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Electronic Rulemaking in the Federal Government

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Electronic Rulemaking in the Federal Government

Summary

Electronic rulemaking, or "e-rulemaking," began in the federal government within individual agencies in the mid- to late 1990s, but current government-wide initiatives can be traced to both congressional and presidential sources. For example, the E-Government Act of 2002 requires federal agencies, "to the extent practicable," to accept public comments on their rules electronically and to ensure that one or more federal websites contains those comments and other materials normally maintained in rulemaking dockets. E-rulemaking is also one of about two dozen e-government initiatives launched as part of the George W. Bush Administration's President's Management Agenda. In the first phase of the initiative, the Administration established a website through which the public can identify all federal rules that are open for comment and provide comments on those rules. The second phase involves the creation of a government-wide docket system that can allow the public to review rulemaking materials (e.g., agencies' legal and cost-benefit analyses for their rules) and the comments of others. The Environmental Protection Agency (EPA) is the lead agency for the e-rulemaking initiative.

E-rulemaking has been described as a way to increase democratic legitimacy, improve regulatory policy decisions, decrease administrative costs, and increase regulatory compliance. However, the implementation of e-rulemaking in the federal government has been controversial. Although the migration of agencies into the government-wide docket was originally planned for 2004, that migration is currently not expected to be completed until 2008. Congress has objected to how e-rulemaking and several other e-government projects have been funded (through appropriations transfers or reimbursements to the projects' "managing partner" agencies), and has voiced other concerns about the overall management and appropriateness of the initiatives. Questions have also been raised regarding the e-rulemaking initiative's centralized structure, its costs (more than $53 million spent through FY2008) and expected financial benefits, the functionality of some of the applications being used, and its effect on public participation in the rulemaking process.

The reasons why the federal e-rulemaking initiative has had such a difficult first five years are many, but one appears to be the lack of direct, consistent funding. From FY2003 through FY2007, Congress appropriated less than $20 million to the E-Government Fund for all e-government projects — much less than the $345 million authorized in the E-Government Act for that period. Congress has also required approval by the Appropriations Committees before any transfers or reimbursements of appropriations are made. Although some have suggested that better communication is needed between Congress and the executive branch, the recent conflicts may reflect basic differences of opinion between the two branches regarding control of federal operations and how the branches should interact. A long-term issue is whether e-rulemaking should continue to be housed in EPA.

This report will be updated as appropriate to reflect changes in the e-rulemaking initiative.

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Electronic Rulemaking in the Federal Government

Electronic rulemaking, or "e-rulemaking," is the term used to describe the use of information technology (IT) to facilitate a range of activities related to the process of developing regulations. Although e-rulemaking in the federal government began primarily within individual agencies, the current government-wide initiative is more centralized and can be traced to both congressional and presidential sources. The E-Government Act of 2002 (P.L. 107-347) requires federal agencies, "to the extent practicable," to accept public comments on their rules electronically and to ensure that one or more federal websites contains those comments and other materials normally maintained in rulemaking dockets.[1] E-rulemaking is also one of about two dozen e-government projects launched as part of the George W. Bush Administration's President's Management Agenda.[2] Initially, the Administration established a website in January 2003 through which the public could identify federal rules that are open for comment, and provide comments on those rules. The second phase of the Administration's initiative is currently underway, and is intended to allow the public to access and review agency rulemaking materials (e.g., agencies' legal and cost-benefit analyses for their rules) and the comments of others more easily.

In concept, e-rulemaking has been described as a way to increase democratic legitimacy, improve regulatory policy decisions, decrease administrative costs, and increase regulatory compliance.[3] However, the implementation of e-rulemaking in the federal government has been controversial, with questions being raised regarding how the Administration's initiative is being funded, its overall structure, its costs and expected financial benefits, the functionality of some of the applications being used, and its effect on public participation in the rulemaking process. This report will

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[1] For more on the E-Government Act, see CRS Report RL30795, *General Management Laws: A Compendium*, coordinated by Clinton T. Brass. A "docket" serves as the repository for documents or information related to an agency's rulemaking and other activities, and typically contain legal or economic analyses that the agency has prepared and the comments submitted by the public.

