

# **Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States**

Steven J. Balla<sup>1</sup>  
Department of Political Science  
The George Washington University  
Monroe Hall, Suite 440  
2115 G Street, NW  
Washington, DC 20052  
Phone: 202-994-6290  
Fax: 202-994-7743  
E-mail: sballa@gwu.edu

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<sup>1</sup> Steven J. Balla is Associate Professor of Political Science, Public Policy and Public Administration, and International Affairs at The George Washington University, where he is also a Research Affiliate at the George Washington Institute of Public Policy and a Senior Scholar at the Regulatory Studies Center. The research assistance of Jess Byron and Dan Horning is gratefully acknowledged.

## Executive Summary

This report, commissioned by the Administrative Conference of the United States (ACUS), investigates agency practices in soliciting, circulating, and responding to public comments during the federal rulemaking process. Specifically, the report develops recommendations regarding the following aspects of the public commenting:

- 1. Should there be a required, or at least recommended, minimum length for a comment period?*
- 2. Should agencies immediately make comments publicly available? Should they permit a “reply comment” period?*
- 3. 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?*
- 4. Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?*
- 5. What effects do comments actually have on agency rules?*

The report considers three sources of information as the bases for developing recommendations in these areas of public commenting. First, the report reviews published research as a means of identifying the most salient arguments and evidence on commenting that have been offered by researchers in law and the social sciences. Second, original research was conducted during the preparation of the report. This research specifically addresses issues for which existing information is especially limited in scope and clarity. Third, interviews were conducted with rulemaking experts from inside and outside of government. The aims of these interviews were to learn about agency experiences in the commenting process and bring the insights of researchers and practitioners directly to bear on the issues being addressed in the report.

Based on these sources of information, the report draws conclusions about the state of practice and understanding in each of the five areas of public commenting and states recommendations for ACUS consideration. The report proposes benchmarks for assessing the impacts of the recommendations, if implemented, on the notice and comment process. The recommendations, which are developed and justified in the text of the report, are listed below by area of inquiry.

*The Duration of Comment Periods*

Recommendation 1: There should not be a required minimum duration of comment periods.

*Agency Circulation of Public Comments*

Recommendation 2: Agencies should be encouraged to make appropriate use of reply comment periods.

Recommendation 3: Agencies should be encouraged to record online both the dates on which comments are submitted and the dates on which comments are posted to the Internet.

Recommendation 4: Agencies should be encouraged to establish a stated policy of posting public comments to the Internet within a specified period after submission.

*The Staleness of Comments*

Recommendation 5: Agencies should be encouraged to make use of existing procedures, such as supplemental notices of proposed rulemaking, to refresh rulemaking records that have become stale due to the passage of time, changes in facts and technology, and activation of additional interested parties.

*Confidential and Anonymous Comments*

Recommendation 6: Agencies should retain the discretion to establish their own policies regarding the submission of anonymous comments.

Recommendation 7: Agencies should be encouraged to state explicit policies regarding the treatment of confidential business information and other forms of proprietary commenting.

*The Effects of Public Commenting*

Recommendation 8: Agencies should be encouraged to report in the *Federal Register* the precise number of comments that are submitted during comment periods.

Recommendation 9: The analysis of stakeholder behavior ought to be considered a fundamental component of assessments of the public commenting process.

Recommendation 10: Agencies should be encouraged to develop and publicize statements about the characteristics of effective comments.

Taken together, these recommendations constitute modest steps that agencies can take to enhance transparency and participation in public commenting without significantly diminishing the efficiency of rulemaking proceedings. The recommendations are grounded in the notion that the commenting process is not broken and therefore is not in need of fundamental reform. Although the published findings, original data, and expert interviews identified uncertainties and concerns in current practices, these sources suggest that, on balance, commenting continues to possess substantial utility for both agencies and stakeholders.

The recommendations are also characterized by a common focus on the provision of information. For example, the report recommends that agencies record the dates on which comments are submitted, as well as the dates on which comments are posted to the Internet. The report also recommends that agencies establish policies of posting comments to online dockets within announced time periods after submission. Such information provision measures serve to enhance the transparency of the commenting process. These measures have the potential to bring about increases in participation and efficiency as well. To what extent do stated policies on the posting of comments result in agencies increasing the speed with which submissions are made available to the public? With what regularity do interested parties take advantage of opportunities to respond to previously submitted comments that are accessible via the Internet?

Systematic assessments of questions such as these are the modes through which the effects of the report's recommendations are most naturally and effectively evaluated. This empirical orientation suggests a final recommendation for ACUS to consider.

Recommendation 11: ACUS should place a high priority on commissioning empirical studies of rulemaking.

In the context of this report, empirical analysis is essential in determining the efficacy of the modest, information provision-oriented recommendations that have been developed. If such analyses indicate that these recommendations have not enhanced transparency and participation, then more substantial, mandate-oriented approaches can be targeted for scrutiny in subsequent ACUS consideration of rulemaking comments.

## Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States

For more than sixty years, the Administrative Procedure Act<sup>2</sup> (APA) has provided the legal foundation for the development of regulations by agencies of the United States federal government. One of the central elements of this foundation is rulemaking via the notice and comment process. As specified in Section 553 of the APA, agencies are generally required to publish in the *Federal Register* notices of proposed rulemaking and to provide interested parties with an opportunity to comment on these notices.<sup>3</sup>

Notice and comment rulemaking has been called one of the “greatest inventions of modern government.”<sup>4</sup> By mandating that agencies give public notice in advance of the promulgation of regulations, the APA institutionalizes a measure of transparency in the rulemaking process. By allowing interested parties to submit comments on agency proposals, the APA establishes a participatory environment grounded in principles such as openness and fairness.

Despite these advantages, the notice and comment process has been criticized on a number of grounds. Detractors argue that certain types of stakeholders are systematically more likely than others to submit comments on agency proposals.<sup>5</sup> Critics point out that comments often do not engage the arguments and evidence presented by agencies and other rulemaking participants.<sup>6</sup> Evidence suggests that comments may not exert much influence over the content of agency regulations.<sup>7</sup>

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<sup>2</sup> 5 United States Code 551-559 (hereafter cited as U.S.C.).

<sup>3</sup> 5 U.S.C. 553. Exceptions to these general requirements include when an agency “for good cause finds...that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest” (5 U.S.C. 553 (b)(3)(B)), as well as agency organizational rules and issues pertaining to the military or foreign affairs (5 U.S.C. 553 (a)(1) and 5 U.S.C. 553 (b)(3)(A)).

<sup>4</sup> Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Urbana, IL: University of Illinois Press, 1976), p. 65.

<sup>5</sup> For example, there is evidence that regulated entities and industry interests are more active in commenting on proposed rules than consumers, environmentalists, and representatives of the public interest. See Marissa Martino Golden, “Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?,” *Journal of Public Administration Research and Theory*, 8 (1998), 245-270, and Jason Webb Yackee and Susan Webb Yackee, “A Bias Towards Business?: Assessing Interest Group Influence on the U.S. Bureaucracy,” *Journal of Politics*, 68 (2006), 128-139.

<sup>6</sup> See, for example, Philip J. Harter, “Negotiating Regulations: A Cure for Malaise,” *Georgetown Law Journal*, 71 (1982), p. 20.

<sup>7</sup> See, for example, William F. West, “Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis,” *Public Administration Review*, 64 (2004), 66-80. For research that reaches a different conclusion, see Susan Webb Yackee, “Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking,” *Journal of Public Administration Research and Theory*, 16 (2006), 103-124.

Given such critiques, as well as the centrality of public commenting in the rulemaking process, one of the initial projects of the reconstituted ACUS is to investigate agency practices in soliciting, circulating, and responding to comments. Specifically, ACUS is interested in addressing a number of issues regarding commenting that have been raised by the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary of the United States House of Representatives. These issues were stated in a December 2006 report entitled, “Interim Report on the Administrative Law, Process and Procedure Project for the 21<sup>st</sup> Century.”<sup>8</sup> Based on the committee’s report, ACUS is considering the formulation of recommendations on the following aspects of the commenting process:

1. *Should there be a required, or at least recommended, minimum length for a comment period?*
2. *Should agencies immediately make comments publicly available? Should they permit a “reply comment” period?*
3. *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?*
4. *Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?*
5. *What effects do comments actually have on agency rules?*

Taking up this task, this consultant report examines agency and stakeholder practices in these areas of the notice and comment process and proposes to ACUS a series of recommendations regarding the solicitation, circulation, and influence of public comments. The report considers three sources of information as the bases for developing prospective recommendations. First, the report reviews published research as a means of identifying the most salient arguments and evidence on commenting that have been offered by researchers in law and the social sciences. Second, original research was conducted during the preparation of the report. This research specifically addresses issues for which existing information is especially limited in scope and clarity.

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<sup>8</sup> The importance of this report, as well as the issues it emphasizes, is referenced on ACUS’s website, <http://www.acus.gov/research/the-conference-current-projects/rulemaking-comments/>, accessed on February 23, 2011.

Third, interviews were conducted with rulemaking experts from inside and outside of government. The aims of these interviews were to learn about agency experiences in the commenting process and bring the insights of researchers and practitioners directly to bear on the issues being addressed in the report. The interviews were semi-structured in their orientation. Interviewees were all asked the five questions about commenting around which the report is organized. The substance of the follow up questions varied across interviews, based on the nature of the initial responses that were provided, as well as the specific expertise and experiences of the interviewees. This approach gave the interviews a central structure while also providing the interviewer and interviewees with opportunities to raise and emphasize issues of their own choosing.<sup>9</sup>

The report is organized as follows. For each of the five areas of public commenting under examination, information about agency and stakeholder practices is discussed. This information is drawn from published studies, as well as the original research and interviews that were conducted during the preparation of the report. Based on this information, conclusions about the state of practice in each of the five areas are reached and recommendations are stated for ACUS consideration. Finally, for each of these recommendations, the report proposes benchmarks for assessing the impacts of the recommendations, if implemented, on the notice and comment process.

### **The Duration of Comment Periods**

A fundamental dimension along which regulatory proceedings vary is in the duration of comment periods. The duration of comment periods is a salient consideration for a number of reasons.<sup>10</sup> Many notices of proposed rulemaking draw upon information that is highly sophisticated in economic, scientific, and technical terms. As a result, comments that engage agency proposals in a serious manner frequently require significant investments on the part of stakeholders. As one observer has put it, interested parties “often are large organizations, which may need time to coordinate an organizational response or to authorize expenditure of funds to do the research needed to produce informed comments.”<sup>11</sup> Comment periods of sufficient duration therefore can play an important part in bringing transparency and public involvement to the rulemaking process.<sup>12</sup>

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<sup>9</sup> A total of fifteen individuals were interviewed. Nine of the interviewees currently occupy positions outside of government, while six of the interviewees are presently government officials. Six of the non-government interviewees have previously served in the federal government.

<sup>10</sup> Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 4<sup>th</sup> ed. (Chicago, IL: American Bar Association, 2006), p. 297.

<sup>11</sup> *Id.*

<sup>12</sup> A central element of ACUS’s mission is to promote “wide public participation” in the rulemaking process, <http://www.acus.gov/about/>, accessed on February 23, 2011.

The duration of comment periods can also have implications for the efficiency of the rulemaking process.<sup>13</sup> A common observation offered by interviewees is that it is not only possible for comment periods to be of insufficient duration. Comment periods can also be longer than is necessary to provide ample opportunity for public input and to generate information that is useful to agency decision makers. As a result, it is important to explicitly consider the various purposes—transparency, participation, efficiency—that public commenting serves when formulating recommendations about the duration of comment periods.

