

A Modest Proposal: Improve E-Rulemaking by Improving Comments

By Fred Emery* and Andrew Emery**

The Commenting Game

Much has been said about using e-rulemaking technology to make it easier for interested public citizens to comment on government agency rulemakings, and much has been said about using similar technology to help government agencies deal with the onslaught of comments. However, little in this dialogue has focused on improving the quality of the comments or the overall quality of the citizen-government discourse. The goal of increased public participation in rulemaking should be to improve the quality of the citizen-government discourse, not to increase the sheer volume of comments. But this objective has been lost in a technology-driven battle, which on the one side generates and shuffles comments and on the other side collects and unshuffles them.

The goal of e-rulemaking from the public citizen perspective is to increase the opportunity and ease by which the public can contribute to the participatory democracy that is rulemaking. One of the goals of e-rulemaking from the agency perspective is to increase the quality of comments. However, this agency goal is often overshadowed by the imperative of dealing with masses of jumbled comments. Sometimes it is no

accident that the comments are jumbled. Interest groups have been known to encourage their members to take steps to make it hard for an agency to treat a mass of comments as if they were just X number of form letters.

In this same publication a year ago, Professor Beth Noveck declared, "The current plan for e-rulemaking is nothing short of a disaster."¹ The problem overlooked by e-rulemaking is the comments numbers game it is fueling. The Internet as a means for expanded public participation in rulemaking has inspired a sort of rulemaking arms race. Some commenter organizations are investing excessive time and money in technology that will enable them and their members to produce large numbers of comments as quickly as possible in response to any rulemaking. Some commenter organizations are convinced that their position is strengthened by taking ten salient points and masquerading them as thousands of unique thoughts from thousands of thoughtful taxpayers.

Under the current e-rulemaking plan, interest groups spend money on the latest software to generate thousands of e-comments, and agencies are forced to invest in sophisticated software that will enable them to mine the thousands of comments to identify the ten salient points. This is a silly, wasteful, and circular game the rulemaking world has engaged in. It is reminiscent of the dilemma faced by Matthew Broderick's character in the movie *War Games*.

The shortcomings of the "current plan for e-rulemaking," and the shortcomings of many proffered solutions, are a result of a failure to recognize that the source of the problem of dealing with masses of public comments is not related to e-rulemaking. Many agencies were besieged by comments long before the coining of the phrase e-rulemaking. The problem of

dealing with large numbers of comments will not be solved by focusing on advances in technologies that exacerbate and complicate the problem and render more expensive the "solution."

The source of the problem is that commenters don't know how to comment effectively and agencies don't do an effective job at inviting comments. The only sensible solution is to convince all of the players that the comment numbers/shuffling game not only produces no winners, but also is pointless. In the movie *War Games*, a supercomputer learned that there were no winners in a global nuclear war. Perhaps we can learn that there are no winners if the rulemaking process is completely turned over to supercomputers. The solution requires the federal regulatory agencies to learn better ways of communicating their requests for comments to the public, and it requires the federal regulatory agencies to educate commenters how best to submit their ideas to the government.

While rulemaking is called a participatory democracy, it is not governed by majority vote. One thoughtful analysis can trump thousands of scrambled form letters. For a fraction of the money the government would spend on software that mines public comments for common themes and useful input, the government could engage in a public relations campaign to educate those who honestly wish to participate in rulemaking.

Recommendations

Clearly Structure Requests for Comments

Agencies should structure their requests for comments to notices of proposed rulemakings the same way they do in advanced notices of proposed rulemakings and similar documents. When

* President of The Regulatory Group, Inc., (TRG) a Washington, DC, consulting firm specializing in Federal agency rulemaking. Mr. Emery's company has been conducting courses on the Federal regulatory process for more than 20 years. Mr. Emery is a former Director of the Federal Register and a Fellow in the Section of Administrative Law & Regulatory Practice.