[2] The President's Management Agenda (PMA), announced in August 2001, is composed of five government-wide initiatives: strategic management of human capital, competitive sourcing, improved financial performance, budget and performance integration, and expanded electronic government. For more on the PMA, see CRS Report RS21416, *The President's Management Agenda: A Brief Introduction*, by Virginia A. McMurtry.

[3] See, for example, Cary Coglianese, *E-Rulemaking: Information Technology and Regulatory Policy*, Regulatory Policy Program, John F. Kennedy School of Government, Harvard University, 2004, pp. v-vi.

explore each of those issues, but begins with information on rulemaking in general and the federal e-rulemaking initiative in particular.

E-rulemaking Initiatives

Federal regulation, like taxing and spending, is one of the basic tools of government used to implement public policy. Regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. The development and framing of a rule has been described as "the climactic act of the policy making process."[4] Another observer described the rulemaking process as "absolutely central to the definition and implementation of public policy in the United States," and said that "no significant attempt to alter the direction of a public program can succeed without effective management of the rulemaking process."[5] Federal agencies issue more than 4,000 final rules each year on topics ranging from the timing of bridge openings to the permissible levels of arsenic and other contaminants in drinking water.

The public can play a role in the rules that affect them through notice and comment provisions in the Administrative Procedure Act (APA) of 1946, as amended (5 U.S.C. § 551 *et seq.*). The APA generally requires agencies to (1) publish a notice of proposed rulemaking in the *Federal Register*; (2) allow interested persons an opportunity to participate in the rulemaking process by providing "written data, views, or arguments"; and (3) publish the final rule 30 days before it becomes effective.[6] However, in order to be involved in rulemaking most effectively, the public must be able to (1) know that proposed rules are open for public comment and (2) prepare and submit comments to relevant decisionmakers, and (3) should be allowed to access regulatory supporting materials (e.g., agencies' legal and economic analyses) and the comments of others so that their comments can be more informed and useful to decisionmakers.

IT has the potential to enhance the public's ability to perform all three of these tasks. As one author said, "information technology could make it easier for agencies to give notice to interested people and allow those people to access and search the proposed rule, could allow for more interactive and collaborative communications from individuals during the rulemaking process, and could make it easier for people and entities to monitor the implementation and enhance the enforcement of rules."[7]

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[4] Colin Diver, "Regulatory Precision," in Keith Hawkins and John Thomas, eds., *Making Regulatory Policy* (Pittsburgh: University of Pittsburgh Press, 1989), p. 199.

[5] Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Public Policy*, 2nd ed., (Washington: CQ Press, 1999), p. ix.

[6] For more on the APA and other rulemaking requirements, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Curtis W. Copeland. For an in-depth discussion of the federal rulemaking process, see Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking: Fourth Edition* (Chicago: American Bar Association, 2006).

[7] Stuart M. Benjamin, "Evaluating E-Rulemaking: Public Participation and Political (continued...)

However, in part because federal IT investments are not always well designed and implemented,[8] the application of IT to the rulemaking process does not automatically guarantee success.

Early Federal E-rulemaking Initiatives

E-rulemaking in the federal government began with both government-wide and agency-specific initiatives in the 1990s. In 1994, the Office of the Federal Register made the *Federal Register* and the *Code of Federal Regulations* available online. Also, individual federal agencies began experimenting with electronic rulemaking in the mid-1990s, with some allowing the public to comment on their rules electronically.[9] In 1998, the Department of Transportation (DOT) took a major step forward and established the first electronic rulemaking docket in the federal government. Compliant with National Archives and Records Administration (NARA) requirements for record systems, DOT's Docket Management System (DMS) allowed the department to eliminate its paper regulatory docket room and has reportedly saved more than $1 million per year in reduced administrative costs.[10] Although DOT's DMS was generally recognized as the most comprehensive and ambitious e-rulemaking system at the time, other agencies also began implementing their own electronic systems.