There is substantial variation across existing requirements, recommendations, and practices regarding the duration of comment periods. The APA does not establish an overall requirement regarding the minimum length of time that comment periods are to remain open. In 1994, ACUS recommended that Congress modify the APA to mandate comment periods of “no fewer than 30 days,” except in situations in which agencies invoke good cause for periods of shorter duration.<sup>14</sup> ACUS also encouraged agencies to go beyond this minimum and routinely keep comment periods open for durations longer than recommended statutory requirements.<sup>15</sup>

A number of executive and legislative actions have suggested or required comment periods in excess of thirty days. For example, Executive Order 12889, issued by President Clinton in 1993, mandates 75-day comment periods for regulations implementing certain provisions of the North American Free Trade Agreement.<sup>16</sup> More generally, Executive Order 12866, also published in 1993, defines a “meaningful opportunity” to comment on most agency notices as a period of “not less than 60 days.”<sup>17</sup> Reaffirming this principle, President Obama, in an executive order released on January 18, 2011, called for comment periods to last for “at least 60 days.”<sup>18</sup>

Many agencies, as a matter of standard procedure, offer comment periods of more than thirty days. According to the Environmental Protection Agency (EPA), comment periods on its notices and proposed rules typically last sixty to ninety days.<sup>19</sup> The Department of

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<sup>13</sup> Facilitating efficiency in rulemaking is one of ACUS’s primary interests, <http://www.acus.gov/about/>, accessed on February 23, 2011.

<sup>14</sup> Administrative Conference of the United States, “Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure,” *Federal Register*, February 1, 1994, p. 4674.

<sup>15</sup> *Id.*

<sup>16</sup> Executive Order 12889, “Implementation of the North American Free Trade Agreement,” *Federal Register*, December 30, 1993, p. 69681.

<sup>17</sup> Executive Order 12866, “Regulatory Planning and Review,” *Federal Register*, October 4, 1993, p. 51740.

<sup>18</sup> Barack Obama, “Improving Regulation and Regulatory Review,” <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>, accessed on February 2, 2011.

<sup>19</sup> Environmental Protection Agency, “Developing Regulations: From Start to Finish,” <http://www.epa.gov/lawsregs/brochure/developing.html>, accessed on January 6, 2011.



Transportation's (DOT) stated policy is to allow for comment periods of sixty days or longer and to provide justifications for periods of shorter duration.<sup>20</sup>

It is not immediately apparent to what extent agency practices are, as a general matter, consistent with such declarations. Original research was therefore conducted during the preparation of the report as a means of generating information about the duration of comment periods. The aim of this research was to identify the duration of a substantial number of comment periods associated with actions taken by agencies from across the government.

The research specifically entailed examining *Federal Register* documents that were published during 2010 on a number of selected dates.<sup>21</sup> A total of 1,298 notices and proposed rules were examined.<sup>22</sup> These searches produced information about the duration of 703 comment periods.<sup>23</sup>

These comment periods were associated with actions taken by dozens of agencies. The agencies with the largest numbers of comment periods include the EPA, Federal Aviation Administration (FAA), and Securities and Exchange Commission (SEC). Each of these agencies published in excess of thirty notices and proposed rules with comment periods of announced durations. Many other agencies, in contrast, issued a single document, or no more than a handful of documents, soliciting public comments during the days for which information was collected.

What ordinary practices emerge from this wide array of institutional contexts regarding the duration of comment periods? The mean duration is approximately 39 days, while the median duration is 32 days. The difference between these measures of central tendency is due to the fact that a small number of proceedings had comment periods of unusually long durations. Specifically, twenty comment periods were announced as being open for ninety days or longer.<sup>24</sup>

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<sup>20</sup> United States Department of Transportation, "The Informal Rulemaking Process," <http://regs.dot.gov/informalruleprocess.htm#What%20are%20the%20legal%20requirements%20for%20the%20informal%20rulemaking%20process>, accessed on January 6, 2011.

<sup>21</sup> The dates are January 12, February 16, February 25, March 25, April 2, April 16, May 24, June 9, June 18, August 3, October 14, and December 16. These dates were chosen to provide variation in both the time of the month and the time of the year for which information was collected.

<sup>22</sup> These documents were identified via the website of the *Federal Register* (<http://www.gpoaccess.gov/fr/>). The year "2010" was selected in the "Browse the Table of Contents from back issues" option. Next, the issue of the *Federal Register* that was published on each of the chosen dates was selected. All documents in each of these issues that were labeled "Notices" or "Proposed Rules" were examined for information about comment periods.

<sup>23</sup> The remainder of the notices and proposed rules either were not associated with a comment period or did not specify the duration of an announced comment period.

<sup>24</sup> These comment periods were associated with 10 different agencies, including the Federal Emergency Management Agency, Food and Drug Administration, and Bureau of Land Management.

Comment periods in the vicinity of thirty days were the most common durations, accounting for approximately one-third of the documents that were examined. Comment periods lasting sixty days were also commonplace, constituting about twenty percent of the notices and proposed rules. Approximately ten percent of the comment periods were open for durations of two weeks or less.

The typical duration of comment periods varies across agencies. For example, the average duration of comment periods for Federal Energy Regulatory Commission (FERC) is about three weeks. In contrast, it is unusual for the DOT and EPA to initiate comment periods that last fewer than thirty days. Even these two agencies, however, on occasion specify comment periods as short as one week in duration. According to an interviewee from the DOT, such short periods are often associated with prospective actions for which the agency has good cause to forego public commenting altogether. In such instances, officials are at times inclined to establish brief comment periods as a means of providing interested parties with an opportunity to state fundamental disagreement with agency plans.

Taken together, these patterns demonstrate that there is substantial variation both within and across agencies when it comes to the duration of comment periods. Information was not collected, it is important to note, on the priority classifications of the notices and proposed rules. These classifications identify agency actions as (1) economically significant, (2) other significant, (3) substantive, nonsignificant, (4) routine and frequent, or (5) informational/administrative/other.<sup>25</sup> As a result of this lack of information, it is not possible to examine the association between the priority of rules and the duration of comment periods for the set of documents under analysis.

A number of interviewees, from both inside and outside of government, stated that there are systematic determinants of agency choices regarding the duration of comment periods. One such determinant is the economic significance of prospective regulations. When the economic stakes of proposed rules are especially pronounced, interviewees suggest that, as a general matter, comment periods are likely to be relatively long in duration. A similar expectation was expressed for issues that are politically controversial. In such instances, agency officials, expecting potentially large volumes of comments, are likely to establish comment periods that are relatively long in duration.

Given these expectations, interviewees were not inclined to judge the prevalence of comment periods of varying durations as an immediate concern. When asked about the possibility of instituting requirements for the minimum duration of comment periods, interviewees were collectively rather skeptical in their assessments. Such skepticism was

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<sup>25</sup> Regulatory Information Service Center, "Instructions for Reporting Regulatory Actions in the Unified Agenda." Document on file with author.

manifested even given a general presumption that agencies would retain the authority to invoke and justify exemptions to minimum duration requirements. Other stated reasons for interviewee skepticism include the presence of procedures through which interested parties can petition for extensions of comment periods and the occurrence of ex parte communications between agency officials and interested parties during various stages of rulemaking proceedings.<sup>26</sup> For some interviewees, these possibilities reduce the significance of the duration of comment periods as a barometer of rulemaking participation.

A number of the interviewees have submitted public comments themselves or been involved in the preparation of organizational comments. Despite such involvement, the interviewees cannot be considered representative of interested parties such as regulated entities and advocates for health, safety, and the environment. The primary vantage points of the interviewees consist of agency decision making and legal and social scientific research. With these vantage points in mind, the interviews are naturally circumscribed in their ability to produce insight into stakeholder attitudes toward the duration of comment periods.

As this discussion emphasizes, both the original research and interviews that were conducted during the preparation of the report are limited in important respects. Nevertheless, it is the position of the report that the empirical evidence and expressed opinions, when considered together with principles of transparency, participation, and efficiency, constitute a sufficient basis for proposing the following recommendation about the duration of comment periods.

*Recommendation 1: There should not be a required minimum duration of comment periods.*

The justifications for this recommendation are grounded in the joint consideration of a pair of observations. First, agencies routinely establish comment periods of relatively short durations. Second, interviewees, when prompted to consider such comment periods, do not express concern that transparency and participation are meaningfully compromised. Comments periods of a required minimum duration are likely to not, as a general matter, increase transparency and participation in the rulemaking process. Such a requirement might, in certain instances, impact the efficiency of rulemaking in a negative manner, by holding comment periods open for longer periods than is otherwise necessary. In addition, concern was expressed among interviewees that mandated minimum duration comment periods might have the unintended consequence of limiting agency utilization of other forms of public outreach, such as reply comment periods.<sup>27</sup>

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<sup>26</sup> A number of interviewees pointed out that relatively little is known about the utilization and resolution of these procedures and communications. For example, with what regularity do interested parties request extensions of comments periods? Under what conditions do agencies grant such requests?

<sup>27</sup> Reply comment periods are discussed in detail in the following section of the report.

The report's recommendation conflicts with the recommendation issued by ACUS in 1994 that Congress amend the APA to require comment periods of thirty days or longer, subject to agency invocation of good cause exemptions for periods of shorter duration.<sup>28</sup> The report's recommendation, however, is not inherently inconsistent with the principle articulated in Executive Order 12866 and President Obama's January 18, 2011 affirmation of existing regulatory procedures.<sup>29</sup> Both of these presidential documents are grounded in the notion that comment periods ought to remain open, as a general practice, for a minimum of sixty days. It is the position of the report that agencies ought to consider the particular applicability of this general notion and retain the discretion to establish the duration of specific comment periods, except in situations in which such discretion has been explicitly prohibited by Congress, the president, or the courts.

As discussed earlier, the empirical bases for this recommendation are subject to a pair of uncertainties. Evidence has not been provided on the association between the priority classifications of proposed agency actions and the duration of comment periods. In addition, interviews have not been conducted with representatives of regulated entities and advocates for the environment, safety, and health.

Given these uncertainties, one way to evaluate the report's recommendation against the establishment of minimum duration comment periods is to assemble information that bears directly on these two areas of concern. For example, a finding that economically significant and politically controversial rules are generally associated with comment periods of relatively long durations would serve as an indication that agency practices are consistent with expectations about the need for especially robust comment periods in such situations. If, however, economically significant and politically controversial rules are routinely assigned comment periods of relatively short durations, then the factual basis for the recommendation might be considered substantially diminished.

The design and implementation of a survey of commenters constitutes a second approach to information collection that has the potential to substantiate or undermine the report's recommendation on the duration of comment periods. Individuals and organizations that have filed submissions in comment periods of various durations might be asked questions about their level of satisfaction with the transparency and opportunity for participation provided by these processes. Such an approach would naturally not provide information about interested parties that did not submit comments during the periods in question. Nevertheless, this type of effort would enhance understanding of stakeholder satisfaction with agency choices regarding the

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<sup>28</sup> Administrative Conference of the United States, *supra* note 15.

<sup>29</sup> On Executive Order 12866, see *supra* note 18 and the accompanying text. On President Obama's January 18, 2011 statement on regulation, see *supra* note 19 and the accompanying text.

duration of comment periods. If such choices were discovered to be viewed as problematic, then the recommendation might be subject to significant doubt and reconsideration.

### **Agency Circulation of Public Comments**

As stated in the introductory section of the report, ACUS is interested in addressing two specific facets of agency circulation of comments. One of these areas is agency use of reply comment periods. The other area concerns the timeliness with which agencies make submitted comments available to the public. These areas are closely linked by the underlying notion that permitting stakeholders to view and respond to comments submitted by other parties has the potential to enhance the informational quality of the commenting process and the agency decisions that are ultimately produced.

#### *Reply Comment Periods*

Agencies on occasion provide stakeholders with opportunities to submit information during reply comment periods.<sup>30</sup> Reply comment periods are specified intervals of public participation that ordinarily extend beyond the closing dates of comment periods attached to proposed rules and other types of *Federal Register* notices. The aim of reply comment periods is to circulate information that stakeholders have previously submitted and solicit responses to this information from other interested parties. With respect to such circulation, it has been asserted that “comments are much more likely to be focused and useful if the commenters have access to the comments of others.”<sup>31</sup> Echoing this assertion, President Obama has called for an “open exchange of ideas” in the development of regulations.<sup>32</sup> As defined by the administration, open exchange refers to a process in which the “views and information provided by participants are made public to the extent feasible, and before decisions are actually made.”<sup>33</sup>

The collection of information on agency use of reply comment periods has not been a focal point of research in law and the social sciences. As a means of assessing the practice of reply comment periods, original research was conducted during the preparation of the report. The aim of this research was to identify recent rulemakings during which agencies provided

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<sup>30</sup> In a few rulemaking contexts, reply comment periods are statutorily mandated. See, for example, the Clean Air Act, 42 U.S.C. 7607(d)(5), and Toxic Substances Control Act, 15 U.S.C. 2605(c)(3)(A).

