Chapter IX

The Federal Docket Management System and the Prospect for Digital Democracy in U.S. Rulemaking

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Abstract

A large interagency group led by the Environmental Protection Agency (EPA) has worked diligently to set up a centralized docket system for all U.S. federal rulemaking agencies. The result, the Federal Docket Management System (FDMS), is still a work in progress, reflecting technical, administrative, financial, and political challenges. A close examination of the effort to design, fund, and shape the architecture of the FDMS suggests many important lessons for practitioners and scholars alike. While both the new technology and the 60-year-old administrative process of rulemaking offer tantalizing glimpses of innovation, increased efficiency, and remarkable democratic potential, the actual progress to date is mixed. Neither the information system nor its users have turned the FDMS into a techno-fix for all or even much of what ails the sprawling U.S. regulatory rulemaking system. In the great American tradition of incrementalism, the FDMS represents a small step toward a number of worthy but perennially elusive goals now routinely linked to the prospect for digital democracy.

Introduction

Agency personnel and the commenting public are adjusting to the increasingly digital landscape of the "notice and comment" process required under the 1946 Administrative Procedure Act (APA). While the APA sets a "floor below which an agency may not go in prescribing procedures for a particular rulemaking" (Lubbers, 2006, p. 6), scholars, activists, and rulemaking practitioners have long recognized the benefits and burdens that accrue when the baseline requirements for gathering public input are exceeded (Furlong & Kerwin, 2004; Kerwin, 2003).

Running parallel to agency and public efforts to adapt, there is a growing body of e-rulemaking research and scholarship focusing on such fundamental issues as whether Internet-enhanced public participation results in better rules (Carlitz & Gunn, 2002) or in a process characterized by informed deliberation (Brandon & Carlitz, 2002; Emery & Emery, 2005). Information technology opens previously unimaginable avenues for engaging the public in meaningful and well-informed public discourse on a national scale. In its latest incarnation, the "new governance" is increasingly defined by the "tool makers and tool users" (Bingham, Nabatchi, & O'Leary, 2005, p. 547) who are building and using the architecture of electronic participation linking citizens and government.

Inside the federal government, best practices continue to target efficient, cost-effective strategies for overworked information managers in budget-strapped agencies facing statutory deadlines and political pressure to promulgate complex rules, allocating billions of dollars of costs and benefits (General Accounting Office [GAO], 2005). Regulatory rulemaking in the United States can be a highly contested, time- and information-intensive process (Coglianese, 2003a; Johnson, 1998; Rakoff, 2000). How and whether outside commenters influence the process and final outcomes is a matter of some debate (Golden, 1998; West, 2004).

Meanwhile, dedicated users of digital communications technologies have started to exploit the potential to flood agencies with vast quantities of public comments (Lubbers, 2006; Shulman, 2006). The outcome of this approach is often a boon for organized interests that instigate the campaigns. Benefits can include regulatory delay (which allows a return to Congress for redress), favorable publicity, and payoffs in terms of membership identification with a group's mission. However, such efforts may also undermine or dilute the voice of the public as agencies face statutory and administrative deadlines to incorporate public input into a legally defensible final rule (Shulman, 2005). Large-volume public comment submissions that bash agency efforts may decrease the overall level of trust of citizens (Yang, 2005) or else hinder agencies' options as they seek rational and coherent approaches to difficult problems (West, 2005). At the very least, they contribute directly to a preexisting "deep ambivalence about citizens directly participating in their government" (Roberts, 2004, p. 315).

This chapter updates earlier reports on the status of electronic rulemaking. First, it briefly introduces the rulemaking process. Second, it documents the origin and progress of the Federal Docket Management System (FDMS) and looks closely at the evolution of the current interface for Regulations.Gov (the FDMS Web portal) in the context of recent literature on public participation and federally funded research into the impact of e-rulemaking. It draws on workshop, interview, and focus group experiences that have fed into a multiyear dialogue between researchers, regulators, and the regulated public.[1] Finally, it concludes,

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