Cornell Law Library
Scholarship@Cornell Law: A Digital Repository

Cornell Law Faculty Publications | Faculty Scholarship

2-21-2010

Achieving the Potential: The Future of Federal E-Rulemaking, Report of the Committee on the Status and Future of Federal e-Rulemaking

Cynthia R. Farina
Cornell Law School, crf7@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/facpub

Part of the Administrative Law Commons, Internet Law Commons, Law and Society Commons, and the Public Law and Legal Theory Commons

Recommended Citation
Farina, Cynthia R., "Achieving the Potential: The Future of Federal E-Rulemaking, Report of the Committee on the Status and Future of Federal e-Rulemaking" (2010). *Cornell Law Faculty Publications.* Paper 35.
http://scholarship.law.cornell.edu/facpub/35

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING

REPORT OF THE COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL ERULEMAKING

Cynthia R. Farina, Reporter

Under the sponsorship of the Administrative Law & Regulatory Practice Section of the American Bar Association, a blue ribbon committee studied the progress and results of the federal eRulemaking Initiative. Its report makes recommendations to Congress, the Administration, and federal agencies for improving the government's online rulemaking system and developing better agency erulemaking practices. These recommendations have been endorsed by the Section, the ABA Board of Governors, and a number of organizations concerned with citizen access to, and participation in, government.

The Foreword and Executive Summary of the report are reproduced here. The full text, and the list of endorsing organizations, can be found at http://ceri.law.cornell.edu/erm-comm.php.

FOREWORD

Rulemaking is one of the most frequently used ways of implementing legislation to advance social, economic, environmental, and public health and safety policies.

With the breakthroughs of technology beginning in the 1980's and the growth of the Internet and electronic government in the 1990's, there was near universal agreement that new information and communication technologies could be applied in federal agency rulemaking to enhance public participation, make the process itself more efficient for both the public and the government, and ultimately produce better decisions.

The government set out to construct a single e-rulemaking portal and a common electronic docket for more than 170 federal entities that engage in

rulemaking. Great effort and significant resources have been expended on this federal eRulemaking Initiative, and various groups within the government have reported from time to time on the considerable progress being made. At the same time, there have been critical comments, from both within and outside government, that the choices being made meant that the enormous potential of this project would not be fully realized.

To sort through all of this, a committee was formed under the auspices of the Section of Administrative Law & Regulatory Practice of the American Bar Association. Its mission was to produce a clear-eyed assessment of the state of the present federal e-rulemaking system and to chart a course going forward. The committee included experts in technology and informatics; prominent scholars on regulation, public administration and information science; experienced regulatory practitioners, including distinguished representatives of business and public interest groups, and current and former state and federal government officials. The individuals selected brought very different expertise, experience and perspectives to the committee's discussions. They reflected different parts of the political spectrum, yet all realized that the issues the committee was exploring are nonpartisan, and they approached their work in that spirit.

Over 17 months, the committee met five times, and had briefings by representatives from the Office of Management and Budget, the Program Management Office of the eRulemaking Initiative, various rulemaking agencies, and other government officials. This information was supplemented with interviews of additional people involved in the Initiative, conducted by members of the committee and reported back to whole. Our deliberations were informed by background memos written by our prodigious and extraordinarily able reporter, Cynthia R. Farina, Professor of Law at Cornell University.

The report that follows was drafted by Professor Farina after extensive discussions in the plenary sessions and meetings of smaller groups focusing on governance and funding, technology, and public participation. Many of the committee members would have supported more extensive recommendations going beyond those set forth below. But it was our judgment that the report should reflect the views of all members. Every member (listed below) has reviewed this document prior to publication, and we have indeed achieved consensus on its contents.

A draft final version of the report was circulated to a small group of key government officials, including people at OMB, the e-Rulemaking Project Management Office, and EPA. Our report has benefited from their full cooperation and many questions, corrections and comments—even on issues about which, respectfully, we disagree.

I wish to acknowledge the crucial financial support of the Ewing Marion Kauffman Foundation and the William & Flora Hewlett Foundation, which enabled us to convene people from across the country and to publish this report. I also thank the National Academy of Public Administration and its exceptional staff for providing facilities and support for our meetings.

