



E-Rulemaking: Digital Dilemmas

Neil Eisner
Assistant General Counsel
U.S. Department of Transportation
ACUS – Brookings Forum
November 30, 2010



E-Rulemaking

- Dockets
- Tracking
- Information websites
- Research
- Blogs
- Interactive compliance tools
- Etc.



But many obstacles

- Practical
 - Budgetary/staffing resources
 - Inertia/resistance to change
 - Bureaucracy
 - Lack of confidence
 - Identification of needs
- Legal issues
- Hard copy obstacles may be exacerbated on Internet



The Legal Issues

- Inconsistent/different requirements
- Legal record
- Signatures
- Obscenity
- Copyrighted material
- Fairness
- Illegally obtained information
- Privacy
- Electronic participation



Inconsistent/Different Requirements

- Whether agencies can impose inconsistent/different requirements
- E.g.:
 - Copyrighted material
 - Obscenity
 - Irrelevant comments
 - Contact information



Legal Record

- Whether electronic record can be legal record and scanned paper can be destroyed
- Whether electronic record is subject to unacceptable tampering
- Whether agency must docket --
 - Entire blog, even if done by private party
 - Each, same, standard form comment
 - Linked documents



Signatures

- Whether commenters can be anonymous
- Whether signatures are necessary
- Whether agency must determine if commenters are who they say



Obscenity

- Whether agency must review comments before posting
- Whether agency may/must censor comments
- What standards agency may/must apply



Copyrighted Material

- Whether agency must determine if material is copyrighted
- Whether agency may post copyrighted material in docket
- Whether conditions would apply
- Whether it makes a difference whether submitted by agency or a commenter



Fairness

- May agency choose one, for profit, site over another to provide information
- May agency provide less opportunity based on internet-access assumptions (e.g., very short reply comment period)



Illegally Obtained Information

- Whether agency must not post illegally obtained information
- Whether agency is obligated to determine whether commenter obtained information illegally



Privacy

- Whether commenters have privacy protections with respect to their comments
- Whether agency must review comments prior to posting to ensure commenters do not provide information about themselves or others that warrants protection
- Would this include email addresses on email submissions



Electronic Participation

- Whether agency may require all comments be submitted electronically
- Whether agency may require all comments be submitted in easily-searched, electronic or standard format



Conclusion

- Difficult to resolve
- Difficult to ignore