



Committee on Rulemaking

Minutes
November 14, 2012

Members Attending

Gary Bass

*Public Member—Bauman
Foundation*

Neil Eisner

Senior Fellow—Transportation

Cynthia Farina

Public Member—Cornell

Randy May

*Public Member—Free State
Foundation*

Elizabeth McFadden

*Gov't Member—Department
of Education*

Nina Mendelson

*Public Member—University
of Michigan*

Rebecca Orban (alternate)

*Gov't Member—Coast
Guard*

Richard Pierce

*Public Member—George
Washington University*

Robert Rivkin (Chair)

*Gov't Member—Department
of Transportation*

Teresa Roseborough

Public Member—MetLife

Robert Shapiro

*Gov't Member—Department
of Labor*

Carol Ann Siciliano

*Gov't Member—
Environmental Protection
Agency*

Lon Smith

*Gov't Member—Internal
Revenue Service*

ACUS Staff Attending

Emily Bremer

Staff Counsel

Gretchen Jacobs

Research Director

Megan Kindelan

Communications Director

David Pritzker

Deputy General Counsel

Paul Verkuil

Chairman

Matthew Wiener

Executive Director

Amber Williams

Attorney Advisor

Invited Guests Attending

Michael Herz

*Consultant—Benjamin N.
Cardozo School of Law*

Jim Tozzi

*Public Member—Center
for Regulatory Effectiveness*



The meeting commenced at 1:04 p.m. in at the Administrative Conference of the United States.

Meeting Opening

Committee Chair Robert Rivkin opened the meeting and asked people to introduce themselves. Mr. Rivkin and the committee approved, by voice vote, the minutes of the committee's March 21, 2012 meeting. The Conference' Research Director, Gretchen Jacobs, introduced the Social Media in Rulemaking Project.

Social Media in Rulemaking Project—Outline and Discussion

Professor Michael Herz, the project consultant, discussed his outline with the committee. He indicated that while the rulemaking process has moved online, the process has not changed much from when rules were promulgated without the Internet. People expected that the move online would result in a dialogic transformation of the process: commenters would engage in back and forth exchanges, resulting in a more conversational flow of information. In Recommendation 2012-8, *Agency Innovations in e-Rulemaking*, the Conference tentatively endorsed the use of social media in rulemaking. The recommendation was tame; the question is whether ACUS should say more.

Professor Herz identified three issues the report would address: (1) how are agencies using social media outside of the rulemaking process (FB, twitter, etc.); (2) how could or should such uses of social media be translated into the rulemaking context; (3) why isn't social media being used in rulemaking (i.e., policy rationales, legal impediments). Professor Herz asked a question about the report's scope: Does the committee want him to consider whether to endorse social media in rulemaking?

Committee Chairman Rivkin invited general discussion of the issues.

Professor Richard Pierce asserted that there are two decisionmaking tracks: (1) the traditional notice-and-comment method; and (2) additional processes, such as the advance notice of proposed rulemaking ("NPRM") and post-NPRM, which are both unregulated periods in terms of ex parte communications. Professor Pierce recommended that the Conference encourage agencies to welcome social media input in the informal, unregulated process.

Neil Eisner asserted that about half of all of agencies have rules governing ex parte contacts. He disclosed that the Department of Transportation (DOT) is working with Cornell to set up a blog to encourage and collect public comments. Ex parte is not the key issue, rather, the key issue is whether agencies have the resources required to review and keep up with a blog. The DOT-Cornell partnership is helping the agency understand how to use graphics and plain language in social media, as well as how to reach out on Facebook to encourage the public to participate. Mr. Eisner recommended that the Conference examine the pros, cons, costs, and benefits of social media. The project may not yield a definitive conclusion or recommendation



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because everyone is still learning about social media. And agencies may have to limit social media usage due to budget issues.