** Vice President of TRG. Mr. Emery is an instructor in TRG's Federal agency rulemaking training courses and works on rulemaking projects within several Federal agencies. See www.RegulationWriters.com.

¹ Beth Simone Noveck, *Public Participation in Electronic Rulemaking: Electronic Democracy or Notice-and-Span?*, 30 ADMIN. & REG. LAW NEWS 7 (Fall 2004).

agencies publish ANPRMs they typically provide a list (sometimes numbered) of specific questions they have and issues they want commented on. Seldom is an agency completely ignorant of the possible issues that will be raised during the comment period. The agencies should state in a numbered list the issues they are aware of and specifically ask for comments on those issues. The NPRM should request that commenters identify the issues they are commenting on by the numbers used in the NPRM. If the agencies are more organized in their request for comments, the commenters are more likely to organize their submissions to the agencies.

Educate Would-be-Commenters on Preferable Method of Submitting Comments

Federal agencies need to make a coordinated effort to convince the public that quality matters more than quantity. Associations and interest groups need to get the message that they should submit one clearly organized comment with as many signatories as they wish, rather than flood the agencies with thousands of scrambled messages. While it may be difficult to convince these groups that rulemaking is not a vote, it may be possible to convince them that their purposes would be better served by having their membership send emails with a simple statement that they support the positions on issues raised by ABC Organization, rather than submitting to the agency “in their own words” a medley of ABC’s concerns.

Implement Public Relations Campaign

The Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) has been very effective in getting the word out to

² Kenneth Culp Davis, *ADMINISTRATIVE LAW TEXT* 142 (3d ed. 1972).

agencies about **Regulations.gov**.

Regulations.gov could publish a Web page, called something like “Submitting Effective Comments,” explaining the regulatory process and how to write a good, persuasive, and effective comment. OIRA could issue a memorandum to agencies instructing them to put a reference to the **Regulations.gov** “Submitting Effective Comments” Web page in all requests for comments.

Another possibility is for agencies to insert boilerplate in their documents about “proper submission of comments,” explaining to would-be-commenters the process that underlies the game of rule-making and how to most effectively participate. Agencies may even want to adopt procedural rules that establish guidelines for effective commenting. While agencies could not refuse to consider comments that do not follow the guidance, commenters who ignore the agency guidance would be less likely to succeed if they challenge the agency in court on procedural grounds.

In addition to efforts made through OMB, all agency press offices/public affairs offices should provide speaking points to agency personnel so that, when appropriate, agency executives speaking at association and interest group meetings could address the issue of submitting effective public comments.


Conclusion

While the above suggestions do not guarantee that in the future the public comment process will work perfectly, they are at least worth trying. The potential commenters who would most likely object to these efforts are those whose hidden agenda is to undermine the rule-making process. Why not let these people sue if they want and trust the courts to rule in an agency’s favor if the agency has

done everything in its power to treat legitimate public comments fairly?

The best argument for pursuing the above recommendations is cost. The cost to provide an organized request for comments and to undertake a public relations campaign on effective commenting would be miniscule compared to the cost of the technological arms race that is now getting underway within agencies and among interest groups. Not to mention the across-the-board cost to government and society of further hamstringing the “efficiency” of the informal rulemaking process, the process that Ken Davis once called “one of the greatest inventions of modern government.”²

We anticipate that the strongest opposition to these recommendations will come from those who would profit from the alternative: groups intent on killing rules through floods of comments, technology companies who would like to sell software to both sides of the commenting game, and “experts” who would like to spend the next decade living off grants that fund their studies of the commenting process.

These recommendations are not a call to abandon technology. Technology and the Internet are going to be deeply embedded in all rulemaking efforts in the future, and they have the potential to improve it. These recommendations are merely a request for the exercise of a little sound judgment. Let’s not get so carried away with the enthusiasm over the newest bit of software that will mine one million jumbled comments in ten seconds that we can’t step back to ask the question, “Why do we have one million jumbled comments?” 

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