

# The Rulemaking Road Show: Bringing the Public Notice and Comment Process to the Public

**THE REGULATIONS THAT federal agencies develop through the rulemaking process affect all of us in every aspect of our lives. In the past year alone, the Department of Transportation (DOT) and its**

agencies issued or proposed regulations prohibiting truck and motor coach drivers from texting while driving, increasing protections for airline passengers, setting fuel economy standards for cars and light trucks, and enhancing automobile safety. The rulemaking process is designed to involve the public in shaping these regulations. Agencies are required to publish proposed rules for public comment and to review and take those comments into account as the DOT develops the final rules. Theoretically, at least, the rulemaking process should be the forum in which the general public has the most influence and impact over our government's actions. Yet there are probably more Americans who have been struck by lightning than there are those who are familiar with the federal rulemaking process, let alone who participate in it.

On Jan. 21, 2009, President Obama issued a Memorandum on Transparency and Open Government, in which he committed to maintaining an unprecedented level of openness in government and to making the government both participatory and collaborative. As part of that effort, the *Federal Register*, which publishes proposed and final rules for public review, has launched a user-friendly, informative, and accessible website: [www.federalregister.gov](http://www.federalregister.gov). But typical members of the public still may not know anything about the *Federal Register* and might not visit the website to see how proposed regulations might affect them. Even in controversial rulemakings, most substantive comments come from highly organized groups of stakeholders, not from the individual citizen who may have extremely useful information to share.

For a small government agency—for example, the Federal Motor Carrier Safety Administration (FMCSA)—involving the public presents a particular challenge. FMCSA is a DOT agency that oversees the safety of commercial motor vehicles. The agency's mission—to prevent crashes, injuries, and fatalities involving large trucks and buses—touches the millions of Americans who travel on the nation's highways. The regulations

the agency promulgates directly affect the way several million truck and bus drivers operate. An agency that has such a broad impact on individual citizens and businesses is one that most needs to reach the public with its comment process. So, how does FMCSA engage those truck and bus drivers as well as the traveling public in its regulatory process? The agency has done so by using innovative technologies to bring the rulemaking process to the public and by taking the FMCSA's show on the road.

### Regulations 2.0

In spring 2010, FMCSA and DOT partnered with Cornell University's e-Rulemaking Initiative (CeRI) to explore ways to open the federal regulatory process to more effective citizen participation. In concert with Secretary of Transportation Ray LaHood's March 31, 2010, announcement of FMCSA's notice of proposed rulemaking (NPRM) banning texting by interstate truck and bus drivers, CeRI unveiled Regulation Room. Regulation Room, found at [www.regulation-room.org](http://www.regulation-room.org), is an online environment that facilitates public participation that allows citizens to learn about the rulemaking process and provide effective feedback to the agency's decisionmakers on a selected proposed rule.

The website provided information on FMCSA's NPRM related to texting while driving in order to allow visitors to the site to understand and comment on the proposed rule. To drive traffic to the site, CeRI employed a broad outreach plan that used press releases and e-mail, in addition to social media outlets like Twitter and Facebook. Secretary LaHood also highlighted the initiative on his own blog, Fast Lane, on his Facebook page, and on his Twitter account. The secretary focused on the importance of public involvement in rulemaking and encouraged people to post comments on the Regulation Room site.

During the 34 days that the site was open, it received almost 2,000 unique visitors, including many truck and bus drivers as well as members of the public. CeRI invited those visitors to comment on the NPRM and its components, discuss them, and react to them in real time. CeRI then prepared and posted a summary of those comments for the website's visitors to review for accuracy and to edit collaboratively. CeRI submitted the final summary to FMCSA's rulemaking docket in the name of the participants.

