

eRulemaking: A Case Example of eGov Transformation

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In the United States, approximately 170 federal entities issue regulations. Over sixty federal departments, agencies, and commissions with a combined staff of over 240,000 full-time employees write and enforce the bulk of these regulations. Overall, they issue thousands of new regulations each year that affect virtually every aspect of social and economic activity in the United States.

Individuals or organizations either subject to these regulations or with an interest in their benefits and costs have a clear stake in the results of the regulatory decision-making process. Over the past fifteen years, U.S. governmental agencies and the Congress have undertaken various efforts to make the rulemaking process more responsive to public expectations and enhance public involvement, although few, if any, of the efforts have achieved significant, lasting change. The rapid growth of the Internet and proliferation of relatively inexpensive information technology have fostered a growing expectation and effort to develop additional and perhaps even transformational changes to the federal rulemaking system, including public participation.

Background

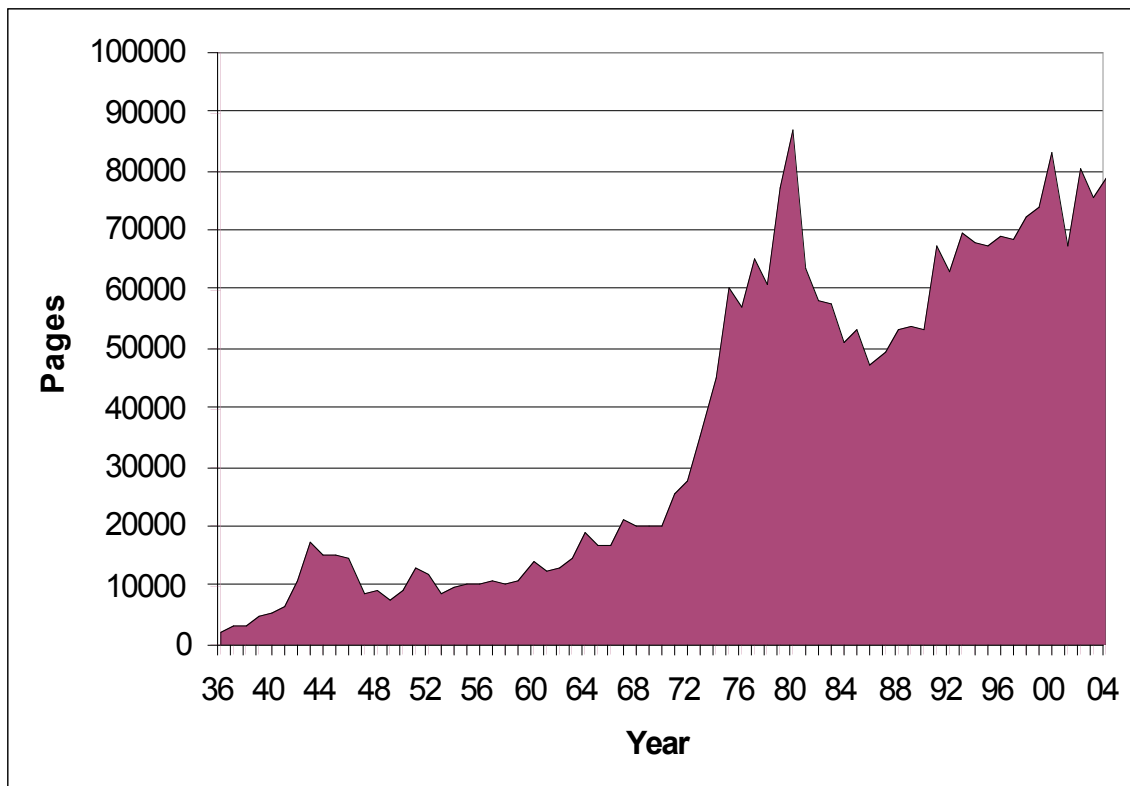
Governments have several tools available to achieve policy goals. In the United States, the primary mechanisms are direct spending (supported by taxes) and regulation of public and private entities. The early 1970s witnessed a dramatic increase in the use of the latter mechanism, when Congress established a host of new agencies devoted to regulating health, safety, and the environment. New regulatory agencies included the Occupational Safety and Health Administration, the Environmental Protection Agency, the Consumer Product Safety Commission, the Nuclear Regulatory Commission, and the National Highway Traffic Safety Administration. While this period saw the beginnings of deregulation in some industries that had previously been regulated (including airlines, trucking, and some forms of energy), these deregulatory efforts were more than surpassed by contemporaneous increases in health, safety, and environmental regulation.