Our greatest debt is to Professor Farina, who has given not only of her time but also her extremely able mind and pen, and without whom this project would never have been launched, let alone landed.

Sally Katzen

Sally Katzen
Chair

EXECUTIVE SUMMARY

Federal regulations are among the most important and widely used tools for implementing the laws of the land—affecting the food we eat, the air we breathe, the safety of consumer products, the quality of the workplace, the soundness of our financial institutions, the smooth operation of our businesses, and much more. Despite the central role of rulemaking in executing public policy, both regulated entities (especially small businesses) and the general public find it extremely difficult to follow the regulatory process; actively participating in it is even harder.

E-rulemaking is the use of technology (particularly, computers and the World Wide Web) to: (i) help develop proposed rules; (ii) make rulemaking materials broadly available online, along with tools for searching, analyzing, explaining and managing the information they contain; and (iii) enable more effective and diverse public participation. E-rulemaking has transformative potential to increase the comprehensibility, transparency, and accountability of the regulatory process. Specifically, e-rulemaking—effectively implemented—can open the rulemaking process to a broader range of participants, offer easier access to rulemaking and implementation materials, facilitate dialogue among interested parties about policy and enforcement, enhance regulatory coordination, and help produce better decisions that lead to more effective, accepted, and enforceable rules. If realized, this vision would greatly strengthen civic participation and our democratic form of government.

A. THE EMERGENCE OF FEDERAL E-RULEMAKING

During the 1990s, several individual rulemaking agencies began creating websites that enabled the public to search for regulations, submit comments electronically, and track a rulemaking's progress online. Some—notably the Department of Transportation (DOT), the Federal Communications Commission and the Nuclear Regulatory Commission—developed entire electronic docket systems for their rulemaking materials. By the turn of the century, the Environmental Protection Agency (EPA) had also begun to build an ambitious e-system for rulemaking. In 2002, the Bush Administration published its E-Government Strategy, which included creation of an "online rulemaking management" system. Ultimately, EPA became the lead agency for this eRulemaking Initiative. Plans quickly focused on creating a single government-wide system and one common public web portal, which would supersede all individual agency rulemaking e-systems and websites. All Executive Branch agencies have been required to join this Federal Document Management System (FDMS). Several of the independent regulatory commissions have also chosen to do so, although most of those with substantial rulemaking activity have so far preferred to have their own systems for reasons of cost or functionality.

The eRulemaking Initiative is funded by the participating agencies without dedicated funding from Congress. The Initiative has a complex, multi-tiered governance structure through which all participating agencies make decisions about design, modifications, upgrades, and budget. All are entitled to equal say, regardless of the amount of rulemaking activity or level of monetary contribution. A separate Program Management Office (PMO) staffed predominantly by EPA oversees system operation and maintenance.

The e-rulemaking system can be understood, for present purposes, as comprising three interrelated elements:

> 1) the FDMS e-docket, an electronic repository for digitized versions of rulemaking documents organized in electronic dockets, with associated document management capabilities;
> 2) FDMS.gov, a password-protected interface through which agencies access the repository; and
> 3) Regulations.gov, the public interface through which those outside the federal government access publicly available materials in FDMS, and can submit comments on proposed rules.

B. PROGRESS TO DATE

The federal government's eRulemaking Initiative has had significant success. More than 170 different rulemaking entities in 15 Cabinet Departments and some independent regulatory commissions are now using

a common database for rulemaking documents, a universal docket management interface, and a single public website for viewing proposed rules and accepting on-line comments. As of July 2007, the FDMS records management module complies with required standards for agencies to use the electronic docket as their official rulemaking record. This gives agencies the option of no longer retaining paper copies of materials in the system. EPA as managing partner, and the personnel of EPA and the participating agencies who have worked on the Initiative, deserve commendation and gratitude. They were given an inherently challenging task, further complicated by political complexities and resource limitations, and they have made a substantial start in building the powerful government-wide federal e-rulemaking system needed by the public and the government itself.