<sup>31</sup> Lubbers, *supra* note 10 at 321.

<sup>32</sup> Obama, *supra* note 18.

<sup>33</sup> Cass R. Sunstein, “Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies,” <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>, accessed on February 4, 2011.

stakeholders with opportunities to submit comments in response to arguments and evidence that had previously been filed by other interested parties.<sup>34</sup>

Seventy documents published in the *Federal Register* between January 2008 and January 2011 contained information about opportunities for interested parties to respond to comments that had been submitted earlier in the rulemaking process.<sup>35</sup> A small number of these documents were duplicates, as when the search identified both a proposed rule opening a reply comment period and a final rule announcing the completion of the associated proceeding. Overall, the search results indicate that the use of reply comment periods is limited to a rather small fraction of the regulatory actions taken by agencies.

In the aftermath of the advent of online docketing, the DOT issued an internal memorandum encouraging agencies to make greater use of reply comment periods.<sup>36</sup> Despite this department-wide emphasis, there has not been an appreciable increase in the prevalence of reply comment periods during DOT rulemakings.<sup>37</sup> According to an interviewee from the DOT, one reason that officials have been hesitant to embrace reply commenting is that agencies often face incentives to proceed quickly in developing regulations. Given such incentives, reply comment periods are often dismissed as having the potential to greatly increase the time it takes to promulgate rules.

More than half of the reply comment periods that were identified were associated with the Federal Communications Commission (FCC). This level of activity is by far greater than that exhibited by any other agency. The Library of Congress (LOC) and FERC were the next most common users of reply comment periods, publishing ten and nine documents, respectively. Altogether, ten different agencies solicited reply comments during the 2008-2011 period.<sup>38</sup>

On occasion, the closing dates for reply comment periods were identical to the closing dates of the associated comment periods. On July 14, 2009, the Copyright Office of the LOC

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<sup>34</sup> The research entailed a series of searches conducted online via the *Federal Register*. From the *Federal Register* main page (<http://www.gpoaccess.gov/fr/>), the “Advanced Search” option was chosen. Next, a single year was selected and “Maximum Records Returned” was set to 350. Searches were conducted for each year from 2008 through 2011. For each of these searches, the term “reply comment” was entered into the “Search” box. The results of these searches were examined, and the proceedings for which reply comment periods were confirmed form the empirical basis of this section of the report.

<sup>35</sup> These documents include proposed rules, final rules, and extensions of previously announced comment periods and reply comment periods. Documents specifically published as part of the Unified Agenda (i.e., agency regulatory plans) were excluded from the analysis.

<sup>36</sup> Author interview with an official at the DOT.

<sup>37</sup> *Id.*

<sup>38</sup> In addition to the organizations already discussed, these agencies are the FAA, Federal Election Commission (FEC), Department of Energy, Federal Motor Carrier Safety Administration, Maritime Administration, Office of the United States Trade Representative, and Postal Regulatory Commission.

proposed that regular users of its services be required to apply for accounts electronically, rather than via the paper-based system that had historically been used.<sup>39</sup> The deadline for the filing of both comments on the proposal and reply comments on previously submitted information was August 28, 2009.<sup>40</sup>

A more typical sequencing was for reply comment periods to extend past the deadlines of comment periods by one or two weeks. Although extensions of as long as one month were not uncommon, reply comment periods that persisted for more than one month beyond the end of comment periods were not regular occurrences. The longest gap between the end of a comment period and the closing of a reply comment period was a FERC proceeding in which comments were due on May 5, 2008 and reply comments were due by June 19, 2008.<sup>41</sup>

As part of the preparation of this report, a case study was conducted of a rulemaking during which a reply comment period occurred. This rulemaking was conducted by the FCC and amended the schedule of regulatory fees that the agency collects from licensed broadcasters.<sup>42</sup> The FCC published a notice of proposed rulemaking on April 26, 2010.<sup>43</sup> This proposed rule announced a comment period with a deadline of May 4, 2010 and a reply comment period that closed on May 11, 2010.<sup>44</sup> The FCC received nine comments and five reply comments on its proposal.<sup>45</sup>

An examination of stakeholder submissions reveals that reply comments were instruments through which interested parties expressed agreement with one another. On May 4, 2010, Robert Bittner commented that the FCC's regulatory fee structure unfairly advantages larger radio and television stations.<sup>46</sup> In a reply comment submitted six days later, Alex Goldman stated his agreement that the burden "falls too heavily" on smaller regulated entities.<sup>47</sup>

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<sup>39</sup> Library of Congress, Copyright Office, "Electronic Registration for Deposit Account Holders," *Federal Register*, July 14, 2009, pp. 33930-33932.

<sup>40</sup> Library of Congress, Copyright Office, *supra* note 39 at 33931.

<sup>41</sup> Federal Energy Regulatory Commission, "PPL Holtwood, LLC; Notice of Extension of Comment Date," *Federal Register*, April 25, 2008, 22361.

<sup>42</sup> Federal Communications Commission, "Assessment and Collection of Regulatory Fees for Fiscal Year 2010," *Federal Register*, July 19, 2010, 41932-41962.

<sup>43</sup> Federal Communications Commission, "Assessment and Collection of Regulatory Fees for Fiscal Year 2010," *Federal Register*, April 26, 2010, 21536-21567.

<sup>44</sup> Federal Communications Commission, *supra* note 43 at 21536.

<sup>45</sup> Federal Communications Commission, *supra* note 42 at 41933.

<sup>46</sup> Robert Bittner, comment posted to the FCC's Electronic Comment Filing System, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020445296>, accessed on February 14, 2011.

<sup>47</sup> Alex Goldman, reply comment posted to the FCC's Electronic Comment Filing System, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020451908>, accessed on February 14, 2011.

The reply comment period also provided stakeholders with opportunities to contest one another's arguments and information. Global Crossing North America, a telecommunications company, filed a comment calling for limits on the aggregate fees that can be assessed on international submarine cable operators.<sup>48</sup> This recommendation was opposed in reply comments submitted by Verizon and Qwest Communications International.<sup>49</sup> These reply comments made a number of substantive arguments regarding the relative fees charged to submarine cable operators and terrestrial and satellite facilities.<sup>50</sup> The FCC ultimately sided with Verizon and Qwest Communications International, stating in the final rule that Global Crossing North America had not offered a convincing "basis for a change in the allocation."<sup>51</sup> As this sequence of events illustrates, reply comment periods, by circulating stakeholder materials before agency decisions have been finalized, can serve to facilitate an "open exchange of ideas" among rulemaking participants.<sup>52</sup>

Such positive assessments also emanate from interviews conducted with FCC officials who have direct experience with reply comment periods. According to these officials, reply comment periods often serve to encourage the submission of initial comments that provide decision makers with accurate information about stakeholder preferences. For example, given the presence of reply comment periods, stakeholders are less likely to submit initial comments that make maximalist claims. In other words, commenters are more likely to directly state which of their arguments and evidence are most crucial to their immediate interests and which points are simply their preferred outcomes in an ideal world. The reason for such differentiation is that reply comment periods open initial submissions up to the possibility of being challenged on factual and analytical grounds. When it comes to reply comments themselves, FCC officials make the argument that these submissions are often more immediately useful than initial comments in that it is during reply periods when issues are narrowed to their most essential elements.

The evidence generated by the original data collection, case study, and interviews suggests that reply comment periods offer a means of enhancing transparency and participation in the commenting process. This evidence, however, is limited in two important respects. First, the evidence does not provide a clear assessment of the implications of reply comment periods for the efficiency of the rulemaking process. A number of interviewees observed that it takes

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<sup>48</sup> Global Crossing North America, comment posted to the FCC's Electronic Comment Filing System, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020446149>, accessed on February 14, 2011.

<sup>49</sup> Verizon, reply comment posted to the FCC's Electronic Comment Filing System, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020455386>, accessed on February 14, 2011, and Qwest Communications International, reply comment posted to the FCC's Electronic Comment Filing System, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020455110>, accessed on February 14, 2011.

<sup>50</sup> *Id.*

<sup>51</sup> Federal Communications Commission, *supra* note 42 at 41935.

<sup>52</sup> On an "open exchange of ideas", see *supra* notes 32 and 33 and the accompanying texts.



time and resources for agencies to manage reply comment proceedings. As a result, reply comment periods have the potential to protract what is often an already deliberate process of incorporating public input into the development of regulations. Second, the evidence assembled in the preparation of this report is drawn from a small set of agency experiences with reply comment periods. In part, this narrow scope is a natural reflection of the fact that relatively few agencies make even occasional utilization of reply comment periods.

*Recommendation 2: Agencies should be encouraged to make appropriate use of reply comment periods.*

Consistent with the evidence that has been generated during the preparation of the report, this recommendation is grounded in a favorable notion of reply comment periods. Nevertheless, the scope of the recommendation is limited in two nontrivial respects. The recommendation does not state a preference for mandating agencies to make more frequent use of reply comment periods. It is the position of the report that agencies, as a general matter, ought to retain discretion regarding the establishment of reply comment periods. In addition, the recommendation emphasizes that agency utilization of reply comment periods ought to be restricted to appropriate rulemaking contexts. As one interviewee stated, reply comment periods are unnecessary in the absence of substantial disagreement among stakeholders. According to another interviewee, reply comment periods are most probably a waste of time and resources for all-or-nothing issues in which dialogue between divergent stakeholders is not likely to identify compromise positions.

An essential element in encouraging agencies to make appropriate use of reply comment periods is securing the support of institutionally salient decision makers. As discussed earlier, the DOT did not experience a substantial increase in the prevalence of reply comment periods in the aftermath of the circulation of an internal memorandum that emphasized the potential benefits of this approach to circulating and stimulating public input.<sup>53</sup> According to an interviewee from the DOT, the outcome might be different if encouragement were to come from influential sources outside of agencies themselves. With this possibility in mind, statements and actions from ACUS, Congress, and the White House Office of Information and Regulatory Affairs (OIRA) in support of reply comment periods are of potentially great importance in bringing about the successful implementation of this recommendation.

The primary means of evaluating the use of reply comment periods is to conduct research on the full range of agency and stakeholder experiences that are manifested after the circulation of the report's recommendation. Such research ought to focus on three aspects of reply comment periods. First, under what conditions do agencies establish reply comment periods? A central element in the recommendation is the preservation of agency discretion regarding the initiation

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<sup>53</sup> See *supra* note 36 and *supra* note 37 and the accompanying texts.

of reply comment periods. It will therefore be important to devote systematic attention to agency utilization of this discretion, as a means of understanding the extent to which agency choices can be considered “appropriate” by salient metrics.<sup>54</sup>

Second, do reply comment periods increase transparency and participation in the development of regulations? One approach to making this evaluation is to conduct archival research on agency documents and public submissions, as well as the dialogues that occur among parties that file comments and reply comments. In addition, interviews and surveys of agency officials and outside participants have the potential to generate important information about attitudes toward and experiences with reply comment periods. Third, what are the implications of reply comments for the efficiency of the rulemaking process? A central component of this evaluation will be determining the extent to which it can reasonably be inferred that the occurrence of reply comment periods has implications for the time it takes to solicit public input and finalize regulations.<sup>55</sup> In sum, thorough attention to these three aspects of agency and stakeholder experiences with reply comment periods offers a means of gauging the effects of the recommendation on important principles in public commenting.

### *Making Comments Available to the Public*

Apart from reply comment periods, another mechanism for engaging stakeholders in dialogue with one another is the circulation by agencies of public submissions prior to the closing of comment periods.<sup>56</sup> Circulation of submissions during comment periods provides interested parties with opportunities to examine and respond to arguments and evidence that have been filed by other stakeholders. Such examination and response has always been possible through in-person visits to agency dockets where rulemaking documents have historically been made available to the public. The possibilities of stakeholder exchanges, however, have greatly expanded with the advent of electronic dockets that are accessible via the Internet.