* For a general description of the rulemaking process and the scope of statutes supporting EPA's rulemaking see: *Regulations: A Vital Toll for Protecting Public Health and the Environment*, (July 2003) available at: <http://www.epa.gov/opei/regulatory/booklet/vitaltool.pdf>, related information available at: <http://www.epa.gov/regulations/>. A more concise version of this paper was originally published in *The Federal Times*, November 2003.

Similar to federal spending programs, regulations provide both benefits and costs. No mechanism is in place like the fiscal budget for keeping track of the “off-budget spending” associated with regulation, however. Thus, efforts to track the change in regulatory activity over time often depend on proxies, such as the number of pages printed in the *Federal Register*—the official U.S. Government publication for public notice of rulemaking documents (FR)—or the size of the budgets of regulatory agencies.

The size of the *Code of Federal Regulations*—the official U.S. Government publication of final regulations which now occupies over twenty feet of shelf space (Code)—provides a sense of the magnitude of the stock of existing regulations with which U.S. businesses, workers, and consumers must comply. The number of pages in the *Federal Register* provides a sense of the flow of new regulations issued during a given period and suggests how the regulatory burden will grow as Americans try to comply with the new mandates. In 2004, the U.S. government printed 78,851 pages of rules and announcements. The graph in Figure 1 shows the growth in the number of pages in the *Federal Register* over time.

Figure 1.
Annual Pages Published in the *Federal Register*

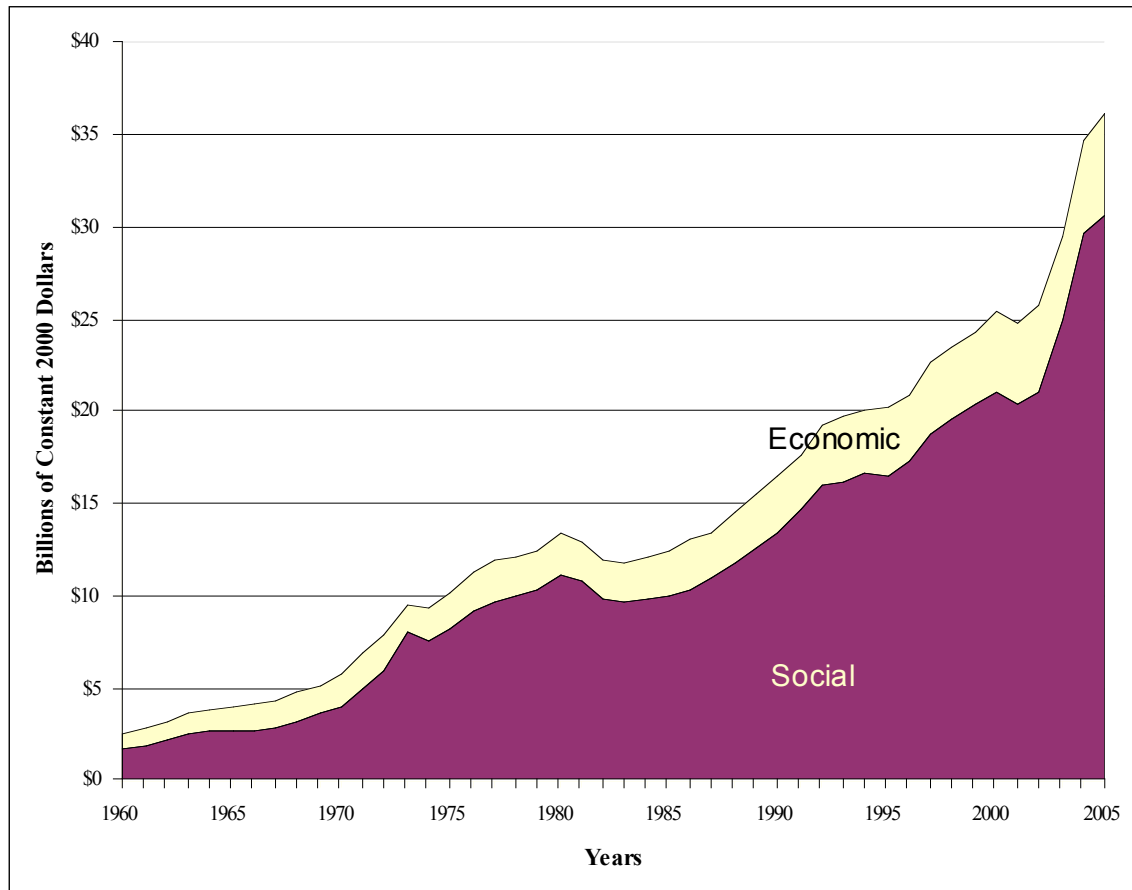


Source: Federal Register page counts maintained by authors.