At the same time, much work remains to be done. So far, the Initiative's focus has been largely limited to putting existing notice-and-comment processes online. Even this has not been entirely successful. A number of significant structural and policy issues must be addressed before the full potential of federal e-rulemaking can be realized:

Architecture

The very early decision to build a single, centralized system made it necessary to design a database and a public website capable of serving all agencies. The result has been a very basic design on which all could agree. Development of additional, or different, applications and web presentations is severely constrained by (i) OMB policy that prohibits agencies from individually operating e-systems and building e-tools related to rulemaking (termed "duplicative and ancillary systems"), and (ii) technical choices that prevent outside groups from easily and efficiently accessing rulemaking information to create richer, more supportive public websites.

Another early decision (which ran in the opposite direction from the decision to build a single, exclusive centralized system) was to retain maximum agency autonomy in formatting and entering rulemaking data and in setting practices for public comment via the system. The decision to retain agency autonomy came about because it proved impossible for all agencies to reach agreement on data standards and practices. This meant, however, that the system lacks harmonization on such essential elements as (i) what agencies call key rulemaking documents; (ii) what information about these documents ("metadata") is supplied during data entry; and (iii) what kinds of documents and metadata will be made available for review by the public (and by other agencies, who can access only materials that are available to the general public). Without harmonization of data standards

and practices, the purpose and utility of a multi-agency rulemaking database and a single public web portal is fundamentally undermined. Beyond a very superficial level, the public does not get a "common look and feel" to rulemaking across agencies. More significantly, searches will produce results that are unreliable in ways that public users are unlikely to realize and cannot, in any event, control.

Funding

Funding the Initiative through existing agency budgets has had several unintended negative consequences. At a minimum, agency and appropriator resistance to this funding method has caused financial instability and uncertainty over the course of the project. Because it often diverted funds from other agency activities, this funding method tended to incline agencies to be less sympathetic to system expansion and evolution, and to support only those features that seem obviously worthwhile to their own operations. Moreover, the particular algorithm currently used for apportioning the costs among participating agencies actually discourages agencies from embracing e-rulemaking because, for example, the more comments received on a proposed rule via regulations.gov, the greater proportion of overall costs the agency must pay.

Governance

Given the fact that all rulemaking agencies were required to contribute to the eRulemaking Initiative, as well as the importance of rulemaking to these agencies, all participating agencies wanted an equal say in the system's design and future direction. The result was a complex multi-level structure of collective decisionmaking—a form of governance that is time consuming and, with its multiple veto points, inclined toward risk-adverse outcomes. At the same time, it provides no clear locus of responsibility and accountability for whether the decisions being made actually further the articulated goals of the Initiative. Moreover, because there has been no sustained and systematic involvement of potential users outside government, design choices and work priorities often undervalue or misapprehend the needs of the public.

Public Access

Lacking sustained and systematic involvement of non-federal users in the design of the public website, regulations.gov continues to reflect an "insider" perspective—i.e., the viewpoint of someone familiar with rulemaking and the agencies that conduct it. The website design also

shows the effects of constrained resources, and the difficulties of designing a single site that must be each agency's official medium for presenting its rulemaking materials to the public. Without doubt, significant improvements have occurred within the last year, and continue to be made. Still, regulations.gov remains neither intuitive nor easy to use, even for those knowledgeable about rulemaking. Recent additions (e.g., e-mail notification, full-text search, RSS feed) are highly desirable improvements, but these important functionalities are not as convenient, effective, or powerful as what is needed and possible.

A deeper problem (and one that limits the government's as well as the public's benefit from the system) is that many agencies are not using FDMS to provide the comprehensive online rulemaking docket contemplated by both the Initiative and the E-Government Act of 2002. No document—even a public comment submitted through regulations.gov—can be viewed by the public (or, for that matter, by other agencies) unless and until the responsible agency approves it for "posting" to the public side of the system. For a variety of reasons, some agencies are failing to post many significant rulemaking materials—including submitted comments. As a result, the publicly accessible portion of the database is not complete and the e-dockets for many agencies are not in fact authoritative, even though the system is capable of meeting official records standards.