Interviewees from outside of government collectively expressed the notion that, as a general matter, public comments ought to be posted to the Internet as they are received. Such posting was viewed by interviewees as constituting a “best practice” in the area of public

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<sup>54</sup> Agency choices regarding the utilization of reply comment periods are not in all likelihood considerable as “random” in the experimental design sense of the word. As a result, information about agency selection of the proceedings during which to open reply comment periods is essential in providing a baseline for comparing these proceedings with those rulemakings where reply comments periods do not occur.

<sup>55</sup> Such inferences may be rather difficult to make, given that agency choices regarding the use of reply comment periods are likely associated with the nature of stakeholder interest in the issues under consideration. See *supra* note 54 and the accompanying text.

<sup>56</sup> This circulation can occur only if submissions are filed in advance of commenting deadlines. The timing of stakeholder submissions will be considered in “The Effects of Public Commenting” section of the report.

commenting.<sup>57</sup> At the same time, a number of these interviewees acknowledged the possibility that exceptions to this overall expectation might be in order when comments contain obscenities and information such as confidential business practices.<sup>58</sup>

According to an interviewee from the DOT, the organization's intent is to post comments within eight working hours of submission to regulations.gov, an online repository for documents related to the rulemaking proceedings of agencies from across the federal government.<sup>59</sup> This interviewee also stated that this goal is successfully met for the vast majority of comments. There are a number of reasons why this self-imposed standard might not be reached. Comments that are submitted in paper form must first be scanned into electronic documents before they can be posted to the Internet. This scanning process can add nontrivial time to the posting of comments, especially when significant numbers of paper submissions are filed in relatively close proximity to one another. Similarly, the posting of both paper and electronic comments is at times slower toward the end of comment periods. This slowdown is due to the fact that it is not uncommon for large volumes of submissions to be filed immediately prior to commenting deadlines.

Interviewees at the FCC also stated that the agency's aim is to post public comments to the Internet in short order. These interviewees estimate that the vast majority of comments are posted within, in many instances well within, 24 hours of submission. Once again, these short turnaround times are made possible by the fact that most comments are filed electronically, relieving the need for the agency to devote resources to scanning and uploading paper documents.

As a means of conducting a general investigation of agency practices in making comments available during comment periods, original research was conducted during the preparation of the report. Information was collected from regulations.gov, the aforementioned government-wide portal for viewing and submitting information to rulemaking dockets.<sup>60</sup> On regulations.gov, agencies are given the option of publicly recording the date on which comments are submitted, as well as the date on which comments are posted to the Internet.

A search was conducted on regulations.gov to determine the extent to which agencies take advantage of this option of recording both submission dates and posting dates.<sup>61</sup> At the time

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<sup>57</sup> These interviews also identified support for agencies making technical documents on which rulemaking decisions are based electronically available to the public in short order.

<sup>58</sup> The various practices that agencies have established regarding the handling of confidential business information are discussed in the "Confidential and Anonymous Comments" section of the report.

<sup>59</sup> See <http://www.regulations.gov/#!home>, accessed on February 18, 2011.

<sup>60</sup> See *supra* note 59 and the accompanying text.

<sup>61</sup> To make this determination, the following protocol was utilized. At regulations.gov, select "See All Documents Posted on this Site." Under "Agency", select the first agency listed. Select the "Title" of the first comment that

of the search, there were 123 organizations that had posted documents to regulations.gov.<sup>62</sup> Of these organizations, 29 were identified as reporting both submission dates and posting dates. Given the fact that less than one-fourth of agencies announce both submission dates and posting dates, the report makes the following recommendation.

*Recommendation 3: Agencies should be encouraged to record at regulations.gov both the dates on which comments are submitted and the dates on which comments are posted to the portal.*<sup>63</sup>

This recommendation establishes a default expectation that agencies report both submission dates and posting dates for all public comments. It is not the position of the recommendation to make such reporting a requirement of agencies. As an interviewee at the DOT pointed out, the process of indexing documents that are to be posted to regulations.gov is a burden in terms of time and resources. Given these burdens, the report's recommendation is that agencies be encouraged to consider the benefits of incurring marginally higher costs when indexing rulemaking comments. These benefits include increases in transparency in the commenting process, as interested parties would be able to access and analyze additional information about the submission and posting of comments. It is also possible that the circulation of information about agency practices would have the effect of inducing agencies to increase the speed with which comments are posted to the Internet. If this effect were to materialize, then the amount of time that interested parties have to view and respond to previously submitted comments would increase as well, thereby enhancing the transparency and participatory nature of the commenting process.

This efficacy of the recommendation can most fundamentally be evaluated by tracking the extent to which agencies record both submission dates and posting dates for public comments. Ascertaining the efficacy of the provision of this information on the speed with which comments are made publicly available is a significantly more difficult undertaking. The basic difficulty is that the timeliness with which comments are circulated is known only for those agencies that record both submission dates and posting dates. Comparisons across circulating and non-circulating agencies, in other words, are not immediately possible via regulations.gov. One alternative approach is to utilize paper dockets to identify submission dates for comments that have been posted to regulations.gov. This approach, however, is labor intensive in that it entails in-person visits to agency dockets.

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appears in the agency's list of documents. Select "Show Details." Identify from the resulting list whether the agency records submission dates and posting dates. Repeat this process for all other agencies listed.

<sup>62</sup> This information is current as of February 22, 2011.

<sup>63</sup> Not all agencies solely use regulations.gov as the portal to which rulemaking documents are posted. For example, the FCC also maintains its own online docket system, the Electronic Comment Filing System (<http://fjallfoss.fcc.gov/ecfs/>, accessed on March 2, 2011). For such agencies, this recommendation encourages the recording of both submission dates and posting dates at all websites that are utilized for online docketing.

The DOT is one of the agencies that records both submission dates and posting dates for public comments. The availability of both pieces of information means that the speed with which the agency posts submitted comments to regulations.gov can be examined empirically. Such an examination is useful in the context of the DOT in that the agency aspires to post comments in short order upon submission. This examination, in other words, will provide insight into the experiences of an agency that has established an ambitious benchmark in the circulation of comments.

Given that the agency has posted tens of thousands of comments to regulations.gov, a systematic sample of these comments was constructed.<sup>64</sup> This procedure produced a sample of 355 comments posted by the DOT to regulations.gov between January 2008 and February 2011.

For this sample of comments, the mean and median number of days from submission to posting on regulations.gov is four and three, respectively.<sup>65</sup> Approximately one-third of comments were posted on the same day they were submitted or on the next day. In excess of three-quarters of comments were posted within one week of their submission. Only a handful of comments experienced lags between submission and posting of longer than two weeks. These longest lagging comments are not remarkable any immediately discernible sense. For example, all of the comments were submitted by individuals as opposed to organizations. Furthermore, none of the comments were more than a few sentences in length, a reflection of the fact that the issues being addressed—tarmac delays, peanuts on airplanes, and the time zone in a North Dakota county—were relatively uncomplicated. The bottom line is that, consistent with stated intentions, it is the general practice of the DOT to post public comments in short order after submission.

As a means of providing a benchmark against which to compare DOT practices in circulating comments, information was collected about the speed with which comments are posted to regulations.gov by the Animal and Plant Health Inspection Service (APHIS), an agency in the Department of Agriculture (USDA).<sup>66</sup> The mean and median number of days from submission to posting was eight and four, respectively. These statistics suggest that APHIS does not generally post comments as rapidly as the DOT. This overall difference, however, is driven

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<sup>64</sup> This sample was constructed according to the following protocol. At regulations.gov, select “See All Documents Posted on this Site.” Under “Agency”, select the Department of Transportation. Under “Document Type”, select “Public Submission.” Under “Docket Type”, select “Rulemaking.” Under “Comment Period”, select “Closed.” Under “Posted Date”, select “From” January 1, 2008. Set “Results Per Page” to 10. Select the last comment from each resulting list of ten comments. Select the “Title” of the comment. Select “Show Details.” Finally, record the dates of the comment’s submission and posting.

<sup>65</sup> It is important to note that a period of eight working hours can span a number of calendar days, as in the context of comments that are submitted immediately prior to the start of weekends and holidays.

<sup>66</sup> This information was collected using the same basic protocol outlined earlier in the context of the DOT. See *supra* note 68. Information was collected for a sample of 204 comments posted by APHIS to regulations.gov between January 2008 and February 2011

by the fact that APHIS on a small number of occasions did not post comments for more than a month after submission. In contrast, no DOT comment experienced a duration of more than 18 days between submission and posting. Apart from these differences in a few extreme instances, DOT and APHIS practices in posting comments are rather similar to one another. For example, APHIS posted nearly three-quarters of the comments it received to regulations.gov within one week of submission.

With electronic circulation of information about rulemaking, as manifested most centrally by regulations.gov, the practice of rapid posting circulates submitted comments broadly, making comments readily available to interested parties via the Internet. Given this availability, the extent to which interested parties engage in dialogues with one another is in no small part a function of stakeholder practices. For example, do interested parties submit comments early enough in comment periods to allow for other stakeholders to offer responses in subsequent filings? Is it the case that comments take advantage of opportunities to refer to arguments and evidence raised in prior submissions? If such open exchanges do not occur, at least during DOT and APHIS comment periods, it is not due to agency practices regarding the timely posting of submitted information.

*Recommendation 4: Agencies should be encouraged to establish a stated policy of posting public comments to the Internet within a specified period after submission.*

This recommendation is consistent with the evidence that has been considered in this report regarding agency practices in circulating public comments. Agencies such as the DOT, FCC, and APHIS have established intentions and practices for posting comments to the Internet. Rulemaking organizations from across the federal government ought to explicitly state and publicize aspirations for the timeliness with which comments are to be circulated. Such actions will increase the transparency of agency practices in the handling of public submissions.

The recommendation is also consistent with a memorandum issued by OIRA on May 28, 2010.<sup>67</sup> The memorandum states OIRA's expectation that agencies "post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov."<sup>68</sup>

The presumption of the report's recommendation is that the agency aspirational time periods ought to be relatively short in duration. The interviews and original research suggest that

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<sup>67</sup> White House Office of Information and Regulatory Affairs, "Memorandum for the President's Management Council", [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket\\_final\\_5-28-2010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf), accessed on March 4, 2011.

<sup>68</sup> White House Office of Information and Regulatory Affairs, *supra* note 67 at 2.

the DOT, FCC, and APHIS post large proportions of comments to the Internet within short order after submission. It is not, however, the position of the report to identify a single time frame that ought to be adopted by all rulemaking organizations in the federal government.<sup>69</sup> Agencies vary substantially not only in resources, but in the volume of rulemaking activities and the quantity and nature of the comments that are received. Given such variation, the evidence assembled in the report does not provide a sufficient basis for recommending a specific government-wide best practice for the timeliness of circulating public comments.

The aim of the recommendation is to increase transparency and participation in the commenting process. The timely posting of comments to the Internet enhances the circulation of information among parties interested in rulemaking proceedings. Such posting also facilitates opportunities for interested parties to file comments in response to arguments and evidence that have previously been submitted by other stakeholders.

The primary concern with the recommendation is that it might require agencies to devote additional resources to the posting of comments. Such resources would be necessary for agencies that establish policies calling for increases in the timeliness of comment circulation. As a result, one way of evaluating the implications of the recommendation would be to ask agency officials about the burdens, in terms of staff time and other resources, that are imposed by establishing policies regarding the circulation of comments.

Another aspect of evaluation would be the examination of the proportion of comments that are posted by agencies within specified increments of time after submission. Such examination will make it possible to address a number of salient questions about agency practices in circulating comments. To what extent do agencies succeed in meeting stated goals regarding the time period within which comments are posted? Do agencies that establish more ambitious goals generally post comments more rapidly than agencies with longer aspirational time periods? Ultimately, the benchmark for success should not be that every comment is posted within established time frames. Rather, agencies ought to be expected to experience increases in posting times at the end of comment periods, during high volume comment periods, and in the context of comments that require unusually careful assessments of content prior to posting.