The pilot project proved to be a success. Members

of the public who might not have otherwise engaged in the rulemaking process reviewed the proposed rule and provided insightful comments. In fact, 94 percent of registered users reported that they had never before submitted comments for the federal rulemaking process. According to Professor Cynthia R. Farina, a professor at Cornell University Law School, “Everyone has the legal right to know about proposed new regulations and give the agency feedback, but few people are aware of their rights and fewer exercise them effectively. We are optimistic that Regulation Room will encourage more meaningful public involvement in the regulatory policy process.” Professor Farina commended the DOT and Secretary LaHood for their leadership in finding “innovative ways to inform and engage the public.”

The DOT has continued to work with CeRI, which subsequently hosted a discussion on the Office of the Secretary of Transportation’s NPRM dealing with the rights of airline passengers. That discussion attracted 19,320 unique visitors. Currently, FMCSA and CeRI are partnering again on a new NPRM, which proposes to require that electronic onboard recorders be used instead of paper logs for recording truck and bus drivers’ hours of service.

#### **FMCSA’s Road Show**

FMCSA has also brought the rulemaking process directly to the public. One of the agency’s most highly visible rulemakings addresses possible changes to its regulation related to trucking hours of service—a regulation that governs the number of hours that a truck driver can drive and work before being required to go off duty. With fatigue-related crashes and deaths a critical safety issue and with questions about the impact new rules might have on drivers, businesses, the enforcement community, and the general public, FMCSA sought as much input as possible *before* drafting an NPRM on trucking hours of service. Rather than limit the location of its public listening session to Washington, D.C., the FMCSA team traveled to sites across the country for additional listening sessions. In early 2010, the team held meetings in Los Angeles and Dallas in addition to sessions designed to encourage participation by truck drivers that were held at the Mid-America Trucking Show in Louisville, Ky., and at the nation’s largest truck stop in Davenport, Iowa. FMCSA also conducted a webcast of the sessions held in Washington and Louisville, streaming them live through the Internet.

On Feb. 17, 2011, after publishing the NPRM on trucking hours of service (75 FR 82170, Dec. 29, 2010), FMCSA held another listening session in the Washington, D.C., area. Once again, the agency broadcasted the entire session through live webcasts to enable public participation across the country. Nearly 7,000 people participated in that webcast. For 12 hours, FMCSA also hosted a user-friendly, interactive, online comment-and-question forum for

the public. In order to accommodate diverse work schedules as well as various time zones, the forum was held live from noon until midnight. The FMCSA employees who staffed the site took comments, facilitated engagement and discussion between commenters, and answered basic questions about the rule. Almost a thousand people logged onto the site and FMCSA received over 400 comments. The agency collected all the comments and questions it received during the listening session and from the public online forum and included them in the official docket for the NPRM dealing with trucking hours of service for further public review.

#### **Fostering Debate**

On another high-visibility rulemaking, FMCSA adapted the traditional notice and comment rulemaking process in order to increase public dialogue on the proposed rule. On Dec. 21, 2010, FMCSA published an NPRM that proposes to restrict the use of handheld mobile telephones—including handheld cell phones—by drivers of commercial motor vehicles while operating in interstate commerce (75 FR 80014). To facilitate vigorous discussion and feedback on that proposed rule, FMCSA offered both a traditional 60-day initial comment period as well as a 30-day reply period. That reply period allowed the public to respond to or comment on the comments that were made initially, instead of simply providing comments unilaterally. This interactive process is expected to provide the agency with more complete feedback and deeper insight into its proposal.

#### **Rooting Out “Dumb” Regulations**

The DOT and FMCSA have also engaged the public as they survey the current regulatory landscape for rules that may need to be revised or removed. On Jan. 18, 2011, President Obama issued Executive Order 13563 (76 FR 3821, Jan. 21, 2011), which outlined a plan to improve regulation and regulatory review. Executive Order 13563 reaffirms the governing principles of contemporary regulatory review, including Executive Order 12866, “Regulatory Planning and Review” (58 FR 51735), by requiring federal agencies to design cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness. Recognizing the importance of those principles to existing regulations as well as to new ones, Executive Order 13563 requires agencies to review existing significant rules to determine if they are “outmoded, ineffective, insufficient, or excessively burdensome.” As President Obama said in “Toward a 21st-Century Regulatory System” (*Wall Street Journal*, Jan. 18, 2011)—an opinion piece about that executive order—“we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.”