Carol Ann Siciliano noted that after closing the comment period, while there may be ex parte meetings, they tend not to produce any new information to be included in the record. Anyone who would like to meet with the Environmental Protection Agency (EPA) may do so, and EPA in fact has a lot of meetings. She advised that the Conference should not yet recommend whether agencies should employ social media, but rather speak to the legal issues that agency general counsels may see as impediments. Perhaps concerns about these legal issues can be overcome with creativity and thoughtful leadership.

Professor Cynthia Farina suggested that whether agencies should use social media or not is not the way to frame the question because social media is not one thing, it's a suite of things. An agency using Twitter may need to consider different issues than an agency using a wiki. Instead of endorsing social media generally, the Conference should urge agencies to identify what they are trying to accomplish with social media and provide some guidance regarding how different social media tools can be best used to accomplish those goals. She affirmed Ms. Siciliano's point that it would be helpful for the Conference to help clear away the legal underbrush, especially since agencies do not have much control over whether and what information will come into a rulemaking through social media. For example, members of the public could cut and paste from an agency's blog and submit that as a formal comment.

Chairman Paul Verkuil agreed that disaggregating social media is a fruitful way to go. Professor Herz also agreed. He further noted that he could imagine a world in which blog posts would not be considered to be comments. If someone cut and paste into a formal comment, the blog would become a comment. Mr. Eisner noted that such a practice could raise privacy concerns, like the disclosure of e-mail addresses.

Professor Herz noted that the extent to which agencies can restrict formal comments is another question. Agencies currently impose limits, such as on comment size and number and size of attachments. Agencies do not limit comments made via social media, although they may be provoked to do so.

Gary Bass thought the report outline should address additional issues, such as how the use of social media in rulemaking might affect those with disabilities. It would also be helpful if the project could address a number of other questions. What is the purpose of social media? How do we assess the success of social media? Do we want better rules to govern agency use of social media? Why do we want to use it? Is the goal to generate more sophisticated comments? To increase participation? Is social media designed as a mass outreach tool? Mr. Bass noted that social media may just be another vehicle for e-Rulemaking; it might reach a broader, but not necessarily more sophisticated, public.

Jim Tozzi indicated that the federal government has a dozen interactive public documents, including Wiki pages and blogs. Web masters clean up the obscenities. When the federal government sets up a blog, the biggest issue is getting people to comment. An exception



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to this issue is the Federal Financing Committee. This co-op had a link via which people commented and the government took what it wanted from those comments and included them in the record. Federal employees read the dockets and selectively downloaded what they wanted to include in the record. There were only two rules governing the inclusion of the information: (1) no obscenities; and (2) no ad hominem attacks.

Mr. Eisner stated that unions and businesses strongly discourage their employees from participating in blogs. Mr. Bass encouraged the Conference to weigh the consequences of the federal government selectively choosing what would be included in the record and what that would do to the rulemaking process.

Professor Farina emphasized that the Conference should encourage agencies to think about what their goals are for the use of social media and to try to identify the stakeholder groups that would not be represented in a more traditional notice-and-comment promise. In her work, she has found that eighty percent of those who comment via social media have not participated in rulemaking before. Organized, sophisticated commenters from industry do not participate in the social media part of the process because the traditional routes are adequate for their needs. This suggests that social media may be most effective for engaging those who haven't traditionally been involved.

Mr. Rivkin pointed out that it's not just the agency that matters, but also the subject of the rule. Professor Farina agreed and affirmed that integrating social media into rulemaking is not a one-size-fits-all process. Characteristics of a rulemaking that may call for different types of public outreach and engagement need to be identified.

Professor Pierce noted that the idea of providing different forums for experts to exchange views is intriguing. He does not think an agency could do it, but perhaps an organization such as Cornell or the Brookings Institute could. He asked what kind of contractual relationship would be involved and how that might tie the agency's hands. Is it possible to have anything other than an informal relationship? In addition, is selective inclusion in the record legal? Ms. Bremer noted that the report should include court cases that involved analogous actions, such as agencies pulling news articles for inclusion into the docket. Chairman Verkuil agreed.