### **The Staleness of Comments**

It is well established that regulations can take many years to develop. Rules in areas such as hydroelectric power licensing have taken more than ten years to come to fruition.<sup>70</sup> Several

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<sup>69</sup> Similarly, the White House declined to state a specific time frame in its memorandum on electronic docketing. See White House, Office of Information and Regulatory Affairs, *supra* note 67.

<sup>70</sup> Cornelius M. Kerwin and Scott R. Furlong, *Rulemaking: How Government Agencies Write law and Make Policy*, 4<sup>th</sup> edition (Washington, DC: CQ Press, 2011), p. 106.

decades ago, a congressional study of rulemaking at the Interstate Commerce Commission found that the average amount of time that elapsed between publication of notices of proposed rulemaking and promulgation of final rules was nearly 500 days.<sup>71</sup> Research on the EPA suggests that the agency's rulemakings consume on average more than 1,000 days from initiation to completion.<sup>72</sup>

One implication of deliberate rulemaking proceedings is that substantial periods of time can elapse between the submission of public comments and the finalization of agency decisions. Given this passage of time, it is possible that comments filed during the course of rulemakings are rendered out of date, or "stale", prior to agencies taking action. Individual comments themselves can become stale, as when arguments and evidence are grounded in outdated facts, circumstances, and technology. According to a number of interviewees, collections of comments can also come to be viewed as insufficiently informative and timely. If, for example, there is substantial change in the set of parties interested in the issues addressed in prospective agency actions, then comments solicited at earlier points in rulemaking proceedings may no longer serve as accurate reflections of stakeholder sentiment. The substance of rules can also be significantly altered during the course of decision making processes. Such revisions might follow from turnover in agency leadership or from the content of comments themselves. Regardless of the specific causes, a principal consequence of these developments is that comments submitted in the past may be diminished in the extent to which they provide a sufficient basis for sustaining agency decisions.

There is wide concurrence among interviewees that rulemakings that linger for extended periods of time raise a number of issues, including the staleness of public comments. Interviewees also acknowledge, however, that it is exceedingly difficult to establish a clear benchmark for determining under what conditions comments can reasonably be considered outdated. The staleness of comments, in other words, is most effectively gauged within the context of the issues that are being addressed in rulemakings, as well as the content of the comments that have been submitted. In some contexts, comments might become stale only after the passage of many years. Some comments, for that matter, might never become stale at all. In other contexts, even recently filed comments may cease to provide information that is up to date and relevant to decisions that are being considered by agencies.

A number of procedures exist for re-opening comment periods and establishing new opportunities for public participation. Such procedures are salient when considering the issue of

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<sup>71</sup> U.S. Congress. 1977. Senate. Committee on Governmental Affairs. *Delay in the Regulatory Process*. 95<sup>th</sup> Cong., 1<sup>st</sup> sess. The Interstate Commerce Commission was abolished by Congress in 1995.

<sup>72</sup> Cormelius M. Kerwin and Scott R. Furlong, "Time and Rulemaking: An Empirical Test of Theory," *Journal of Public Administration Research and Theory*, 2 (1992), pp. 135-136. For the rules that were studied, the average time that elapsed between initiation of the rulemaking and publication of the proposed rule was 571 days, while the average time that elapsed between publication of the proposed rule and promulgation of the final rule was 523 days.



stale comments. Interested parties, for example, can petition agencies to re-open comment periods, as a means of facilitating the provision of updated information to rulemaking dockets. As part of its regulatory review, OIRA can return rules to agencies on the basis that the record is stale and additional commenting is warranted.<sup>73</sup>

Another instrument for updating dockets is the publication in the *Federal Register* of supplemental notices of proposed rulemaking. Supplemental notices are typically associated with proceedings in which agencies have significantly modified the substance of rules subsequent to the issuing of notices of proposed rulemaking.<sup>74</sup> In such contexts, supplemental notices can be useful instruments in providing agencies with protection from legal challenges claiming that a final rule is not a “logical outgrowth” of the notice of proposed rulemaking and associated public comments.<sup>75</sup>

Research in law and the social sciences has produced little systematic empirical information regarding agency use of supplemental notices of proposed rulemaking. A study of 584 actions announced as completed by the DOT between 2001 and 2003 finds that supplemental notices were published in 13 of the proceedings.<sup>76</sup> This study suggests that, given that the agency issues a number of supplemental notices on a yearly basis, such notices serve as an established means, at least in the context of the DOT, of refreshing rulemaking dockets that have for one reason or another been rendered outdated.

*Recommendation 5: Agencies should be encouraged to make use of existing procedures, such as supplemental notices of proposed rulemaking, to refresh rulemaking records that have become stale due to the passage of time, changes in facts and technology, and activation of additional interested parties.*

It is the position of the report that the current state of knowledge about the staleness of comments does not warrant the making of a more specific recommendation regarding the conditions under which public submissions become sufficiently outdated. Rather, the recommendation defers to agencies and interested parties to make such determinations according to their own conceptions. As a result, one central aspect of evaluating the recommendation would be to analyze the conditions under which agencies publish supplemental notices of proposed rulemaking. To what extent are supplemental notices published primarily due to the

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<sup>73</sup> Author interview with a former OIRA official.

<sup>74</sup> Lubbers, *supra* note 10 at 284-285.

<sup>75</sup> On supplemental notices of proposed rulemaking and the logical outgrowth test, see Arnold Rochvarg, “Adequacy of Notice of Rulemaking Under the Federal Administrative Procedure Act: When Should a Second Round of Notice and Comment Be Provided?”, *American University Law Review*, 31 (1981), 1-24, and Philip M. Kannan, “The Logical Outgrowth Doctrine in Rulemaking,” *Administrative Law Review*, 48 (1996), 213-225.

<sup>76</sup> Steven J. Balla, “Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking,” *I/S: A Journal of Law and Policy for the Information Society*, 1 (2004), p. 79.

passage of time, as opposed to changes in facts and technology and the activation of additional interested parties? Another aspect of evaluation concerns the nature of stakeholder responses to supplemental notices. How many comments are ordinarily submitted in response to supplemental notices? What kinds of arguments and evidence are typically offered by parties that file comments on supplemental notices? By addressing these and other salient questions, the utilization of supplemental notices to refresh rulemaking dockets will become better understood from an empirical point of view. Such new understandings will in turn potentially serve as means of informing the development of future recommendations on the underlying issue of the staleness of comments.

### **Confidential and Anonymous Comments**

A salient consideration in the circulation of comments is the extent to which agencies keep all or parts of comments out of the public record. For example, do agencies permit interested parties to submit comments anonymously? How do agencies handle requests that sensitive disclosures in comments, such as individual health records or proprietary business information, be kept confidential? As a means of assessing agency practices and formulating recommendations in these areas of concern, original research was conducted on the fields that interested parties are required to fill out when submitting comments via regulations.gov. In addition, insights were drawn from published research and interviewees were asked about the advantages and disadvantages of holding back from the public information about commenters and the substance of rulemaking filings.

The FCC requires that interested parties fill out a “Name of Filer” field when submitting information via the agency’s Electronic Comment Filing System.<sup>77</sup> To what extent is this practice of not accepting anonymous comments standard across agencies?<sup>78</sup> To address this question, research was conducted during the preparation of the report on agency practices in requiring the provision of commenter names at regulations.gov. This research focused on a set of agency actions that were currently open for public comment.<sup>79</sup> Of these actions, a sample of regulations drawn from 25 agencies was selected. These agencies include a wide variety of rulemaking entities, including the EPA, SEC, Federal Reserve System (FRS), and a number of DOT modal organizations. For each regulation in the sample, the “Submit a Comment” option was selected and it was noted whether the name of the commenter was a required field in the filing process.

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<sup>77</sup> See *supra* note 63 for information about the FCC’s Electronic Comment Filing System.

<sup>78</sup> An interviewee pointed out that although the identity of commenters can be forged in electronic filings, such forgery can also characterize paper submissions.

<sup>79</sup> These actions were identified via the following protocol. At regulations.gov, select “Regulations with Comment Periods Closing Soon.” Select “Closing Within 7 Days.” This search, which was conducted on March 4, 2011, produced 165 actions.

The research reveals a significant split in agency practices. Ten of the agencies, including the EPA and FRS, require commenters to submit information about their identity. Fifteen of the agencies, however, have no such required fields. These agencies include the SEC and DOT organizations such as the FAA and National Highway Traffic Safety Administration (NHTSA). This split suggests that no established best practice exists among agencies regarding the submission of information about commenter identities. Given this uncertainty, it is the position of the report that agencies should not be restricted in their practices regarding the filing of anonymous comments.

*Recommendation 6: Agencies should retain the discretion to establish their own policies regarding the submission of anonymous comments.*

With agencies free to permit or prohibit anonymous comments, an important point of evaluation will be assessing the consequences of agency choices for transparency, participation, and efficiency in rulemaking. To what extent does anonymity negatively affect the transparency of the commenting process? Under what conditions might prohibitions on anonymous comments inhibit participation on the part of individuals and organizations with a stake in agency actions? What implications do agency decisions regarding comment anonymity have for the efficiency of rulemaking? It is the position of the report that questions such as these must first be systematically addressed before more detailed recommendations can be considered regarding agency policies toward anonymous comments.

Agencies also vary substantially in their practices regarding the treatment of information contained in comments as confidential. Commenter requests for confidentiality raise difficult concerns for agencies, concerns that frequently operate in conflict with one another. For example, confidential submissions can leave agencies “without a basis for the rule in the record” and, as a result, “without a justification for the rule if it is challenged in court.”<sup>80</sup> Agency refusals to accede to confidentiality requests, however, run the risk of substantially diminishing the willingness of stakeholders to disclose sensitive information that is of direct salience for the actions in question.

Research on confidential business information, a particularly common and important form of proprietary commenting, reveals the spectrum across which agency practices differ in handling requests for confidentiality. The Internal Revenue Service does not accept comments containing confidential business information.<sup>81</sup> Other agencies, such as the FAA and Nuclear Regulatory Commission (NRC), allow for the submission of confidential business information.<sup>82</sup>

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<sup>80</sup> Heather E. Kilgore, “Signed, Sealed, Protected: Solutions to Agency Handling of Confidential Business Information in Informal Rulemaking,” *Administrative Law Review*, 56 (2004), p. 521.

<sup>81</sup> Kilgore, *supra* note 80 at 528.

<sup>82</sup> Kilgore, *supra* note 80 at 527.

These agencies exclude proprietary information from rulemaking dockets. Records of such exclusions, however, are inserted into dockets, alerting interested parties to the fact that confidential business information has been submitted.

Agencies such as NHTSA, the Federal Maritime Commission, and Department of the Interior take a third approach toward confidential business information.<sup>83</sup> These agencies mandate that parties submit two versions of documents containing confidential business information. One version is the document in its entirety. This version is not released to the public. The second version is stripped of all confidential business information and is posted to the rulemaking docket.

Another dimension along which agency practices vary concerns the timing of decisions regarding the merits of stakeholder requests for keeping business information confidential. Agencies such as the NRC, NHTSA, and Department of Labor (DOL) make immediate determinations as to whether to treat requested documents as confidential.<sup>84</sup> The EPA and FAA, in contrast, make no such immediate determinations, in effect conferring upon documents confidential status.<sup>85</sup> It is only when interested parties submit disclosure requests under the Freedom of Information Act that these agencies review claims of confidentiality.

Both of these aspects of agency policies toward confidential business information have salient implications for transparency, participation, and efficiency in rulemaking. For example, it is costly in terms of time and resources for agencies to make immediate determinations on confidentiality requests.<sup>86</sup> Such determinations, however, have positive consequences for the transparency of agency decision making.<sup>87</sup> Based on the evidence that has been generated thus far, it is not sufficiently clear how such potential tradeoffs are best evaluated. Precisely how costly is it for agencies to make immediate determinations on confidential business information? What implications do such determinations have for the informational quality of filings that are submitted during comment periods?

*Recommendation 7: Agencies should be encouraged to state explicit policies regarding the treatment of confidential business information and other forms of proprietary commenting.*

The principal aim of this recommendation is to increase the transparency of agency decision making processes concerning the adjudication of confidentiality requests. Such transparency would enhance certainty at the institutional level for both stakeholders and agency officials. This transparency would also facilitate systematic empirical investigation of the

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<sup>83</sup> Id.