Another interesting measure of regulatory activity and cost is the direct fiscal budget expenditures devoted to regulatory activity—the federal personnel and expenses necessary to develop and enforce regulations. While the federal budget tracks a small fraction of the estimated social costs that regulatory agencies impose, the expenditures of federal regulatory agencies and the trends in that regulatory spending over time can both serve as a useful barometer of regulatory activity, providing policymakers and others with useful insights into the composition and evolution of regulation.

Figure 2 shows the growth in the portion of the U.S. budget obligated to writing and enforcing regulations between 1960 and 2005. (Note that figures for 2004 and 2005 are estimates based on the presidential budget request to Congress.)

Figure 2.
Growth In Spending for Writing and Enforcing Regulations



Source: Mercatus Center at George Mason University and Weidenbaum Center on the Economy, Government, and Public Policy at Washington University in St. Louis. *Regulators' Budget Continues to Rise*. July 2004.

Of course, regulations impose social costs on individuals and businesses beyond the direct tax dollars expended to write and enforce them, and *Federal Register* pages, agency staffing, and these on-budget costs are merely proxies. Probably the best recent estimate of the social cost imposed by regulations is a 2001 report for the U.S. Small Business Administration by Professors Mark Crain and Thomas Hopkins. They estimated that in 2000 Americans spent 843 billion USD, or over 8,000 USD per household, to comply with federal regulations.

The Office of Information and Regulatory Affairs in the U.S. Office of Management and Budget (OMB) has been keeping a running total of the costs and benefits of the major regulations issued during the previous ten years. In its draft 2005 report (OMB 2005), it estimates the cost of major regulations issued over the last decade at 35 to 39 billion USD per year, and the benefits at 68 billion to 260 billion USD per year.

Public Participation Enhancements

Given the extensive role that federal regulations play in the daily lives of virtually all individuals and organizations across the country and—perhaps more importantly—given the fundamental, constitutional relationship of the American people and a government constituted by them on their behalf, it is no surprise there is a constant public interest in the how, when, why, and what of federal rulemaking. The general legal foundation for acting upon this interest, the Administrative Procedure Act (NARA), provides a mechanism for public involvement in the form of public notification and an opportunity to comment on proposed federal regulatory actions. While there has been substantial growth in the number and complexity of regulations over the past thirty years, the underlying rulemaking and public participation processes have remained relatively static.

The legislative and executive branches have made efforts to improve public participation, although these generally have been adjuncts or special additions to the basic notice and comment process. For example, in passing the Negotiated Rulemaking Act in 1992 (see NARA rulemaking laws), the U.S. Congress laid the groundwork for increasing the use of a new concept at the time called negotiated rulemaking. Various departments or agencies developed specific guidance to implement the law (see for example, DOL). Over the past decade, various federal departments and agencies have focused attention on other mechanisms, such as “town hall” meetings and online interactive efforts designed to enhance public involvement in various decision-making processes, including rulemakings. The Environmental Protection Agency’s Public Involvement Policy (EPA, July 2003) describes some of these efforts.

An adjunct series of analytical and procedural requirements (established through various Presidential Executive Orders and laws such as the Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, the Paperwork Reduction Act, etc. (NARA, Presidential Executive Orders; EPA 2003) have attempted to make the rulemaking process more transparent and more responsive to public concerns. Finally, there have been ground breaking efforts to create a more open rulemaking process by using the Internet as a mechanism for providing substantially greater access to rulemaking documents and the commenting process. The electronic regulatory dockets created by the Department of Transportation (DOT-Regulatory Docket), EPA (EPA-EDOCKET), and the Occupational Safety and Health Administration (OSHA-Docket) are examples. Regulatory dockets are the publicly accessible locations where agencies store all public comments and documents associated with a regulatory decision.

E-Gov, the President’s Management Agenda, and eRulemaking

The emergence of the Internet and relatively low cost, accessible information technology has allowed individuals across the globe to express views and exchange ideas with a degree of clarity, speed, and geographic reach they could only imagine a decade ago. We have also come to expect that information, business transactions, and personal expression be nearly instantaneous, on demand, and tailored to our individual interests regardless of time and location.