Diversification and Innovation

It is exceedingly difficult, if not impossible, to map a single e-rulemaking model onto the many rulemaking needs and circumstances of all participating agencies. Similarly, one universal public website, no matter how well-designed, cannot adequately capture and convey the kind of agency-specific and rule-specific information many public users will need to understand rulemaking and to participate effectively. Yet, the current closed, exclusive, one-size-fits-all technical architecture, in conjunction with the broadly interpreted OMB policy against "duplicative or ancillary systems," prevents the creation of additional components, tools and web presentation formats—either by agencies or by interested individuals and groups outside government. And, in any event, agencies with the greatest rulemaking activity—and thus the greatest incentive to experiment and progress in this area—lack funds to do so because they are now bearing a disproportionate share of the cost of the entire e-rulemaking system. Neither the needs of public users nor the requirements of many agencies are being adequately met, and innovation is being hampered.

C. RECOMMENDATIONS AND GUIDING PRINCIPLES

If a government-wide electronic docket and rulemaking support system were being designed in today's technological environment, the preferred architecture almost certainly would not be a single and exclusive centralized system. The power of web technology is precisely that it allows data and applications to be drawn from multiple sources and presented in multiple ways tailored to the needs of various users. But starting anew would be a radical step, especially given the money and effort already invested. If the current FDMS can be enhanced, and situated within a new open and more flexible technical architecture, it can function as the primary rulemaking system for agencies with modest rulemaking activities, and as the core from which other agencies can build out more robust and innovative e-rulemaking capabilities.

We recommend a number of interrelated actions:

Architecture

The redesigned system should allow for growth, promote innovation, and provide opportunities for information sharing and collaboration through an architecture based on open standards, adaptable to the evolution of the Web, and capable of incorporating non-centralized models of information sharing.

Governance

A single agency should be given responsibility for specifying and implementing the new architecture. To minimize concerns from even the perception that one agency is being empowered to impose its particular rulemaking practices on the entire system, this new lead agency should not be one of the major rulemaking agencies.

An interagency e-rulemaking committee should be created, funded, and charged to provide regular, ongoing advice to the new lead agency about agency needs and preferences. A parallel advisory committee of public users and various relevant outside experts should be created, funded, and charged to provide regular, ongoing advice to the lead agency about the needs and preferences of the wide range of non-federal government users.

Data Standardization

The new lead agency should oversee a process of facilitated discussions among participating agencies, the object of which is to establish the common data and metadata standards and to define the quality information practices essential to effective cross-government electronic rulemaking.

This process must be done independently of any effort that might be undertaken to conform underlying rulemaking practices to a standard model. If agreement still cannot be achieved, the lead agency must be empowered to establish the necessary standards and practices, and OMB must unambiguously support their implementation and use.

Funding

A separate appropriation to the new lead agency for developing and maintaining the core e-rulemaking system should be authorized and funded. The appropriation should include an amount for further modernization and enhancement.

Agency Practice

The online docket should become the authoritative rulemaking record for all agencies, with clear indication and adequate identification of any portions of that record not being made publicly available. Agencies should be expected to create comprehensive, accurate electronic dockets that are well-indexed and effectively searchable. They should be expected to post supporting materials and comments in a prompt and timely manner, and they should receive adequate resources for this and other preparation and entry of data.

Existing communication mechanisms should be used and new ones created to increase communication between agency personnel with technical expertise and those with regulatory program expertise, within as well as across agencies. The goals include identifying both good practices in, and legal or institutional obstacles to, e-rulemaking; creating the basis for collaboration among agencies in developing new e-tools and applications; and sharing of experience with innovative uses of technology in rulemaking.

Public Access

The regulations.gov website should be completely redesigned, making creative use of web capabilities and state-of-the-art web design practices (i) to provide information in formats readily accessible to and comprehensible by the full range of potential users, and (ii) to interact efficiently and effectively with rulemaking information on agency sites. Active engagement in this process by the public users and experts of the public e-rulemaking advisory committee is essential.

Agencies that engage in substantial rulemaking activity should provide more detailed rulemaking information on their own public websites and

explore web-based methods for increasing the breadth and quality of public participation. Such e-rulemaking innovation and entrepreneurship by individual agencies should be encouraged, rather than inhibited.

The history of the eRulemaking Initiative demonstrates that governance, management and funding, technical architecture, agency practice, and public response all interact synergistically. The extent to which agencies and the public use the e-rulemaking system depends on how it is designed and implemented. Design and implementation choices flow from governance and management structures. Governance and management structures rest on how it is funded.

