
PROSPECTS FOR IMPROVING THE REGULATORY PROCESS USING E-RULEMAKING

BY JANE E. FOUNTAIN

U.S. citizens participate directly in rulemaking—a deliberate agenda-setting process designed to elicit, sort, and clarify fact and opinion from a wide variety of interested parties. The rulemaking process offers a directness and scope for public participation unavailable in other policy-making processes [1].

Rulemaking procedures are defined by law in section 553 of the Administrative Procedure Act of 1946, which requires agencies to publish a notice of proposed rulemaking in the Federal Register; to permit any interested party to engage in the rulemaking process through provision of written data, views, or arguments; and to publish the rule 30 days before it takes effect. Regulatory rulemaking often entails a multiyear process requiring intense use of paper, time, and information. Thus, nearly all federal agencies are in the process of experimentation and adoption of e-rulemaking motivated by legislation such as the Paperwork Reduction Act of 1995 as well as intuitive judgments of efficacy [3].

One of the best-known examples of e-rulemaking—the U.S.

Department of Agriculture's National Organic Program (NOP)—began in December 1997. Information technologies presorted and auto-indexed material by topic, including thousands of identical form letters whose solicitation was organized by special interest groups and which comprised more than 50% of the public comments received. In an online docket room, the public record was fully accessible on the Web. Although initial costs of digitizing some material were high, benefits of online docket rooms appear to outweigh those costs. Accessibility of comments and

related material offsets manual processing of individual requests for information through the Freedom of Information Act. More importantly, public perception of the legitimacy and transparency of the NOP e-rulemaking process was highly favorable, even among opponents of the regulation.

THE U.S. General Accounting Office, among other federal actors, is optimistic about the potential of e-rulemaking to “reduce regulatory burden; improve the transparency of regulatory processes; and, ultimately, facilitate the accomplishment of regulatory objectives” [4]. Yet the research base to support such optimism has not been built.

To this end a symposium on e-rulemaking, sponsored by the NSF Digital Government Program and organized by the Council for Excellence in Government and Drake University, convened about 50 experts from government, industry, and universities (for details, see [2]). Participants concluded that four broad issues might serve to outline a research program for e-rulemaking. First, there appears to be unmet citizen demand to participate in the policy-making process. Rulemaking is the central source of U.S. law and a key agenda-setting function and thus a natural point of access to policymaking for citizens. Second, a knowledge base to support e-rulemaking initiatives will demand input from government policymakers, social scientists, and computer scientists.

Third, development of e-rulemaking capacity within the federal government may require substantial involvement of the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). If public participation in rulemaking were to increase significantly or to change because of e-rulemaking, this might affect relationships between the OMB and agencies. Federal agencies will require resources to make sizeable IT systems available on the Web. Government-wide standards for e-rulemaking will need to be developed. Agencies will need incentives to modernize rulemaking procedures and in some cases to motivate them to participate in empirical research projects. Leadership from OMB might facilitate technology transfer across agencies.

Finally, little empirical evidence exists to date to

measure the potential effectiveness of e-rulemaking. Key research questions posed by the participants focus on effectiveness measures: Does e-rulemaking affect the level and quality of citizen participation? What is the effect of e-rulemaking on the quality of the rules that result? How do various types of citizens and public actors view the relative legitimacy of e-rulemaking versus traditional processes? What is the variance in agency perceptions of the public’s ability and interest to participate in rulemaking given the technological tools to do so? What is the impact of e-rulemaking on levels of respect and other measures of interaction among adversaries in rulemaking processes?

Technological change always yields unanticipated consequences. Technological changes embedded within a complex social and political process central to democratic participation, such as e-rulemaking, require close and careful

study of their technical and social dimensions. **C**

Technological change always yields unanticipated consequences.

REFERENCES

1. Kerwin, C. *Rulemaking: How Government Agencies Write Law and Make Policy*. Congressional Quarterly Press (1994), Washington, D.C.
2. Shulman, S. et al. Citizen agenda-setting: The electronic collection and synthesis of public commentary in the regulatory rulemaking process. In *Proceedings of National Conference on Digital Government Research*. (May 2001, Redondo Beach, CA); www.dgrc.org/dgrc/dgo2001/papers/session-3/shulman.pdf. Also see Coglianese, C. E-rulemaking: Improving the Regulatory Process. National Defense University (June 10, 2002), ksghome.harvard.edu/~CCoglianese.Academic.Ksg/Publications.html.
3. U.S. General Accounting Office. *Federal Rulemaking: Agencies’ Use of Information Technology to Facilitate Public Participation*. GAO/GGD-00-135R (June 30, 2000).
4. U.S. General Accounting Office. *Regulatory Management: Communication about Technology-Based Innovations Can Be Improved*. GAO-01-232 (Feb. 12, 2001).

JANE E. FOUNTAIN (jane_fountain@harvard.edu) is the director of the National Center for Digital Government (www.ksg.harvard.edu/digitalcenter) and an assistant professor of public policy at the John F. Kennedy School of Government at Harvard University, Cambridge, MA.

Permission to make digital or hard copies of all or part of this work for personal or classroom use is granted without fee provided that copies are not made or distributed for profit or commercial advantage and that copies bear this notice and the full citation on the first page. To copy otherwise, to republish, to post on servers or to redistribute to lists, requires prior specific permission and/or a fee.