Comment from Special Counsel Jeffrey S. Lubbers on *Public Engagement in Agency Rulemaking Under the Good Cause Exemption*

November 4, 2024

Line 27: Instead of "the proposed rule," shouldn't it be "the rule the agency is considering"? It seems odd to use the term "proposed rule" when the agency has already invoked or may be considering issuing the rule as a final rule under the good cause exemption.

Line 58: "comment on" instead of "comment in"

Lines 62-63: As a style matter, instead of "when agencies use direct and interim final rulemaking" say "when agencies use direct final and interim final rulemaking"

Otherwise it could be read as "direct rulemaking" and "interim final rulemaking.' This issue recurs elsewhere.

Line 127: This is a bit wonky, but instead of referencing EO 14,094 here, shouldn't it be EO 12,866 as amended by EO 14,094. If you read 14,094, it makes clear it is amending 12,866—which is still the main operative EO. This occurs again in paragraph 9(a).

Line 136: Instead of "subsequent rule," wouldn't it be clearer to say "final final rule"? It comes up again in paragraph 9.

Line 160: The term "subsequent rule" is also used here. I again would use "final final rule" for IFR's. But I don't think either term is apt in referring to DFRs because any "subsequent" rule would be a regular N & C rule that is separate from the original DFR. Moreover I don't think an agency would ever do any public engagement during the comment period of the DFR—maybe they would do some beforehand, but once they issued it as a DFR, they would simply wait to see if anyone objected.

As for paragraph 11(a)-(e), why don't we just say that our Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking, should apply to both IFRulemaking and DFRulemaking?? I do note that 2014-4 does say that "Agencies should not impose restrictions on ex parte communications before an NPRM is issued" although they "may" disclose them if they want to. This recommendation as written would apply to pre-NPRM communications, but it doesn't differentiate between them and others.

Line 173:—I renew my dubiety about singling out independent agencies here. See ACUS Recommendation 88-9.

Mr. Goodenough's question: I do disagree with that part of his comment that urges ACUS not to make a recommendation to the President or OMB. ACUS has made numerous recommendations to OMB, and its highly influential recommendation 88-9, while written in the passive voice was cleary addressed to the White House. Moreover, ACUS's statute clearly authorizes it to make recommendations "to the President."

See 5 U.S.C. § 594: the Administrative Conference of the United States may–

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to

administrative agencies, collectively or individually, and **to the President**, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;