<sup>84</sup> Kilgore, *supra* note 80 at 528.

<sup>85</sup> Kilgore, *supra* note 80 at 529.

<sup>86</sup> Id.

<sup>87</sup> Id.

advantages and disadvantages of practices that have been adopted by various agencies. Such analysis would in turn provide a basis for considering more detailed recommendations regarding the submission and handling of filings containing information that commenters request be treated as confidential.<sup>88</sup>

### **The Effects of Public Commenting**

A fundamental concern in the commenting process is the extent to which stakeholder filings have an impact on rulemaking outcomes. Is commenting a form of Kabuki theater, “a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues?”<sup>89</sup> If commenting is a substantively consequential component of rulemaking, then under what conditions are comments most likely to exert influence over agency decisions? In addressing such issues, the report considers evidence regarding two salient dimensions of public commenting. First, what types of stakeholders submit comments on prospective agency actions? Are certain types of stakeholders more active than others in participating in notice and comment rulemaking? Second, what effects do comments have on regulatory proceedings and outcomes? What are the inferential difficulties associated with empirical analyses of the efficacy of commenting?

#### *The Submission of Public Comments*

On occasion, interested parties collectively submit tens of thousands of comments in response to agency notices. In 1991, the Health Care Financing Administration (HCFA) published in the *Federal Register* a proposed schedule of fees for Medicare physician services.<sup>90</sup> Approximately 95,000 comments were received in response to this proposal.<sup>91</sup> In 1997, when the USDA issued proposed standards for the marketing of organic products, more than a quarter-

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<sup>88</sup> Previous research (Kilgore, *supra* note 80) on confidential business information comes to different conclusions than this report regarding the formulation and justification of recommendations. This prior research recommends that agencies be encouraged, or perhaps required, to adopt the procedures that are currently followed by NHTSA. (Kilgore, *supra* note 80 at 532.) Agencies should require commenters to submit public and non-public versions of documents containing confidential business information. Agencies should also make immediate determinations regarding requests for confidentiality. Such procedures, it is argued, promise to increase agency transparency and reduce the burdens associated with public involvement in the determination process. (Kilgore, *supra* note 80 at 532-533.) It is the position of this report, however, that enough is not yet known about the precise magnitude of these benefits to warrant adoption by agencies from across the government. In addition, insufficient attention has thus far been paid to the implications of these recommendations for the efficiency of the rulemaking process.

<sup>89</sup> E. Donald Elliott, “Reinventing Rulemaking,” *Duke Law Journal*, 41 (1991), pp. 1492-1493.

<sup>90</sup> Health Care Financing Administration, “Medicare Program; Fee Schedule for Physicians’ Services,” *Federal Register*, June 5, 1991, 25792-25978. In 2001, the Health Care Financing Administration was renamed the Centers for Medicare and Medicaid Services.

<sup>91</sup> Steven J. Balla, “Administrative Procedures and Political Control of the Bureaucracy,” *American Political Science Review*, 92 (1998), p. 666.

million comments were submitted.<sup>92</sup> This stakeholder response was larger in volume than any proceeding in agency history.<sup>93</sup>

Apart from such atypical high-volume rulemakings, to what extent do stakeholders submit comments in response to agency notices? Research indicates that notices of proposed rulemaking for the most part generate fairly limited numbers of comments. An analysis of 11 rules issued by three agencies during the Clinton administration reveals that no notice of proposed rulemaking received more than 268 comments.<sup>94</sup> The median number of comments submitted on these rules was 12.<sup>95</sup>

Other studies of public commenting have uncovered similar results. An analysis of 42 rules issued by 14 agencies in 1996 finds that the median number of comments submitted in response to the notices of proposed rulemaking was 19.<sup>96</sup> An analysis of 463 actions completed by the DOT during two three-year periods—1995-1997 and 2001-2003—reveals that a median number of 13 comments were submitted in response to the proposed rules.<sup>97</sup>

Much of what is known about the volume of comments, and public commenting in general, is derived from analyses of notices of proposed rulemaking. Researchers, in other words, have devoted relatively little attention to commenting in response to advance notices of proposed rulemaking, supplemental notices of proposed rulemaking, interim final rules, and direct final rules. In addition, systematic information has not yet been generated with respect to

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<sup>92</sup> Stuart W. Shulman, “An Experiment in Digital Government at the United States National Organic Program,” *Agriculture and Human Values*, 20 (2003), p. 255 (on the date of the notice of proposed rulemaking) and p. 257 (on the number of public comments submitted).

<sup>93</sup> Shulman, *supra* note 92 at 255.

<sup>94</sup> Golden, *supra* note 5 at 252. The three agencies are the EPA, NHTSA, and Department of Housing and Urban Development (HUD). (Golden, *supra* note at 252.) The 11 rules were selected randomly from all rules issued by these agencies in which both the notice of proposed rulemaking and final rule were published during the Clinton administration. (Golden, *supra* note at 251.)

<sup>95</sup> Golden, *supra* note 5 at 252. The median has advantages over the mean as a measure of the typical number of comments. These advantages derive from the presence of outliers, rulemakings during which unusually large numbers of comments are submitted. Outliers affect the calculation of the mean to a much greater extent than that of the median. In the sample of rules analyzed, a HUD proposed rule on the elderly and disabled received more than four times as many comments as any other proposal. (Golden, *supra* note 5 at 252.)

<sup>96</sup> West, *supra* note 7 at 79. See West, *supra* note 7 at 68 for a discussion of the procedures used to select the agencies and rules included in the analysis.

<sup>97</sup> Steven J. Balla and Benjamin M. Daniels, “Information Technology and Public Commenting on Agency Regulations,” *Regulation & Governance*, 1 (2007), p. 57. The analysis focuses on all DOT actions listed in the Unified Agenda as completed actions during the 1995-1997 and 2001-2003 periods for which a notice of proposed rulemaking was published in the *Federal Register*. (Balla and Daniels, p. 53.) One action dropped out of the analysis because information about the number of comments submitted in response to the proposed rule was unavailable. (Balla and Daniels, p. 64.)

levels of stakeholder activity during reply comment periods or comment periods of varying durations.

The few analyses of public commenting outside of notices of proposed rulemaking that have been published are case studies of high-profile proceedings and therefore cannot be readily generalized to rulemaking as it is ordinary carried out. Prior to issuing its proposed Medicare physician fee schedule, HCFA published a Model Fee Schedule in the *Federal Register*.<sup>98</sup> The payments included in the Model Fee Schedule were extremely tentative and did not encompass all physician services.<sup>99</sup> HCFA received 290 submissions in response to this initial request for public comments.<sup>100</sup>

An analysis of the setting by the EPA of best practicable technology standards for industrial water pollution control focuses on two distinct comment periods.<sup>101</sup> The first comment period occurred after the circulation of economic analyses and technical reports produced under contract by nongovernmental organizations.<sup>102</sup> The second comment period provided interested parties with the opportunity to provide feedback on proposed standards for specific industries.<sup>103</sup> Although comments filed in the second period were often more detailed than those that had been submitted in the first round, these latter comments for the most part elaborated on criticisms of the standards that had been raised in the earlier period.<sup>104</sup>

As a means of augmenting these case studies, original research was conducted as part of the preparation of this report. This aim of this research was to generate information about the volume of comments submitted in response to a cross-section of different types of agency notices. Searches were conducted of all final rules that were published in the *Federal Register* between January 1, 2011 and February 14, 2011.<sup>105</sup> These searches specified four types of notices in which comments are routinely solicited—“advance notice of proposed rulemaking”, “supplemental notice of proposed rulemaking”, “interim final rule”, and “direct final rule.” The results of the searches were examined for agency statements about the number of comments that had been received in response to each of the types of *Federal Register* notices.

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<sup>98</sup> Health Care Financing Administration, “Physicians’ Services; Model Fee Schedule,” *Federal Register*, September 4, 1990, 36178-36245.

<sup>99</sup> Balla, *supra* note 91 at footnote 5.

<sup>100</sup> Balla, *supra* note 91 at 666.

<sup>101</sup> Wesley A. Magat, Alan J. Krupnick, and Winston Harrington, *Rules in the Making: A Statistical Analysis of Regulatory Agency Behavior* (Washington, DC: Resources for the Future, 1986), p. 32.

<sup>102</sup> Magat, Krupnick, and Harrington, *supra* note 101 at 33.

<sup>103</sup> Magat, Krupnick, and Harrington, *supra* note 101 at 38-39.

<sup>104</sup> Magat, Krupnick, and Harrington, *supra* note 101 at 39.

<sup>105</sup> The option “Advanced Search” was selected at the website of the *Federal Register* (<http://www.gpoaccess.gov/fr/index.html>). The 2011 volume was then selected, as was the section “Final Rules and Regulations.”

Altogether, the searches identified 54 *Federal Register* documents.<sup>106</sup> One of these documents stated the number of comments received in response to an advance notice of proposed rulemaking.<sup>107</sup> This document, a DOT action addressing disadvantaged business enterprises, highlights that “approximately 30 comment letters” were submitted in response to an advance notice that had been published two years earlier.<sup>108</sup> Five of the notices that discuss interim final rules provide information about counts of comments. In four of these instances, the counts were 29 or fewer. The exception is a USDA notice that mentioned the submission of “approximately 624” comments in response to an interim final rule that had been published in January 2009.<sup>109</sup> In sum, the results of the advance notice and interim final rule searches are consistent with published findings on the frequency of stakeholder commenting on notices of proposed rulemaking, in that most documents generate fairly modest levels of participation and that occasional documents stimulate public involvement that is orders of magnitude higher than ordinary levels.

The results of the supplemental notice of proposed rule and direct final rule searches demonstrate that patterns of participation vary across different types of *Federal Register* notices. In none of these instances was more than a single comment submitted in response to the notices. These small numbers are likely attributable to the specific purposes that the two types of notices serve. For example, direct final rules are announcements that agency decisions are to become binding on a particular date unless significant adverse comments are submitted during the comment period.<sup>110</sup> The submission of a single adverse comment is therefore highly salient in that by itself it can trigger subsequent notice and comment rulemaking that would not have otherwise occurred. In such contexts, the submission of large numbers of comments in opposition to agency plans is redundant and therefore not likely as common as in the context of other types of agency notices.

*Recommendation 8: Agencies should be encouraged to report in the Federal Register the precise number of comments that are submitted during comment periods.*

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<sup>106</sup> Five of these documents contained the term “advance notice of proposed rulemaking”, seven contained the term “supplemental notice of proposed rulemaking”, 18 contained the term “interim final rule”, and 24 contained the term “direct final rule.”

<sup>107</sup> The other four documents identified in the “advance notice of proposed rulemaking” search did not mention specific numbers of comments. In general, there is substantial variation across rulemakings regarding the precision with which agencies provide information about the magnitude of the stakeholder response to *Federal Register* notices.

<sup>108</sup> Department of Transportation, “Disadvantaged Business Enterprise: Program Improvements,” *Federal Register*, January 28, 2011, p. 5083.

<sup>109</sup> This notice amended the agency’s regulations governing the implementation of the Farm and Ranch Lands Protection Program. Department of Agriculture, “Farm and Ranch Lands Protection Program,” *Federal Register*, January 24, 2011, p. 4032.

<sup>110</sup> See Lubbers, *supra* note 10 and the accompanying text.



The research conducted during the preparation of this report reveals substantial variation in agency practices regarding the reporting of levels of stakeholder activity during comment periods. In some instances, agencies announce the precise number of comments that were submitted. In other instances, agencies offer approximate counts or no information at all on the volume of comments. The burden imposed on agencies of reporting exact comment totals, and thereby increasing transparency regarding levels of public participation, ought to be minimal in the context of the vast majority of rulemakings. If, however, agencies find it difficult to produce precise counts, then it would be consistent with the intention of this recommendation for agencies to state the reasons for such difficulties and offer the most detailed approximations possible under the circumstances.

