

The Administrative Conference: Review of Research Projects

Emily Bremer, Attorney Advisor

Administrative Codes and Registers Section
2014 Summer Meeting



The Administrative Conference “is a public-private partnership designed to make government work better.”

President Barack Obama
July 8, 2010

ACUS Overview

- The Conference is an independent agency in the executive branch.
- 101 voting members, including:
 - Chairman: Appointed by the President and confirmed by the Senate.
 - Council: 10 members, split between public and private; appointed by President.
 - Government Members: 50 high-ranking agency officials.
 - Public Members: 40 individuals from the private sector, including academics, private practitioners, and experts working for non-profit organizations; politically balanced.
- Non-voting members include:
 - Liaison Representatives: other agencies and professional associations (e.g., ABA).
 - Senior Fellows: previous members, including three Supreme Court Justices.

The Research Process

- Members are divided into six committees.
 - Each has a different subject matter focus:
 - Adjudication, Administration & Management, Collaborative Governance, Judicial Review, Regulation, and Rulemaking.
- Independent research conducted by consultants or in-house researchers.
- Recommendations crafted in open committee meetings and adopted by vote of the full Assembly of the Conference at semi-annual plenary sessions held in June and December.

Recommendations

- The Conference typically issues 8-10 recommendations per year.
- Conference recommendations can be directed to:
 - Congress, urging it to create, amend, or repeal statutes;
 - The Executive Branch, including agencies and the White House; and
 - The Judiciary, through the Judicial Conference.

E-Rulemaking Recommendations

- The Conference was de-funded in 1995, just as electronic communications were coming into use.
- Since 2010 re-birth, many of our projects have focused on the new realities agencies face as a result of these technologies.
- Several recent recommendations have contributed incrementally to a body of work addressing these new realities:
 - Recommendation 2011-1, *Legal Considerations in e-Rulemaking*
 - Recommendation 2011-2, *Rulemaking Comments*
 - Recommendation 2011-8, *Agency Innovations in e-Rulemaking*
 - Recommendation 2013-5, *Social Media in Rulemaking*

Social Media in Rulemaking

- Expected “revolution” in rulemaking—hope for a more dialogic process—but process has remained largely recognizable, even as it has moved from a paper process to an electronic process.
- Social media holds obvious potential for fulfilling the hopes of e-Rulemaking.
- Issues related to the use of social media in rulemaking were raised in Committee on Rulemaking’s deliberations on previous e-Rulemaking recommendations.
- But these issues were beyond the scope of those projects and deserved careful study.

Purpose and Goals of the Study

- “Social media” defined as “any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public.”
- Federal government use of social media is significant, but largely related to non-rulemaking activities.
- Non-use of social media in the rulemaking context apparently attributable to legal uncertainty and policy considerations.
- Goal is to establish a framework for experimentation, with understanding that further examination will likely be required.

Research

- Consultant: Professor Michael Eric Herz of Cardozo School of Law.
- Research included workshop co-sponsored with the GWU Regulatory Studies Center and use of third-party facilitator for online discussion.
- Few available case studies:
 - Department of Transportation's work with Cornell eRulemaking Initiative (CeRI).
 - Federal Communications Commission
 - Consumer Financial Protection Bureau

Recommendation 2013-5

- Adopted on December 5, 2013.
- Recommendation takes a tone of cautious optimism.
- Recognizes that social media may bring benefits, but not in all rulemakings.
- Pre-rulemaking stage (i.e., before a Notice of Proposed Rulemaking (NPRM) is issued) and retrospective review may be ideal times for experimentation.
- Acknowledges costs.
- “Social media” must be disaggregated: it consists of a set of tools that will evolve and change over time.

Recommendation 2013-5

- Addresses:
 - Opportunities to improve public outreach;
 - Importance of thoughtful planning;
 - Necessity of explaining to the public how a social media discussion will be considered;
 - Special considerations related to particular types of social media tools; and
 - Legal considerations.

Recent Recommendations

- Recommendation 2014-1, Reducing FOIA Litigation Through Targeted ADR Strategies.
- Recommendation 2014-2, Government in the Sunshine Act.
- Recommendation 2014-3, Examining the Guidance Function of Agency Preambles.
- Recommendation 2014-4, Ex Parte Communications in Informal Rulemaking.
- These four recommendations were published at 79 Fed. Reg. 35,993 (June 25, 2014), and are also available at www.acus.gov.

Current ACUS Projects (Selected)

- Retrospective Review of Agency Rules.
- Petitions for Rulemaking.
- Best Practices for Using Video Teleconferencing for Hearings and Related Proceedings.
- Federal Administrative Adjudication.

Thank you!

- Information on these and all our other projects available at www.acus.gov.
- Please contact me at ebremer@acus.gov or 202.480.2086.

