

COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING

WHAT. A committee, under the auspices of the Administrative Law Section of the ABA, comprised of: prominent scholars on regulation, information science, and public administration; experts in technology and informatics; regulatory practitioners, distinguished representatives of business and public interest groups, and current and former government officials that will examine, and issue a comprehensive report on, the status of the federal government's e-rulemaking and e-docket project. The report will contain recommendations to Congress and the President for both immediate and longer term actions.

WHY. One of 24 e-government initiatives under the E-Government Act of 2002 and the President's Management Agenda, "e-rulemaking" will use the Internet to conduct and provide information about the public parts of the rulemaking process. As currently envisioned, it entails (i) a website, www.regulations.gov; and (ii) an electronic docket, the Federal Docket Management System (FDMS). Both are currently operating, although only some agencies have been fully integrated into the website and even those agencies have relatively few documents available online. When it is completed, *regulations.gov* will be the e-rulemaking site for all federal agencies, with FDMS providing Internet access to all associated rulemaking documents. Any rulemaking websites and electronic dockets now operated by individual agencies will be superseded, and shut down.

Constructing a *single* e-rulemaking portal and a *common* electronic docket for more than 150 agencies was an extremely challenging task from the outset. To an extent that perhaps no one anticipated, the agencies have divergent rulemaking practices and work flow patterns, and they approached e-rulemaking from widely varying pre-existing states of technological sophistication. These factors impeded consensus on such essential elements as standardization of document names, items of mandatory data submission, and common web presentation protocols.

Moreover, the stress of designing a unitary cross-government rulemaking system was exacerbated when Congress did not appropriate new money for this, or many other e-government, projects. Congress appropriated only between \$3 and \$5 million annually to an E-Government Fund, despite the E-Government Act's contemplation of a substantially larger fund with increasing amounts of money each year from 2003-06. Instead, OMB oversees the transfer of funds between agencies for e-government initiatives, and recently moved to a self-service model where user agencies pay for services received. Since all of this money necessarily comes from existing programs, agencies dissatisfied with choices/ compromises reached in the course of developing *regulations.gov* and FDMS came to feel doubly aggrieved – especially if they had an existing website and/or e-docket that would be shut down.

Finally, Congressionall appropriators became increasingly suspicious of OMB's control as a result of the e-government transfers. Restrictions on transfers of money for e-government projects began to appear in the appropriations statutes for individual agencies. These became more stringent, and widespread, until this year, when several of the 2007 appropriations bills included language that would prohibit transfers absent a "certification" (or similar report to Congress) that the specific e-government project would save the government more money than it

cost, or have more “direct benefits” than the program from which funds were being taken. Such conditions can be very difficult to meet. (These bills were among the majority left unpassed when the 109th Congress adjourned.)

Although they did not specifically target the e-rulemaking project, the effect of appropriations restrictions over time has been seriously to impede the development and implementation of *regulations.gov* and FDMS. The stop-and-start nature of funding has caused delays in (i) making technical improvements crucial to the site’s functionality; (ii) adding agencies and documents to the system; and (iii) developing software tools and other enhancements that would make the *regulations.gov* interface more user-friendly and allow agencies to explore web-based methods for increasing the nature and quality of participation in rulemaking.

The small EPA working group in charge of the project (with OMB oversight) has performed remarkably in the face of prolonged funding uncertainty, virtually constant criticism of the website and database, and a cumbersome management structure that includes, for example, a “change control committee” consisting of representatives of 25 agencies. They seem to believe strongly in the project’s value -- and indeed it’s hard to imagine what, besides such faith, would keep obviously talented people from leaving in such trying circumstances. Nonetheless, as of today, e-rulemaking’s significant potential to advance public understanding of the regulatory process, and to facilitate greater participation in rulemaking from at least some sectors of the public, has not been even modestly tapped by *regulations.gov* and FDMS.

Given the factors just described, this situation is unlikely to change for the better without outside intervention to:

- I. *Separate e-rulemaking from the general Congressional appropriator concerns about e-government projects.* This requires articulating the benefits *regulations.gov* could offer the public, the regulated community, the rulemaking agency, and other agencies, as well as the cost savings eventually produced by the conversion from paper to an e-docket system like FDMS.
- II. *Produce a clear-eyed, expert outside assessment of the state of regulations.gov and FDMS.* This requires discerning and discussing the structural, financial, technical, and agency-cultural factors that impede the success of the e-rulemaking project.
- III. *Make specific recommendations to Congress and the President.* This requires focusing both on what should be done *now* to produce a well-functioning website and reasonably complete e-docket system, and on what *could* be done in the future to realize more fully the potential of the Internet to improve the practice of federal rulemaking. It also requires repeatedly asking the question whether the necessary actions can be effectively legislated or directed in, “top down”; if not, how are such actions to be accomplished?

The assessment and advice of a highly credentialed committee comprised of experts in the several areas relevant to these questions -- which gets information from the agencies most deeply involved in this project, but which maintains a perspective apart from the project’s long struggles

and controversies -- may be the only hope of achieving a truly effective and innovative federal e-rulemaking system.

HOW. Although the Committee could decide to proceed differently at its first meeting, the expected methodology is essentially as follows:

The Reporter will produce an initial background memo that, among other things, identifies what appear to be the major areas of inquiry. At the first meeting, the Committee will discuss the project generally, clarify ambiguities, raise questions, and change or supplement the major areas of inquiry. It will also draw on the various expertise of its members to suggest, and outline the contours of, field research that should be done on any area.

Subsequent meetings (ideally, no more than 4) will take up 1-2 areas of inquiry, depending on size. Prior to each meeting, the Reporter will have undertaken necessary research and produced a background memo on the area(s). This memo will present possible recommendations for the Committee's consideration. The goal of the meeting will be to determine the Committee's at least provisional recommendations in this area/these areas.

A goal of this methodology is to provide ample and accurate information for the Committee's ultimate report without unduly burdening Committee members' time. That said, the Committee could (1) choose to appoint, and/or members could volunteer to serve on, subcommittees to undertake field research/factfinding in particular areas; or (2) decide to have additional or extended meetings in order to itself meet with key agency officials.

WHEN. As soon as the Administrative Law Section secures funding for the Committee's expenses, the first meeting will be set on the earliest date fitting most members' schedules. Assuming this can be done by February, the goal is to complete the Committee's work in Summer 2007.

WHERE. Meetings will be held in Washington D. C.