



REGULATORY CHECKBOOK

November 9, 2011

Mr. Paul R. Verkuil
Chairman, Administrative Conference of the United States
1120 20th St. NW Suite 706 South
Washington, DC 20036

Dear Mr. Verkuil,

The procedures ACUS is following to seek and obtain public comment prior to the November 14, 2011 meeting appear fundamentally incompatible with its stated mission of “promoting effective public participation and efficiency in the rulemaking process.”¹

ACUS published notice of this meeting in the *Federal Register* on October 28, 2011.² While ACUS’ established policy of allowing 15 days for public comment is already unusually short by federal agency standards, it also requires comments to be submitted five calendar days before the meeting date.³ This further truncates the public’s opportunity to participate to a mere 10 calendar days.

In this case, ACUS did not make the requisite materials available for review on the date of *Federal Register* publication, but rather five calendar days later, finally posting the outlines on November 2, 2011.⁴ This left the public only seven calendar days (five business days) to read the materials, consider them thoughtfully, and prepare and submit comments. Prof. Beermann’s outline of his Midnight Rules Project is nine single-spaced pages long.⁵ Mr. Copeland’s outline of his Regulatory Analysis Requirements Project is more than seven single-spaced pages long.⁶ I hope to put something together later today, but any comments I am able to prepare and submit will be necessarily incomplete and rushed.

¹ Administrative Conference of the United States, “About; The Conference,” <http://www.acus.gov/about/the-conference/>.

² Administrative Conference of the United States, Committee on Rulemaking, “Notice of Public Meeting, *Federal Register* 76:209 (October 28, 2011), p. 66891.

³ Administrative Conference of the United States, “Meeting Policies and Procedures,” <http://www.acus.gov/research/meeting-policies-and-procedures/>.

⁴ Shawne McGibbon, ACUS General Counsel, “RE: November 14th meeting,” email to Richard B. Belzer dated November 2, 2011 (5:11 pm).

⁵ Jack M. Beermann, “Midnight Rules Report Outline,” <http://www.acus.gov/wp-content/uploads/downloads/2011/11/Outline-of-Midnight-Rules-Project.pdf>.

⁶ Curtis W. Copeland, “Regulatory Analysis Requirements Draft Outline,” <http://www.acus.gov/wp-content/uploads/downloads/2011/11/Review-of-Regulatory-Analysis-Outline.pdf>.

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This limited opportunity for public participation appears contrary not only to ACUS' stated mission, but President Obama's commitment to open exchange, as set forth in Section 2(b) of Executive Order 13563:

To promote ... open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.⁷

As you know, OIRA Administrator Sunstein's implementation memorandum goes even further, putting substantial flesh on the Executive Order's bones:

In this context, "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. Section 2 thus seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself...

This provision is not satisfied simply through the acceptance of electronic submission of rulemaking comments by interested parties who lack information about the arguments and information provided by other parties. A central goal of public participation is to improve the content of rules, and open exchanges of information by interested parties can be helpful in that endeavor.^{8,9}

ACUS is not proposing regulations, of course, but it certainly hopes that its recommendations for regulatory process reform will be taken seriously. I am concerned that the highly abbreviated procedures ACUS is following reduce that likelihood substantially. First, ACUS' procedures could embolden agencies to give short shrift to their own implementation of Executive Order 13563. If a council of senior federal agency administrative lawyers looks like it is not taking the President's directive seriously, it's hardly clear why they should do so. The Office of Management and Budget made a similar miscalculation when it established expansive information quality guidelines and error correction for federal agencies

⁷ Barack Obama, 2011. "Executive Order 13563: Improving Regulation and Regulatory Review." *Federal Register* 76 (14), pp. 3821-22.

⁸ Cass R. Sunstein, 2011. *Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies: Executive Order 13563, "Improving Regulation and Regulatory Review,"* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

⁹ ACUS new Internet forum (<http://www.acus.gov/forum/>) might provide just such an example, but as of today no member of the public has used it.



generally, but adopted narrowly tailored standards and severely restrictive procedures with respect to the information OMB itself disseminates.¹⁰

Second, ACUS unwittingly invites everyone to strategically refrain from participating. Those who like the recommendations ACUS makes can choose to endorse them as vigorously as they desire. But those who don't like ACUS' recommendations can quite credibly dismiss them as the products of fatally flawed administrative procedures.

It would be better if ACUS set a high example for the agencies concerning how to effectively implement President Obama's open government principles. This requires making all of its policies and procedures transparent, including for example the criteria it uses to evaluate and rank research proposals, and adhering to both the letter and the spirit of Executive Order 13563. ACUS' recommendations would be based on research that is more likely to meet the highest quality standards and have greater procedural credibility.

Sincerely,



President
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¹⁰ Compare Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication." *Federal Register* 67 (36):8452-8460 (2002), and Office of Management and Budget, *Office of Management and Budget Information Quality Guidelines* http://www.whitehouse.gov/omb/info_quality_iqg_oct2002/.