Teresa Wynn Roseborough asked whether the Conference might consider adding a portal or even an entire blog to Regulations.gov. Professor Farina thought both of those would be good additions. Ms. Roseborough expressed her view that the report should consider not only legal obstacles. It should also explore how the use of social media might increase participation and how agencies should determine the value of comments. She was concerned that agencies could be drowned in comments. Mr. Bass suggested that one way to address this concern would be for organizations to submit a summary of social media discussions to the agency as a comment, as some organizations currently do.

Mr. Rivkin called for a brief break so that he, Chairman Verkuil, Ms. Jacobs, and Professor Herz could confer and focus the discussion for the remainder of the meeting.



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When the meeting reconvened, Mr. Rivkin explained that Professor Herz thought it would be helpful for the agency representatives in the room to briefly identify any best practices that should be part of the report. Professor Herz also asked for worst practices.

Mr. Eisner offered that one of the most useful things is for agencies to talk with and involve one another. In this time of limited resources, agency collaboration is essential and useful.

Ms. McFadden noted that blogging has been somewhat effective, such as with the Department of Education's grant competitions. The agency did not use the notice-and-comment process for the "Race to the Top" grant process. Rather, the agency posted an executive summary on its website as a blog posting and invited the public to comment on specific elements. There was no back and forth exchange, and the agency did not consider all of the comments, but it was a helpful and informative process.

Ms. Siciliano stated that she was not aware of the EPA using blogs or wikis in relation to a proposed rule. But the EPA often uses social media in other contexts and appreciates the variety of input that it generates from people who usually do not participate in rulemaking. The EPA has not pursued the use of social media in rulemaking because of the cost, technological requirements and expertise, and, most especially, legal risks. She explained that while the EPA will not be an innovator in this area, it could be a good customer. Items that the report could address that would be helpful to the EPA would include an analysis of the potential legal issues and discussion of the reasons why agencies would want to use social media.

A public attendee noted that the National Highway Traffic Safety Administration (NHTSA) would benefit from an evaluation of the circumstances in which social media input is the most valuable. For example, if NHTSA needs technical information to inform the development a rule, comments from a lay member of the public may not be as relevant or valuable. On the other hand, if NHTSA is considering a less technical rule, then lay public comment may be more beneficial.

Lon Smith noted that the Internal Revenue Service (IRS) has not used social media in its published guidance yet. The IRS has seven hundred lawyers who draft the guidance, so the agency would need to get a lot of people to sign on before it could be rolled out. The IRS recognizes that social media is a valuable tool to disseminate information and is thinking about how to use it in the rulemaking process. He agreed with Mr. Eisner's recommendation that the report should include an assessment of the costs and benefits of using social media in the rulemaking process.

Ms. Orban noted that terms of service is the key issue for the Coast Guard because the agency is more interested in quality interaction among commenters, rather than just generating more comments. The Coast Guard also has a record-keeping issue. It lacks both virtual and actual space. The agency has had difficulty determining what must keep and has been reluctant to use social media because of the potentially massive amount of information it may need to retain.



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Joel Kaufman, a public attendee from the Federal Communications Commission (FCC), noted that the FCC monitors its blogs itself. It does not have a relationship with a third-party service provider like the one that DOT has with Cornell. The FCC has found that actively moderating agency blogs is a challenge because the agency: (1) does not have sufficient resources; and (2) was concerned that active moderation would be used against it. The FCC used an Ideascale and, while it did not cause issues in one rulemaking, the FCC would be reluctant to use it again. If it did use Ideascale again, it would include a disclaimer that ideas are not ranked based on merit, but on how they facilitate the discussion.

Professor Herz explained that he would proceed with his report largely according to his outline. He affirmed that the Conference is not in a position to endorse or reject social media generally. Instead, it should be a more disaggregated analysis, encouraging agencies to consider using certain social media tools in particular contexts. The report would also consider potential legal impediments to give agencies further guidance.

Meeting Closing

The meeting adjourned at 2:59 p.m.