These same expectations are increasingly being applied to government. In 2001, President George W. Bush created the E-Government Initiative under the President’s Management Agenda (PMA) to better meet this public demand. As part of the Initiative, interagency teams are managing a variety of federal government-wide projects designed to eliminate redundant investments, help agencies more effectively achieve their missions, and create a more citizen-centric government. One of the teams, the eRulemaking Project, is using information technology to enhance and potentially transform certain aspects of the rulemaking process. Its

goals are to expand public understanding of the regulatory process, increase the amount, breadth, and ease of citizen and intergovernmental access and participation in rulemaking, and to improve the quality of regulatory decisions.

The Project is managed by a team of twelve federal agencies with the Environmental Protection Agency as the lead partner. Through a senior level Steering Committee, a working level Advisory Board, and seven workgroups with members from thirty federal agencies addressing legal, technical, budget, and other issues, these partners are guiding eRulemaking and bringing together over 150 federal entities involved in the regulatory process.

The Project has three components: (1) a relatively limited online ability to search for and comment on any ongoing federal rulemaking (currently operational), (2) a federal docket management system building upon the first component (commencing in 2005), and (3) electronic tools for regulatory officials (under development).

1. *Regulations.gov*

www.Regulations.gov, as the Project's first effort, seeks to free the public from the constraints of location or other lack of access to basic regulatory documents and the commenting process. The web site provides a single, easy, and consistent way for the public to find, view, and comment on proposed federal regulations. It was launched in January 2003 as an interim solution. To date, it has had almost 9 million hits, averaging nearly 19,000 per day. The number of pages viewed or downloaded has reached 5.7 million. The number of unique visitors has reached almost 1.1 million. While it has received many awards, including the National Association of Secretaries of State's Award for Innovation in Rulemaking, it is only a first step. Public options for finding regulatory information and commenting on rulemaking actions are still limited and confusing.

2. Federal Docket Management System

The second part of the project will expand the capabilities of *Regulations.gov* to include a federal government-wide electronic docket based on the software technology underlying the Environmental Protection Agency's existing electronic regulatory docket (EPA-EDOCKET).

This enhanced *Regulations.gov* will replace existing agency-specific electronic and paper dockets with a single web site providing access to nearly all federal rulemaking documents. It will enable the public and agency employees to search electronically for regulatory actions, view supporting materials, submit comments with attached documentation, and review other public comments on virtually all ongoing rulemakings and *Federal Register* notices—without having to know the agency name or various other technical information. It can also include non-rulemaking documents open for public comment. Specific features will include: simple and sophisticated search capabilities (Boolean and compound searches); email notifications to users when, for example, a document has been added to a specific docket; public and agency report generating capabilities; data import and export; electronic system of records; and secure access for internal users.

It is an image and text-based system that employs a centralized information technology architecture and is designed to allow modular expansion in the future. It uses commercial software and has taken about two years to build. Federal rulemaking entities will begin migrating their existing paper or electronic regulatory dockets in phases starting in the early summer of 2005.

While appearing to be an automated version of paper-based dockets, this system has the potential to make substantial and transformational changes in a public involvement process that has, with some exceptions,

remained fairly static. The initial functionality provides only the foundation for that change. Further change depends, in part, on the cyclically reinforcing effect of three principal factors: 1) unanticipated, constructive uses of the system by the public and regulators; 2) demand for additional system capabilities or an increase in its scope; and 3) a growing community of internal government and public users beyond the existing, relatively small universe of legal, regulatory, and technical experts.

Consider, for example, the ramifications of the public's ability to view and respond almost in real time to comments submitted by another interested party. Unlike the existing sequential process where broad public access to the docket contents is, as a practical matter, limited to those who can physically visit file rooms often located in Washington, D.C., online commenting could stimulate a dialectic between interested parties, with one commenter building upon, or discrediting, another's data, views, or analysis during the public comment period. Regulators could eventually stimulate such a dialogue by the design of *Federal Register* publications and the commenting system.

The new *Regulations.gov* platform also holds the potential for using interactive models, presenting regulatory information in visual or interactive formats more tailored to the needs of specific users, driving geospatially-related information to interested parties, and unleashing the research potential of historical docket contents.

3. Electronic Tools

Under the third aspect of the project, the team is identifying and creating electronic tools agencies can use in all phases of the rulemaking process. Using best practices from across government and other sources, this effort will provide a host of tools to help regulatory staff and managers gather, analyze, and communicate information including: electronic libraries or reading rooms; collaboration zones; electronic public meetings; workflow and scheduling; content categorization and public comment analysis; online models; data mining; and desktop dashboard for rule writers and managers.