The principal means of evaluating the implementation of this recommendation would be to track the reporting of levels of commenting activity across agencies and rulemakings. Such evaluation would provide insight into the extent to which implementation of the recommendation increases transparency about the reporting of comment volumes. If agency reporting practices were to become more precise as a result of the recommendation, then the ability of researchers to systematically analyze commenting patterns over time and across agencies would be significantly enhanced. Such enhancement would be a positive byproduct of the recommendation.

In addition to overall levels of public involvement, a salient facet of stakeholder participation is variation in commenting practices across types of interested parties. A central issue in this regard is the extent to which regulated entities and industry interests are more active participants than consumers, environmentalists, and representatives of the public interest.<sup>111</sup> The limited evidence that has thus far been brought to bear on this issue suggests that although business organizations are in certain contexts more active than other segments of society, it is not uncommon for agencies to receive comments from diverse arrays of interested parties.

The aforementioned analysis of 11 rules issued by three agencies during the Clinton administration reveals that business participation is not uniformly higher than commenting by other types of stakeholders.<sup>112</sup> For rules issued by the EPA and NHTSA, industry interests submitted between two-thirds and one-hundred percent of the comments on the notices of proposed rulemaking.<sup>113</sup> For the majority of these agencies' rules, representatives of citizen interests did not submit a single comment.<sup>114</sup> By contrast, notices of proposed rulemaking circulated by HUD resulted in active commenting on the part of citizen advocacy and public

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<sup>111</sup> For a classic statement on differential mobilization by various types of societal interests, see E.E. Schattschneider, *The Semi-Sovereign People* (New York: Holt, Rinehart, and Winston, 1960).

<sup>112</sup> Golden, *supra* note 5 at 252-256.

<sup>113</sup> Golden, *supra* note 5 at 252-253.

<sup>114</sup> Golden, *supra* note 5 at 253.

interest groups, with minimal participation from corporations, trade associations, and business coalitions.<sup>115</sup>

An analysis of 37 EPA reviews of cancer-causing pesticides that took place between 1975 and 1989 reveals that pesticide manufacturers commented on virtually every proposed decision.<sup>116</sup> Although environmentalists were also active participants in a number of these review processes, such groups did not submit comments on about half of EPA's proposals.<sup>117</sup> Similarly, an analysis of thirty notices of proposed rulemaking issued by agencies inside the DOL and DOT finds that businesses submitted over 57 percent of the comments.<sup>118</sup> Non-business and non-governmental interests, by way of comparison, accounted for 22 percent of the comments.<sup>119</sup>

These analyses naturally beg an interpretive question. What level of imbalance in participation across different types of stakeholders constitutes a bias toward regulated entities and industry interests? The construction of an answer to this question may in part be contingent upon the influence of comments on agency actions. What are the general effects of comments on rulemaking proceedings? More specifically, do these effects vary across different types of interested parties? The issue of the influence of public comments will be considered in detail in the subsequent section of the report.

One final aspect of public involvement in rulemaking is the time during comment periods in which stakeholders file submissions. To what extent is it the case, for example, that stakeholders wait until immediately before the close of comment periods to transmit arguments and evidence to agencies? If such practices are common, then interested parties do not have regular opportunities to respond to comments that have previously been submitted by other stakeholders. Such opportunity structures, in turn, can have nontrivial implications for the influence that particular comments and types of comments exert over agency decision making. For example, comments that are submitted immediately prior to the close of comment periods are naturally shielded from the scrutiny of interested parties, including opposing interests that might otherwise communicate to agencies substantive criticisms.

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<sup>115</sup> Golden, *supra* note 5 at 254.

<sup>116</sup> Maureen L. Cropper, et al., "The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making," *Journal of Political Economy* 100 (1992), pp. 178-179 (on the EPA actions that were studied) and p. 187 (on the ubiquity of manufacturer participation).

<sup>117</sup> Cropper et al., *supra* note 116 at 187.

<sup>118</sup> Yackee and Yackee, *supra* note 5 at 133. The thirty rules were promulgated by the Occupational Safety and Health Administration, Employment Standards Administration, Federal Railroad Administration, and Federal Highway Administration between 1994 and 2001. (Yackee and Yackee, *supra* note 5 at 128-131.)

<sup>119</sup> Yackee and Yackee, *supra* note 5 at 133.

Research in law and the social sciences has not provided systematic evidence regarding the time during comment periods in which stakeholders file submissions. As means of enhancing understanding of this aspect of rulemaking participation, original research was conducted during the preparation of the report on the timing of filings in relation to comment period deadlines. Specifically, information was collected for the set of comments submitted to the DOT and APHIS that were discussed in the report's earlier section on the time it takes agencies to post submissions to regulations.gov.<sup>120</sup> In the context of the present analysis, the duration of interest is the number of days that elapsed between stakeholder submission and the close of the comment period.<sup>121</sup>

For the sample of comments, all of which were submitted to the DOT and APHIS between January 2008 and February 2011, the average submission was filed more than twenty days in advance of the deadlines established by both of the agencies. This average duration is indicative of general patterns in the timing of submissions in that the distribution of stakeholder filings did not vary substantially across the DOT and APHIS. For both agencies, about ten percent of submissions were filed after comment periods had closed. This finding is consistent with the estimation of an interviewee at the EPA that less than ten percent of the comments received by the agency are submitted after deadlines have passed.

The largest single concentrations of filings occurred on the days that comment periods closed. Approximately one-fifth of the comments in the sample were submitted on closing days. This percentage increases to one-third when comments filed on final days are considered together with comments submitted on the three days prior to the close of comment periods. On the other extreme, about twenty percent of submissions were filed fifty days or more in advance of comment deadlines. This prevalence of early commenting is broadly consistent with the argument, made by several interviewees, that advantages can follow from filing information early in the commenting process. Submitting information at the outset of comment periods offers interested parties the opportunity to influence the nature of the arguments and evidence that are subsequently filed by other stakeholders and ultimately considered by agency decision makers.

An important feature that distinguishes comments from one another is the quantity and quality of information that is transmitted to the agency. Some comments are simply statements of agreement or disagreement with agency proposals. Other comments, in contrast, contain extensive economic, scientific, and technical analyses and justifications. Given this general distinction, an important consideration is the extent to which there is variation across types of

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<sup>120</sup> See *supra* notes 64-66 and the associated texts for details on these comments and the protocol through which the comments were identified.

<sup>121</sup> This number is coded as negative in the context of comments submitted after deadlines have passed. The prevalence of such comments is discussed below.

comments in the timing of submission. Is it the case, as posited by a number of interviewees, that analytically informative comments are especially likely to be filed toward the end of comment periods?<sup>122</sup>

As a means of making an initial assessment of this possibility, information was recorded about the nature of the parties that submitted the DOT and APHIS comments under study. Specifically, a determination was made as to whether each comment was filed by an individual or on behalf of an organization. The notion in this approach is that, as a general matter, organizational comments are likely to incorporate higher levels of economic, scientific, and technical information than submissions filed by individuals.<sup>123</sup> 411 comments were identified as being submitted by individuals, while one hundred comments were coded as organizational submissions.<sup>124</sup> Approximately one-fourth of the comments filed by individuals were submitted on the final days or one of the three days prior to the closing of comment periods. For organizational comments, fifty percent of submissions were filed on one of these dates. It is therefore the case, at least in the context of this limited analysis, that analytically informative comments were more likely than simple expressions of opinions to be submitted at or near the end of comment periods.

*Recommendation 9: The analysis of stakeholder behavior ought to be considered a fundamental component of assessments of the public commenting process.*

For the most part, this report focuses on the implications of *agency* decision making on transparency, participation, and efficiency in public commenting. As has been suggested by this analysis on the timing of submissions, stakeholder decisions have significant consequences for these fundamental concerns as well. For example, submissions filed at or near the end of comment periods can have negative impacts on the transparency of commenting, the character of stakeholder participation, and the efficiency of the rulemaking process. As an interviewee pointed out, it is not feasible to mandate that interested parties file submissions early in comment periods or to impose on stakeholders responsibility for responding to one another's comments. Nevertheless, it is possible to generate systematic information about various aspects of stakeholder decision making in the commenting process. It is the position of this report that the collection and analysis of such information ought to play a central role in assessments of transparency, participation, and efficiency in public commenting.

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<sup>122</sup> See *supra* note 11 for one main justification of this expectation.

<sup>123</sup> A task for future research is to examine the extent to which this notion is sustained by systematic empirical analysis of individual and organizational comments. In addition, future analyses of the timing of submissions ought to consider the utilization of alternative measures of analytically informative comments, such as the number of words or pages contained in comments.

<sup>124</sup> There were eight comments for which such a determination could not be made in a ready manner. These comments were excluded from the present analysis.

*Analyzing the Impact of Public Comments*

The APA requires that agencies consider the “relevant matter presented” in response to notices of proposed rulemaking.<sup>125</sup> Over the decades, this basic requirement has begged a number of specific questions. What constitutes “consideration” on the part of agencies? By what standards is the relevance of submitted materials to be evaluated?

With these questions in mind, courts have stated general principles regarding agency responsiveness to public comments. For example, the D.C. Circuit has stated that: “‘Consideration of comments as a matter of grace is not enough.’ It must be made with a mind that is open to persuasion.”<sup>126</sup> According to the Ninth Circuit, a key standard for relevance is the extent to which arguments and evidence raised in comments “would require a change in the agency’s proposed rule.”<sup>127</sup>

Given the centrality of agency responsiveness in public commenting, the issue has generated attention among legal and social scientific researchers. This research demonstrates that there are instances in which comments exert significant influence over agency decision making. In the aforementioned rulemaking on the marketing of organic products, the USDA instituted wholesale changes after receiving hundreds of thousands of comments on its proposal.<sup>128</sup> According to Secretary of Agriculture Dan Glickman, “If organic farmers and consumers reject our national standards, we have failed.”<sup>129</sup>

Such responsiveness is consistent with the perspectives articulated by interviewees who are government officials. These officials universally acknowledged the utility of comments. One interviewee stated that comments are at times determinative of rulemaking outcomes. Another interviewee opined that nearly every significant regulation is changed in some way as a result of the information contained in comments.

Interviewees, however, did not ascribe influence to comments of all varieties. One interviewee stated that “I feel” comments are not all that useful to agency decision makers. Another interviewee identified the provision of data, citation of studies, and specification of

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<sup>125</sup> 5 U.S.C. 553 (c).

<sup>126</sup> *Advocates for Hwy. & Auto Safety v. Fed. Hwy. Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (citing *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988)).

<sup>127</sup> *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1151 (9<sup>th</sup> Cir. 2002) (quoting *Am. Mining Congress v. EPA*, 965 F.2d 759, 771 (9<sup>th</sup> Cir. 1992)).

<sup>128</sup> See Shulman, *supra* notes 92 and 93 and the associated texts for information about this rulemaking and the public’s response to the proposed standards. See Shulman, *supra* note 92 at 255 (on the nature of the changes made in response to the comments).

<sup>129</sup> Shulman, *supra* note 92 at 255.

alternatives as essential elements that differentiate important comments from those that carry little weight.

These statements are consistent with research on the efficacy of various types of comments. An analysis of three rulemakings carried out by the FEC, NRC, and Department of the Treasury reveals that agency responsiveness occurs in proportion to the sophistication of the information contained in comments.<sup>130</sup> In this analysis, sophisticated comments are distinguished by a number of specific characteristics. These determinants of influence include knowledge about the statutory underpinnings of rulemakings and provision of logical arguments and legal, policy, and empirical information that is directly relevant to the changes being suggested.<sup>131</sup>

Such findings that agencies routinely respond to substantive comments naturally beg the question of the magnitude of this responsiveness. According to one researcher, the changes agencies make to proposed rules in response to comments “tend to be small and painful, and they are often subtractive rather than innovative or additive.”<sup>132</sup> The aforementioned analysis of 11 rules issued by three agencies during the Clinton administration reveals that although most proposed rules were altered in some way, only one proposal changed in a manner that can reasonably be considered significant.<sup>133</sup> Other research finds that wholesale changes in proposed rules were unusual during the administrations of both Bill Clinton and George W. Bush.<sup>134</sup>

The evidence is mixed regarding the extent to which comments filed by regulated entities and industry interests exert greater influence over agency decision making than arguments and evidence submitted by consumers, environmentalists, and representatives of the public interest. Some research finds that “undue business influence” is not generally manifested in the commenting process.<sup>135</sup> One reason for such limited influence is that business interests are frequently internally divided and therefore do not exert unambiguous pressure on agency decision makers.<sup>136</sup> Other research, in contrast, reveals that “agencies appear to alter final rules to suit the expressed desires of business commenters, but do not appear to alter rules to match the expressed preferences of other kinds of interests.”<sup>137</sup>

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<sup>130</sup> Mariano-Florentino Cuellar, “Rethinking Regulatory Democracy,” *Administrative Law Review*, 57 (2005), p. 414.