**RULEMAKING** *continued on page 38*

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## PROGRAMS *continued from page 37*

keep the fund solvent until the end of calendar year 2012.<sup>7</sup>

There is great pressure for Congress to make decisions before the end of 2011 on Highway Trust Fund programs for the next five to six years. There appears to be little appetite for any further infusion of general funds to support short-term extensions, but the best opportunity to make adjustments in funding mechanisms and to create program stability is at hand. As the 2012 presidential election approaches, political pressures will make it increasingly difficult to tackle the tough decisions required for long-term reauthorization.

In short, the next few months are critical to the future of federal transportation programs. Now is the time when interested practitioners and the public alike will discover whether the new consensus we need can be forged so that the country can improve its transportation system—a system that is crucial for enhancing the quality of citizens' lives and maintaining an efficient and productive economy. **TFL**

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### Endnotes

<sup>1</sup>See Report of the Congressional Budget Office, *Public Spending on Transportation and Water Infrastructure*, November 2010, Appendix A.

<sup>2</sup>Richard Weigoff, *Palace Coup: President Ronald Reagan and the Surface Transportation Assistance Act of 1982*, HIGHWAY HISTORY, Federal Highway Administration

<sup>3</sup>TRANSPORTATION WEEKLY, 8 (March 9, 2011).

<sup>4</sup>*Ibid.*

<sup>5</sup>Federal Highway Administration, *2008 Status of the Nation's Highways, Bridges and Transit: Conditions and Performance*, undated, pages 3-3, 3-18, and 3-28.

<sup>6</sup>James L. Oberstar, Former Representative, D-Minn., Remarks to the Transportation and Infrastructure Summit, August 10, 2010.

<sup>7</sup>See TRANSPORTATION WEEKLY, 8 (March 9, 2011).

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## RULEMAKING *continued from page 29*

On Feb. 16, 2011, the DOT published a notice of regulatory review (76 FR 8940) that invited public comment on how the department could most effectively implement Executive Order 13563. On March 14, 2011, the DOT hosted a Retrospective Regulatory Review public meeting in Washington, D.C. That meeting, in which the department's general counsel and the chief counsels of each DOT agency participated, was broadcast via a live webcast, allowing the panel to hear from a variety of speakers, both in person and by phone. In late March/early April, FMCSA sought similar feedback on existing regulations from its Motor Carrier Safety Advisory Committee, a committee that consists of representatives from safety advocacy groups, motor carriers, shippers, truck and bus associations, labor, and state motor carrier enforcement agencies. FMCSA held the April 1, 2011, portion of the advisory committee's public meeting during the 40th Anniversary Mid-America Truck Show in Louisville—the nation's most widely attended trucking convention and an ideal forum for receiving feedback from small businesses and independent truck drivers.

To allow for less formal submissions to the DOT and its agencies on regulatory review, the department created a website using IdeaScale, [dotregreview.ideascale.com](http://dotregreview.ideascale.com). The blog-like, interactive website allows visitors to file their suggestions by transportation mode and to vote in support of other users' comments. The website is designed particularly for individuals and

small entities that might be uncomfortable or unfamiliar with the normal method of submitting comments to the DOT. The site also may assist participants in refining their suggestions and gathering additional information or data to support those suggestions.

As President Obama ordered, federal agencies must ensure that regulations protect the public interest and our safety, health, and environment while promoting economic growth. To do our jobs, federal regulators must leave the office, get out of Washington, D.C., and employ technology creatively so that they can hear the voices of experts, businesses, and the general public on how best to strike that balance. With these tools and with some creativity, even small agencies like the DOT's Federal Motor Carrier Safety Administration can take advantage of limited resources to engage the public in the critical work that agencies do. **TFL**

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