In June 2000, the General Accounting Office (GAO, now the Government Accountability Office) reported on efforts to allow the public to participate electronically in the rulemaking process in five federal agencies: DOT; the Departments of Agriculture (USDA), Health and Human Services (HHS), and Labor (DOL); and the Environmental Protection Agency (EPA).[11] All five of the agencies had websites that conveyed rulemaking information to the public and/or maintained some rulemaking records in electronic form, but there were differences between and sometimes within the agencies regarding the types of services provided. Individuals and organizations outside of the federal government suggested greater use of certain practices (e.g., proactive regulatory notification systems), and some suggested that agencies move to a more consistent organization, content, and presentation of

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[7] (...continued)
Institutions," *Duke Law Journal*, vol. 55, no. 6 (March 2006), p. 899.

[8] U.S. Government Accountability Office, *Information Technology: Further Improvements Needed to Identify and Oversee Poorly Planned and Performing Projects,* GAO-07-1211T, September 20, 2007.

[9] Some agencies went even further than allowing electronic comments. For example, in 1996, the Nuclear Regulatory Commission reportedly experimented with "electronic dialogues" on proposed changes to fire protection rules for nuclear reactors. See Michele Ferenz and Colin Rule, "RuleNet: An Experiment in Online Consensus Building," in Lawrence Susskind, Sarah McKearnan and Jennifer Thomas-Larmer eds., *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (Thousand Oaks, CA: Sage Publications, Inc., 1999), pp. 879-898.

[10] U.S. General Accounting Office, *Federal Rulemaking: Agencies' Use of Information Technology to Facilitate Public Participation*, GAO/GGD-00-135R, June 30, 2000, p. 9.

[11] Ibid.

information to allow for a more common "look and feel" to agencies' e-rulemaking efforts. However, representatives of the agencies did not believe that cross-agency standardization was either necessary or appropriate, and said that each agency should be allowed to develop systems to meet its own particular circumstances.

In February 2001, GAO reported that federal and state agencies were also making extensive use of IT to address other aspects of regulatory management.[12] For example, DOL had a system of electronic "advisors" imitating the interaction that an individual might have with an employment law expert, and EPA was working with partners in state government to develop a national environmental information exchange network. Several of the state innovations included interactive systems that allowed regulated entities to identify their regulatory responsibilities and complete related transactions. Representatives from non-governmental organizations suggested that federal agencies improve both the content and access to on-line information, more broadly and consistently use some existing applications, and adopt some new applications. Factors that reportedly facilitated or hindered the adoption and diffusion of such applications were (1) top-level leadership commitment and support, (2) adequate financial resources and staffing, (3) legislative and executive branch IT initiatives, (4) internal and external partnerships with critical stakeholders, (5) reengineering of existing business processes, and (6) development of an effective communication infrastructure.

Congressional Initiatives

Congress was an early advocate of the use of IT in administrative processes. For example, in 1998, Congress enacted the Government Paperwork Elimination Act (GPEA) (44 U.S.C. § 3504 note), which required that, by October 21, 2003, federal agencies provide the public, when practicable, with the option of submitting, maintaining, and disclosing information electronically, instead of on paper. GPEA made the Office of Management and Budget (OMB) responsible for ensuring that federal agencies met the act's implementation deadline. Although GPEA did not specifically mention rulemaking, both OMB and rulemaking agencies told GAO that the act's requirements provided an impetus for developing IT-based approaches to rulemaking and, more generally, to regulatory management.[13]

Congress has also prompted the use of IT in rulemaking specifically. For example, Section 206(c) of the E-Government Act of 2002 requires agencies to accept rulemaking comments under Section 553(c) of the APA electronically "to the extent practicable." Section 206(d) of the Act requires agencies, in consultation with the OMB Director and to the extent practicable, to (1) "ensure that a publicly accessible Federal Government Web site contains electronic dockets for rulemakings under section 553"; and (2) make available in those dockets all submissions under the APA, and all other materials that are usually included in such dockets, even if not submitted electronically. Notably, the commenting and docket requirements are

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[12] U.S. General Accounting Office, *Regulatory Management: Communication About Technology-Based Innovations Can Be Improved*, GAO-01-232 (February 12, 2001).

