

eRulemaking Challenges in the United States

Summary for Bertelsmann-GW Workshop on Regulatory Consultation

Rick Otis, November 2010¹

We define eRulemaking as the application of information technology to the process of developing regulations. It offers the potential to substantially transform the process and the use of regulatory information by improving internal government operations, enhancing transparency and public engagement, creating more productive deliberation and collaboration mechanisms, reducing time delays, simplifying terminology, making document formats more consistent and understandable, and improving regulatory outcomes. It also offers the potential to better coordinate related statutes, regulations, legal reviews, compliance, enforcement, and programmatic evaluation.

Over the past 15 years, various efforts have been undertaken by the U.S. government, think tanks, interest groups, and academia to advance eRulemaking. These include a research effort by the National Science Foundation, small and large scale use of software by individual federal agencies to manage their internal regulatory processes, a federal government-wide on-line regulatory docket and public commenting system, and academic research papers and forums.

While some eRulemaking improvements have been made, substantial opportunities remain. Many federal agencies employ complex, time consuming, and manual work processes. Public understanding, access, and engagement remains limited. Transparency continues to be circumscribed. Related activities (such as developing laws and regulations) remain distinct processes. Congressional interest is limited. Little effort seems to be dedicated to developing an overall vision for eRulemaking and putting in place the steps necessary to address these and other challenges.

Regulations.gov

Federal agencies often develop regulations as part of their efforts to implement laws passed by Congress. The process includes:

1. announcing the agency's intended action in the government-wide Regulatory Agenda;
2. publishing a proposed rule in the Federal Register for public comment; and
3. considering public comments and issuing a final rule that will also be published in the Federal Register.

¹ Erin Bankey contributed to this draft.

Most documents associated with the rulemaking process are made public in a Docket. Until 2003 when Regulations.gov launched, most federal Dockets were paper-based and scattered over hundreds of different locations.

[Regulations.gov](http://www.Regulations.gov) was created to provide an online source for documents associated with rulemaking at most all [federal regulatory agencies](#). It enhances the public's ability to participate by providing access to searchable database of proposed rules, public comments, background studies and analyses, final rules, etc. It also allows users to submit a comment, application, petition, or adjudication document on a regulation, access popular, newly posted, or closing-soon regulations from the homepage, sign up for e-mail alerts about a specific regulation, and subscribe to RSS feed by agency. As described on the Regulations.gov website, the eRulemaking Program manages Regulations.gov with the assistance of 25 partnering federal agencies.

Challenges

The following are select challenges faced by the US federal government as it moves forward with eRulemaking.

Challenge 1: Should and if so, how can broad public engagement in regulatory decision making be productively increased?

Federal agencies have undertaken many experiments over the past decades to create greater public participation in the rulemaking process. Most sought to create deliberative and collaborative mechanisms aimed at reducing conflict during the process and greater acceptance of the final regulatory decision. Few, if any, of these experiments have become permanent, formal parts of agencies' public notice and comment procedures.

Challenge 2: What institutional mechanisms appear best able to advance eRulemaking?

Except for certain aspects of rulemaking (White House oversight, the Federal Docket Management System (FDMS), and publication in the *Federal Register*), federal agencies manage their own regulatory development processes and any associated information technology. They are generally hesitant to relinquish this role or accept externally imposed requirements. The National Science Foundation has reduced its research role and non-government entities such as universities provide a limited support role. No one entity has either been assigned or taken the role of advancing the field.

Challenge 3: What degree of coordination and common system architecture should be employed across federal agencies to increase the use of information technology in all phases of the rulemaking process?

Differing approaches to providing agency staff with information technology tools have advantages and disadvantages. The FDMS provides a common electronic docket and public commenting service to all federal regulatory agencies. Those under control of the President are required to use its services. Other uses of information technology are within

the purview of individual agencies. The entity managing the FDMS or other federal entities could provide additional eRulemaking services to agencies such as records management, team work and other workflow tools, comment analysis capabilities, data standards, etc.

Challenge 4: Should eRulemaking systems be designed to allow non-government entities to link their systems (e.g.: other interfaces for the electronic docket) and/or be provided electronic access to regulatory data for their purposes.

Non-government entities have expressed a significant interest in a greater degree of integration between their activities and government's internal systems. The growing use of internet-based social networking tools, software as a service, and an increasingly digitally aware population raise questions about the need and desire to more fluidly share government data, more readily interact with government systems, and supplant government services.

Challenge 5: Should and if so, how can information technology be employed to coordinate the related (but currently distinct) steps of establishing law, creating regulations, resolving legal challenges, assuring compliance and enforcement, and determining whether programmatic outcomes have been achieved?

Currently, each of these steps operates as if they are functionally separate although they are part of an integrated chain of activities. This degree of separation creates delay, confusion, and opportunities for mistakes.

Suggested additional resources:

1. US Federal Document Management System (FDMS)
<http://www.regulations.gov/search/Regs/home.html#home>
2. US Regulatory Information Service Center (RegInfo)
<http://www.reginfo.gov/public/>
3. E-Rulemaking: Information Technology and Regulatory Policy, New Directions in Digital Government Research
http://www.dgsociety.org/library/E_Rulemaking_Report2004.pdf
4. E-Rulemaking: Information Technology and the Regulatory Process
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=500122
5. Transparency and Public Participation in the Rulemaking Process: Recommendations for the New Administration
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292911
6. University of Pennsylvania, RegBlog
<http://www.law.upenn.edu/blogs/regblog/>
7. Cornell University, RegRoom experiment
<http://regulationroom.org/about/>
8. OpenRegs.com
<http://openregs.com/>
9. University of Massachusetts: Qualitative Data Analysis Program
<http://www.umass.edu/qdap/index.html>
10. Achieving the Potential: The Future of Federal Rulemaking
<http://www.abanet.org/adminlaw/E-Rulemaking%20Report%20Web%20Version.pdf>