Future Challenges

The future success of the eRulemaking project depends upon several factors, including the continued collaboration among all agencies and institutions interested in federal rulemaking. A wide spectrum of organizations have expressed interest in the project, including many different academic disciplines and institutions, interest groups, organizations such as the National Sciences Foundation's Digital Government Program (NSF), and federal agencies themselves. The project team has reached out to these groups, congressional committees, and others interested in the rulemaking process and will continue to expand the universe of those who wish to understand the effort and provide suggestions, guidance, and creative solutions.

The success of eRulemaking also depends on the ability of project managers and supporters to identify and respond to anticipated and unanticipated challenges as it evolves over time. As with the introduction of any new information technology affecting a core business process, this effort may require a thoughtful examination of underlying operating policies and procedures (such as the Administrative Procedure Act). It may also lead others to examine and adapt their own business models. To date, the project team has responded to challenges that include accommodating differing business practices within federal agencies, identifying and accommodating varying expectations for the system's initial functional capabilities, and expanding public knowledge of electronic docket service's availability. These will certainly not be the last.

Conclusions

By all measures, governmental regulation of public and private entities is significant and growing, and affects virtually all aspects of our lives. In 2004, the federal government printed 78,851 pages of rules and announcements. At four minutes per page, that would require 2.5 people reading eight hours per day for a year just to keep up with the new rules and pronouncements. Of course, individuals and most organizations cannot invest that much in keeping abreast of new regulations. Instead, they rely on someone else, if anyone, to do it for them.

Economists and political scientists have long recognized the benefits of regulation tend to be biased toward well-organized interest groups sometimes at the expense of the broader public interest. This is because small interest groups with strongly felt preferences often can invest the resources necessary to effect regulatory policy. The costs of regulation, on the other hand, are dispersed widely among the public, so individuals do not have the same incentive to invest the necessary resources to influence policy outcomes. A more transparent rulemaking infrastructure could lower the cost and increase real public involvement in the development of regulations.

As the U.S. eRulemaking project moves forward, we can anticipate further enhancements to public participation, new rule-writing tools, greater government accountability, more timely actions, and ultimately, better regulatory decisions affecting the economic vitality, safety, health, and environment of our common future.

References

Code, background information on the U.S. Code of Federal Regulations is available at:
http://www.archives.gov/federal_register/tutorial/table_of_contents.html

Crain, W. Mark and Thomas D. Hopkins. (October 2001). *The Impact of Regulatory Costs on Small Firms*, The Office of Advocacy, U. S. Small Business Administration (RFP No. SBAHQ-00-R-0027). available at:
<http://www.sba.gov/advo/research/rs207tot.pdf>

Department of Labor (DOL), *Handbook on Negotiated Rulemaking*, available at:
<http://www.dol.gov/asp/programs/negreg/nrbtabl.htm>

Department of transportation (DOT-Regulatory Docket), *Regulatory Docket*, available at: <http://dms.dot.gov/>

Dudley, Susan and Melinda Warren. (July 2004) *Regulators' Budget Continues to Rise: An Analysis of the U.S. Budget for Fiscal Years 2004 and 2005*. Mercatus Center at George Mason University and Weidenbaum Center on the Economy, Government, and Public Policy, Washington University in St. Louis. available at
<http://www.mercatus.org/regulatorystudies/article.php/796.html>

Environmental Protection Agency (EPA), *EPA's Public Involvement Policy*, (July 2003) and related information available at:
<http://www.epa.gov/publicinvolvement/public/index.htm>

Environmental Protection Agency (EPA-EDOCKET), *EDOCKET*, available at:
<http://www.epa.gov/epahome/lawregs.htm>

FR, background information on the *Federal Register* is available at:
http://www.archives.gov/federal_register/tutorial/table_of_contents.html

National Archives and Records Administration (NARA), various rulemaking laws available at:
http://www.archives.gov/federal_register/public_laws/acts.html#nra

National Archives and Records Administration (NARA), Presidential Executive Orders, available at:
http://www.archives.gov/federal_register/executive_orders/executive_orders.html

National Science Foundation's Digital Government Program (NSF), information available at:
<http://www.digitalgovernment.org/>

Occupational Safety and Health Administration (OSHA-Docket), *OSHA Docket*, available at:
<http://dockets.osha.gov/>

Office of Management and Budget (OMB), *Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations*, (2005) available at: http://www.whitehouse.gov/omb/infoereg/regpol-reports_congress.html

PMA, *President's Management Agenda*, available at: www.egov.gov