[13] U.S. General Accounting Office, *Regulatory Management: Communication About Technology-Based Innovations Can Be Improved*, p. 27.

placed on agencies, not OMB, and could be could be satisfied with agency-specific systems, a government-wide system, or something in between. Section 206(e) of the Act does, however, state that agencies are to implement the requirements of the section "consistent with a timetable established by the [OMB] Director."

Section 101 of the E-Government Act (which added a new Chapter 36 to Title 44 of the *United States Code*) created an Office of Electronic Government within OMB, headed by an administrator appointed by the President. That section of the Act also established an "E-Government Fund" that was to be:

> administered by the Administrator of the General Services Administration to support projects approved by the Director, assisted by the Administrator of the Office of Electronic Government, that enable the Federal Government to expand its ability, through the development and implementation of innovative uses of the Internet or other electronic methods, to conduct activities electronically.

The Act stipulated that no transfers of funds from the E-Government Fund to federal agencies may be made until 15 days after a proposed spending plan and justification for each project to be undertaken using such monies has been submitted to the House and Senate Committees on Appropriations. Finally, the Act authorized appropriations to the fund of at least $345 million for the FY2003 through FY2007 period.[14]

Presidential Initiatives

Presidential initiatives to encourage the use of IT in rulemaking can be traced to at least the start of the Clinton Administration. In September 1993, the President announced the results of the National Performance Review,[15] and one of the review's specific recommendations was that agencies should "Use information technology and other techniques to increase opportunities for early, frequent and interactive public participation during the rulemaking process and to increase program evaluation efforts."[16] The Clinton Administration also took several other actions to promote electronic government initiatives.[17]

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[14] The Act authorized $45 million for FY2003, $50 million for FY2004, $100 million for FY2005, $150 million for FY2006, and "such sums as are necessary for fiscal year 2007."

[15] For a description of this effort, see CRS Report RL30596, *The National Performance Review and Other Government Reform Initiatives: An Overview, 1993-2001*, by Harold C. Relyea, Maricele J. Cornejo Riemann, and Henry B. Hogue.

[16] Office of the Vice President, *From Red Tape to Results: Creating a Government That Works Better and Costs Less*, Report of the National Performance Review (Washington: GPO, 1993), p. 168 (recommendation REG04).

[17] For example, in July 1996, President Clinton issued Executive Order 13011 on "Federal Information Technology," which, among other things, established a Chief Information Officers Council as the principle interagency forum to improve agency information resource management and to "share experiences, ideas, and promising practices." Also, a December 17, 1999, presidential memorandum on electronic government directed federal agencies to take steps to address the public's growing demand for online services and access to

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The subsequent Bush Administration made electronic government one of the five components of its President's Management Agenda. The President's E-Government Strategy, released by OMB on February 27, 2002, identified 24 government-wide initiatives, one of which was e-rulemaking.[18] DOT was initially named managing partner of the initiative, and six other agencies were initially named as partners — EPA, HHS, DOL, USDA, the Federal Communications Commission (FCC), and the General Services Administration (GSA). The initiative is also guided by an executive committee (composed of 25 agency chief information officers) and other boards. For example, a "change control board" reviews and determines which requests for changes to the system will be approved.[19] OMB has representatives on the executive committee from both its Office of Information and Regulatory Affairs (OIRA) and its Office of Electronic Government and Information Technology (often referred to as OMB's "e-government" office).

The Administration's e-rulemaking initiative has been given several awards, including (1) the 2007 Intergovernmental Solutions Award from the American Council for Technology, (2) a 2007 Excellence.Gov "Top Five" Winner award from the Industry Advisory Council Collaboration and Transformation Shared Interest Group, and (3) a 2004 Public Access to Government Information Award from the American Association of Law Libraries. The initiative is also being examined by a "Committee on the Status and Future of E-Rulemaking" composed of prominent scholars and practitioners. The committee was organized under the auspices of the Administrative Law Section of the American Bar Association, and is expected to produce a report in early 2008 containing recommendations to Congress and the President for both immediate and longer term actions.[20]