For these reasons, the set of recommendations made in this report should not be read as an á la carte menu, but should be recognized instead as an integrally interrelated plan for moving forward. Continuing to develop a powerful and flexible e-rulemaking system is one of the rare federal projects in which every segment of the public, as well as the government, stands to gain. But before e-rulemaking's potential benefits can become a reality, Congress, the President, and OMB must recognize that the current system—while a remarkable accomplishment given where the Initiative started—is only a first step, and that achieving the great potential of technology-supported rulemaking now demands a fundamentally new approach.

[For the balance of the report, see http://ceri.law.cornell.edu/erm-comm.php.]

MEMBERS OF THE COMMITTE AND SIGNATORIES ON THE REPORT

William Y. Arms
Professor, Computer Science
Cornell University

Gary D. Bass
Executive Director, OMB Watch

Barbara Brandon
Faculty Services Librarian
University of Miami School of Law

Thomas R. Bruce
Director, Legal Information Institute
Cornell Law School
Affiliated Researcher, Information Science
Cornell University

Robert Carlitz
Exec. Director, Information Renaissance

Daniel Chenok
Senior Vice President &General Manager
Pragmatics, Inc.
OIRA 1990-2003
Branch Chief, IT Policy 1999-2003

Cary Coglianese
Associate Dean for Academic Affairs
Edward B. Shils Professor of Law
Professor of Political Science
Director, Penn Program on Regulation
University of Pennsylvania

Robin S. Conrad
Executive Vice President
National Chamber Litigation Center
U.S. Chamber of Commerce

Sharon Dawes
Senior Fellow, Center for Technology in Government
Assoc. Prof., Pub. Administration & Policy
University of Albany

J. Stephen Fletcher
Chief Information Officer
Exec. Dir., Dep't of Technology Services
State of Utah
Deputy CIO/CTO
Department of Education 2004-05

Jane E. Fountain
Professor of Political Science & Public Policy
Director, Nat'l Center for Digital Government
University of Massachusetts Amherst

John D. Graham
Dean, School of Public & Environ'l Affairs
Indiana University
Administrator, OIRA 2001-06

Cornelius Kerwin
President, American University
Professor of Public Administration
Center for the Study of Rulemaking

Andrew Langer
President, Institute for Liberty
Sr. Manager, Regulatory Affairs, National Federation of Indep. Businesses 2002-08

Jeffrey S. Lubbers
Fellow in Law & Government
Washington College of Law
Co-Director, Ctr. for the Study of Rulemaking
American University
Research Director, ACUS 1982-95

Beth Simone Noveck
Professor of Law
Director, Inst. for Information Law & Policy
Director, Democracy Design Workshop
New York Law School

Richard Parker
Professor of Law
University of Connecticut School of Law

Peter Shane
Jacob E. Davis & Jacob E. Davis Chair in Law
Director, Project on Democratic Development
Ohio State University

Peter L. Strauss
Betts Professor of Law
Columbia Law School

W. Frederick Thompson
President, FredT2007 LLC
Principal & Representative, Council for Excellence in Government
CIO Office, Dep't of Treasury 1988-2002

EX OFFICIO

Lawrence Brandt
Program Director, Information Integration &Informatics
National Science Foundation

Robert Litan
Senior Fellow, Brookings Institution
Assoc. Director, OMB 1995-96
Staff, Council of Econ. Advisors, 1977-79

Rick E. Melberth
Director, Regulatory Policy
OMB Watch

REPORTER

Cynthia R. Farina
Professor of Law
Cornell e-Rulemaking Initiative
Cornell University

CHAIR

Sally Katzen
Public Interest/Public Service Fellow
University of Michigan Law School
Administrator, OIRA 1993-98
Deputy Dir., Management, OMB 2000-01

We also benefitted greatly from the contributions of Lawrence Fineran of the National Association of Manufacturers and Dr. Stuart Shulman of the Carnegie-Mellon/University of Pittsburgh E-rulemaking research group, who had left the Committee before the report was drafted.

Additional information on committee members can be found at http://ceri.law.cornell.edu/erm-comm.php.