACUS's placing a "high priority" on empirical research (simply noting the value of doing such research should be sufficient). Mr. Frisby and Mr. Balla agreed with this approach.

Mr. Siegel stated that the ACUS staff will conduct some additional research on recommendations one (minimum comment periods) and three (displaying dates of comment submission and posting) and prepare a draft recommendation for the next meeting. Mr. Frisby proposed that, for recommendation one, that draft lay out three alternative approaches: (1) recommending no minimum duration for the comment period (as proposed in Mr. Balla's report); (2) recommending a comment period of a set duration (*e.g.*, 30 or 60 days); or (3) recommending a tiered approach wherein the length of the comment period depends on the complexity of the proposed rule. Mr. Frisby then adjourned the meeting.