<sup>131</sup> Cuellar, *supra* note 130 at 431.

<sup>132</sup> West, *supra* note 7 at 67.

<sup>133</sup> Golden, *supra* note 5 at 260.

<sup>134</sup> Stuart Shapiro, “Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations,” *Journal of Law and Politics*, 23 (2007), pp. 407-408.

<sup>135</sup> Golden, *supra* note 5 at 262.

<sup>136</sup> *Id.*

<sup>137</sup> Yackee and Yackee, *supra* note 5 at 135.

One explanation for such mixed results is that analyses of the influence of comments are limited in empirical scope and, as a result, do not provide a strong basis for making inferences about the conditions under which stakeholder participation matters. A number of interviewees who are legal and social scientific researchers identified a more fundamentally challenging explanation. According to these interviewees, it is exceedingly difficult to engage in the process tracing necessary to reliably conclude that comments affect agency decision making.<sup>138</sup> In other words, “to say that a proposed rule was changed is not to say the change necessarily resulted from public comment.”<sup>139</sup> The occurrence of *ex parte* communications between agency officials and interested parties, for example, may exert substantial influence over the course of rulemakings.

Taken together, the evidence on the effects of public comments on agency rules suggests that no unconditional conclusions can be readily drawn. There is little doubt that comments at times exert fundamental influence over agency decision making. For the most part, however, significant effects are limited to comments that exhibit high levels of sophistication. Furthermore, there are many instances in which even sophisticated comments are associated with nothing more than marginal changes in agency proposals.

Given the apparent importance of comment sophistication, the report makes the following recommendation regarding the guidance agencies provide to prospective commenters.

*Recommendation 10: Agencies should be encouraged to develop and publicize statements about the characteristics of effective comments.*

One potential way to facilitate the submission of sophisticated comments is for agencies to adopt proactive measures. Some agencies currently provide interested parties with information about best practices in commenting. For example, the DOT’s Office of the General Counsel offers on its website a list of suggestions for how to craft and submit effective comments.<sup>140</sup> This list includes items such as responding directly to issues and questions raised in proposed rules, specifying alternatives to agency solutions, and explaining the basis for calculations included in comments.

It is the position of the report that agencies ought to retain the discretion to develop statements about effective comments that are tailored to their own policy and environmental

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<sup>138</sup> One interviewee observed that it is also challenging to isolate the influence of business interests, given the association between the identity of commenters and the sophistication of submissions. Observations of business influence, in other words, may at least in part be reflections of comment sophistication rather than organizational identity itself.

<sup>139</sup> West, *supra* note 7 at 71.

<sup>140</sup> See <http://regs.dot.gov/informalruleprocess.htm#How%20do%20I%20prepare%20effective%20comments>, accessed on March 11, 2011.

circumstances. There is no immediate need to craft uniform guidance that applies to organizations from across the government, unless officials from various agencies determine that such uniformity is feasible and beneficial. Regardless of this determination, agencies ought to be universally encouraged to publicize commenting guidelines via prominent venues. One example of such a venue is readily identifiable pages on agency websites. In addition, agencies can provide links to these web pages in the sections of *Federal Register* notices in which comments are solicited. Finally, a compilation of links to agency statements can be circulated via regulations.gov. Such steps would have the potential effects of increasing the transparency of the commenting process, as well as the quality of stakeholder participation in this process.

The impacts of this recommendation are best evaluated from two perspectives. First, to what extent do agencies adopt statements about the characteristics of effective comments? Second, are agency adoptions associated with increases in the sophistication of submitted comments? From this second perspective, comment quality ought to be assessed in light of the specific guidelines and metrics developed at the level of individual agencies. Such targeted assessments will protect against drawing conclusions that are insufficiently attentive to variation in agency and stakeholder circumstances.

### **Summary and Conclusions**

This report has investigated agency and stakeholder practices in the public commenting process that has been a central component of rulemaking since the enactment of the APA in 1946. Specifically, the report has addressed a number of issues pertaining to agency solicitation, circulation, and responsiveness to comments submitted by parties interested in prospective regulatory actions. These issues are the duration of comment periods, the provision of opportunities for stakeholders to reply to comments that have previously been submitted, the potential staleness of comments when proposals take a number of years to finalize, the confidentiality and anonymity of comments, and the effects of comments on the content of agency regulations.

In addressing these questions, the report has drawn on information from three sets of sources. Relevant research in law and the social sciences has been reviewed and synthesized. Original data were collected during the preparation of the report, as a means of generating insight in specific areas where existing knowledge is especially limited. Finally, more than a dozen interviews were conducted with rulemaking experts from inside and outside of government.

Based on analyses of this assembled information, the report has offered ten recommendations concerning the practice and analysis of public commenting. These recommendations suggest modest steps that agencies can take to enhance transparency and participation in public commenting without significantly diminishing the efficiency of



rulemaking proceedings. The recommendations are grounded in the notion that the commenting process is not broken and therefore is not in need of fundamental reform. Although the published findings, original data, and expert interviews identified uncertainties and concerns in current practices, these sources suggest that, on balance, commenting continues to possess substantial utility for both agencies and stakeholders.

As an example of the modest nature of the recommendations, it is the position of the report that mandating comment periods of a minimum duration is an unnecessary burden to place on agencies. A similar notion holds for the report's recommendation on the utilization of reply comment periods. Rather than support a requirement that agencies make use of reply commenting, the report suggests that encouraging adoption is an appropriate and potentially powerful catalyst. As a general matter, encouragement from institutionally influential sources, such as ACUS, OIRA, and Congress, readily attracts the attention of agency decision makers and therefore is well positioned to impact the procedural environments within which regulations are developed.

The recommendations are also characterized by a common focus on the provision of information. For example, the report recommends that agencies record the dates on which comments are submitted, as well as the dates on which comments are posted to the Internet. The report also recommends that agencies establish policies of posting comments to online dockets within announced time periods after submission. Such information provision measures serve to enhance the transparency of the commenting process. These measures have the potential to bring about increases in participation and efficiency as well. To what extent do stated policies on the posting of comments result in agencies increasing the speed with which submissions are made available to the public? With what regularity do interested parties take advantage of opportunities to respond to previously submitted comments that are accessible via the Internet?

Systematic assessments of questions such as these are the modes through which the effects of the report's recommendations are most naturally and effectively evaluated. This empirical orientation suggests a final recommendation for ACUS to consider.

*Recommendation 11: ACUS should place a high priority on commissioning empirical studies of rulemaking.*

In the context of this report, empirical analysis is essential in determining the efficacy of the modest, information provision-oriented recommendations that have been developed. If such analyses indicate that these recommendations have not enhanced transparency and participation, then more substantial, mandate-oriented approaches can be targeted for scrutiny in subsequent ACUS consideration of rulemaking comments.

## APPENDIX A

### **Brief Report on Economically Significant Rules and the Duration of Comment Periods**

Steven J. Balla

April 19, 2011

During the March 24, 2011 meeting of the Committee on Regulation of the Administrative Conference of the United States (ACUS), there was an extended discussion of the association, or lack thereof, between the substantive importance of proposed rules and the duration of the comment periods associated with agency proposals. Is it the case, for example, that rules of the highest significance are ordinarily assigned comment periods of 30 days or longer in duration? In general, to what extent do agencies provide for comment periods of substantial duration when soliciting public feedback on actions of the greatest magnitude and impact?

This association between rule significance and comment period duration is salient for a number of reasons. In my consultant report, I have recommended that there should not be a required minimum duration of comment periods. One expressed concern in response to this recommendation is that such an approach leaves open the possibility that agencies might exercise discretion over the duration of comment periods in ways that are in some respects problematic. For example, proposals that are likely to be met with substantial opposition might be assigned comment periods of relatively brief durations, thereby limiting public input in the very instances in which such input is potentially of great consequence. In addition, in a previous recommendation, ACUS had called for amending the Administrative Procedure Act to prohibit, under most circumstances, comment periods of less than 30 days in duration. Although past recommendations are not necessarily determinative of current ACUS decisions, such existing statements presumably carry substantial weight in ongoing discussions.

After the March 24, 2011 meeting, I was asked by ACUS staff to return to the sample of comment periods that I had assembled during the preparation of my report. For each of these comment periods, I had collected information about the number of days that the prospective agency actions were open for public input. My specific charge was to explore the nature of the association, if any, between the substantive importance of the actions at hand and the durations of the assembled comment periods.

During the course of the research that has since followed, I identified a small number of the proposed actions in the sample as economically significant. I then compared the duration of the comment periods for these economically significant actions with the durations for all of the other prospective actions that did not meet this classification. Although this comparison is severely limited in nature and scope, it offers an initial glimpse into the connection between rule importance and comment period duration.

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Perhaps the most general way to juxtapose the comment periods of economically significant actions with the comment periods of other types of actions is to compare their respective mean durations. The average duration of the comment periods for proposed actions that are economically significant is 45.1 days. The average duration of the comment periods for all other types of actions is 38.7. Overall, then, economically significant rules have comment periods that average nearly one week longer in duration than the comment periods for other types of prospective agency actions.

As an additional means of comparison, I examined the respective prevalence across the two sets of actions of comment periods of less than 30 days in duration. For actions that are not economically significant, nearly one-quarter of the proposals have comment periods of less than 30 days in duration. Although there are instances in which economically significant rules have comment periods of such short durations, such occurrences are relatively uncommon.

Furthermore, when such short comment periods occur in the context of economically significant actions, there are circumstances surrounding the actions that can perhaps help account for agency decisions regarding comment period duration. On August 3, 2010, for example, the Environmental Protection Agency (EPA) published an economically significant proposed rule on oil spill prevention and established a two-week comment period. The reason provided by the EPA for such a short comment period was that the proposal being published on that particular day served to further extend the compliance date by which facilities must prepare, amend, and implement Spill Prevention, Control, and Countermeasure plans. In other words, although the overall action being taken by the EPA was indeed economically significant, the proposal itself had previously been exposed to public scrutiny through earlier comment periods.

To be clear, the data that have been brought to bear in this post-consultant-report research on the issue of rule importance and comment period duration are extremely limited and are by no means necessarily generalizable to the rulemaking process in general. Simply put, the aim here has been to provide an initial sense of the extent to which economically significant actions are afforded comment periods of substantial duration, in comparison to actions not meeting this classification.

With these limitations in mind, I would suggest that robust oversight of agency practices in the setting of comment period durations, by Congress and the White House Office of Information and Regulatory Affairs, can serve as institutional constraints on potential abuses, should the report's recommendation that there not be a required minimum duration of comment periods be adopted by the Committee on Regulation and by ACUS in general.



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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



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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<sup>1</sup>).

**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.<sup>2</sup> 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.<sup>3</sup> In contrast, some agencies affirmatively announce that they will *not* be able to consider late comments.<sup>4</sup> Other agencies are more ambiguous, stating that any comments

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<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> *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”).

<sup>4</sup> *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



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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).<sup>5</sup> Still other agencies provide that comments submitted too late for the action at issue will be considered as informal suggestions for future action.<sup>6</sup> Finally, some agencies announce in later Federal Register notices that late comments already received by the agency will be considered.<sup>7</sup> 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.<sup>8</sup>

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,<sup>9</sup> 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”).

<sup>5</sup> 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.”).

<sup>6</sup> 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”).

<sup>7</sup> 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.”).

<sup>8</sup> 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).

<sup>9</sup> 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.



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**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



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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.