

# E-Rulemaking

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## INTRODUCTION

Throughout the world, governments use regulation to combat monopoly power, protect consumers, and reduce health, safety, and environmental risks. Regulation promotes the safety of transportation, the cleanliness of the air, and the quality of their food and drugs. Today, nearly every major aspect of contemporary public life is significantly affected by rules made by regulatory agencies, ministries, or bureaus (Kerwin, 2003).

Given the consequential and complex nature of regulatory decision-making, crafting rules presents government agencies with significant informational challenges. Government regulators must collect information to understand the causes of regulatory problems, identify available regulatory options, and predict the effects of each alternative (Coglianese, Zeckhauser, & Parson, 2004). To develop a new rule, regulators must often undertake extensive studies and analyses and respond to comments from industry groups and other interested organizations.

E-rulemaking—or the use of information technology in government rulemaking—promises to help regulatory agencies make rules more efficiently and with better quality (Brandon & Carlitz, 2002; Johnson, 1998). E-rulemaking may also help expand public access to and participation in government decision making. Despite the significance of regulatory decisions, they have often been made in relative obscurity, with organized business lobbies sometimes having disproportionate influence over policymaking. Information technology may facilitate greater transparency and democratic accountability in the rulemaking process.

Already, regulatory agencies are making use of information technology to create Websites containing notices of new regulatory proposals and various background documents. They have also begun to allow citizens to use the Internet to share comments on new regulatory policies or engage in online dialogues (Beierle, 2003; Brandon & Carlitz, 2002). In early 2003, for example, the United States government launched a new Web portal called Regulations.Gov that allows the public to locate and comment on all new regulatory proposals announced by hundreds of federal regulatory agencies (Skrzycki, 2003). In addition, American officials are currently at work developing a government-wide, online docket system that will

make available all the extensive information contained in each agency's rulemaking files (Skrzycki, 2004). Efforts such as these are likely to continue and can be expected in other regulatory jurisdictions around the world.

## BACKGROUND

In order to understand how information technology can be used in the rulemaking process, it helps to understand the basic contours of that process. By way of illustration, consider how rulemaking operates in the United States for agencies like the Environmental Protection Agency, Department of Agriculture, and Federal Aviation Administration. These agencies typically first develop plans or “regulatory agendas” that are published twice each year in the *Federal Register*, a daily publication that includes regulatory notices and other material submitted by federal departments and agencies.

As agencies work on the items included in their agendas, they gather information, conduct analysis of the underlying problem, and identify possible regulatory solutions. They also frequently engage in discussions with industry representatives, other organized interests, and staff members from Congress or other agencies (Strauss, Rakoff, & Farina, 2003). When an agency has reached a tentative decision, it proceeds to publish a notice of proposed rulemaking (NPRM) in the *Federal Register*. In addition to describing the proposed rule, the NPRM will usually enunciate reasons for the proposed new rule and discuss the agency's underlying regulatory analysis (Administrative Procedure Act, 1946). The NPRM also informs interested parties how they can submit comments to the agency over its proposed course of action.

After reviewing the comments submitted on the NPRM and conducting any further analysis, the agency staff will make revisions to the proposed rule and then publish the final rule in the *Federal Register*. In addition to publishing the operative rule itself, the agency will also explain its decision in a preamble, a section of the *Federal Register* that accompanies the final rule. These preambles will often be longer than the final rules themselves, sometimes spanning more than a hundred pages for a single new rule.

Even after the final rule is published in the *Federal Register*, the rulemaking process continues (Coglianese,

2001). The operative rule itself, without the preamble, is later moved to and published in the relevant section of the *Code of Federal Regulations*. Furthermore, businesses or nongovernmental organizations can take the agency to court over new rules. Depending on what happens in litigation, the regulatory agency may need to revise its rules, which would start the entire process over again.

## E-RULEMAKING'S PROMISE

Interest in applying information technology to the rulemaking process is growing (Shulman, Thrane, & Shelley, 2005). Already, regulatory agencies in the United States and other countries have begun to apply information technology to the rulemaking process. Agencies now permit members of the public to submit their comments by e-mail; they make the contents of their regulatory dockets available on the Internet; and they use information technology to help agency managers track the progress of rulemaking staff (Brandon & Carlitz, 2002). These existing applications only scratch the surface of information technology's potential for government rulemaking.

Researchers and public officials are contemplating a variety of new applications of digital technology in an effort to help government agencies improve the process of rulemaking—and thereby also to improve the quality of the rules themselves. Since making rules requires the acquisition, processing, and analysis of large quantities of technical and time-sensitive information, systems for information retrieval and extraction can aid the work of the regulatory analysts. Analysts could also use text categorization technology to sort public comments based on the issues they address or the departments within their agency to which they refer (Shulman, Hovy, Callan, & Zavestoski, 2004; Lau, Law, & Wiederhold, 2005). Summarization systems could automatically condense large studies or comments into more useable size for government officials to digest.

In addition, information technology can help regulators draft the text of new rules or supporting documents. Systems could be designed to flag potential inconsistencies within a proposed rule or between the proposed rule and existing rules. In order to maximize the regulated community's understanding of its obligations under a new rule, drafting software could suggest alternative sentence construction to make rules simpler and more accessible to a broad audience. Rule compliance wizards available on an agency's Web site could also help ensure that regulated entities understand and meet their regulatory obligations, even in areas with complex systems of rules (Kerrigan & Law, 2005).

Information technology can be used in a variety of ways to inform citizens about government rulemaking. Agencies can easily create automatic alerts to inform interested citizens about proposed rules under development. To help citizens offer more informed comments, information technology could provide clearer or easier access to information about a rule's development. Agencies could develop simulation software that would show how the costs and benefits of a proposed rule would vary under different parameters or assumptions, and then make that software available for the public to use to develop a better understanding of the tradeoffs implicit in a rulemaking (Belton, 2000).

Information technology could also create new opportunities for public deliberation over rulemaking. Information technology could allow members of the public to submit questions to the agency or engage in ongoing dialogue with agency staff or others interested in a proposed rule. In addition to online chat rooms, agencies could conduct digital public hearings or even convene cyber-juries that would link citizens from across the jurisdiction to deliberate over core policy issues raised by a rulemaking (Coglianese, 2005).

## GOALS FOR E-RULEMAKING

As these examples show, e-rulemaking encompasses a range of new digital government applications. Some of these applications use existing technologies simply to digitize the existing rulemaking process, such as by providing documents online or allowing the submission of electronic comments. However, new applications also have the potential to transform the existing rulemaking process in significant ways (Lubbers, 2002). Whether applying existing technologies or designing new ones, decisions about whether and how to apply e-rulemaking call for attention to e-rulemaking's goals. E-rulemaking is generally thought to have the capacity to advance one or more of the following goals (Coglianese, 2004a).

1. **Enhance Democratic Legitimacy:** Increasing democratic legitimacy could be accomplished by using information technology to increase public understanding of rulemaking, make the process more interactive and deliberative, and make it easier for more democratically accountable institutions, such as the legislature, to oversee the rulemaking process
2. **Ensure Better Decisions:** E-rulemaking could improve policy decisions by making it easier for regulatory officials to analyze large volumes of data drawn from multiple sources. Simulation software

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