E-rulemaking Modules

The Administration's e-rulemaking initiative was designed to occur in three separate phases or "modules": (1) a central "front-end" system (known as "Regulations.gov") in which the public could identify rules that were open for comment and provide comments on those rules; (2) a government-wide electronic rulemaking docket (the Federal Docket Management System, or FDMS) that would allow the public to review the comments that had been submitted on the rules and regulatory supporting materials (e.g., agencies' legal and cost-benefit analyses); and (3) an integrated federal rulemaking system (sometimes referred to as a regulatory "toolbox," "workbench," or "desktop") in which agencies could access various rule development tools. The third module was conceived as a voluntary part of the

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[17] (...continued)
information.

[18] See [http://www.whitehouse.gov/omb/inforeg/egovstrategy.pdf] for a copy of this document.

[19] U.S. Government Accountability Office, *Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System*, GAO-05-777, September 9, 2005, p. 20.

[20] Links describing this committee's purpose and operation, and its membership, can be found at [http://ceri.law.cornell.edu/news-blue-ribbon.php].

initiative, and has always been less defined. The first e-rulemaking module was initiated fairly quickly, but the second module has been plagued with implementation problems.

Module 1: Regulations.gov

In January 2003, the Administration launched the Regulations.gov website. There, the public could review all proposed rules that were open for public comment by agency, and could identify such "open" rules even if they did not know which agency had issued the rule.[21] An OMB press release issued at the start of Regulations.gov said that the website would "make the federal rulemaking process more accessible and enable citizens and small businesses to quickly access and comment on hundreds of open proposed rules from all federal agencies. This consolidation is estimated to save $94 million by creating a single system for the entire federal government."[22] The website was expected to be able to handle 12,000 comments per hour,[23] and one of the Administration's initial goals for this initiative was to receive 200,000 comments via Regulations.gov (although the time frame for receipt of these comments was not specific).[24]

In September 2003, GAO issued a report examining the early implementation of Regulations.gov.[25] GAO reported that the new website was generally more effective than the systems that the individual agencies used both to identify rules that were open for comment and to allow the public to comment on the rules electronically. However, GAO reported that only two of the 411 proposed rules that were issued in the first three full months of implementation mentioned Regulations.gov as a commenting option, perhaps explaining why so few comments were being submitted through the new system.[26] GAO also reported that about one-

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[21] For example, if a member of the public believed that an agency had published a proposed rule on wetlands management but did not know if it was issued by EPA, the Department of the Interior, or the Army Corps of Engineers, the person could enter the word "wetlands" in the search box and find a list of all rules open for comment with the word "wetlands" in the title.

[22] U.S. Executive Office of the President, Office of Management and Budget, "Regulations.gov to Transform U.S. Rulemaking Process and Save Nearly $100 Million," January 23, 2003. It was not clear how Regulations.gov (as opposed to the consolidated docket system in module 2) would yield such savings.

[23] Cindy Skrzycki, "U.S. Opens Online Portal to Rulemaking; Website Invites Wider Participation in the Regulatory Process," *Washington Post*, January 23, 2003, p. E01.

[24] U.S. Executive Office of the President, "Implementing the President's Management Agenda for E-Government: E-Government Strategy," April 2003, p. 26, available at [http://www.whitehouse.gov/omb/egov/2003egov_strat.pdf]. The document did not indicate a date for this goal.

[25] U.S. General Accounting Office, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved* (GAO-03-901), September 17, 2003.

[26] Although EPA reported receiving many "hits" or "page views" on the website, EPA said only about 200 comments were received from the public during this period via

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third of all rules (including more than 40% of EPA rules) did not permit the public to comment electronically. GAO recommended that OMB issue guidance to the agencies on ways to improve commenting, instructing agencies to provide a link to Regulations.gov on their websites and note in the preambles of their proposed rules the availability of Regulations.gov as a commenting option. GAO also recommended some specific changes to Regulations.gov (e.g., using the titles of the rules as they appear in the *Federal Register*).

In response to GAO's recommendations, on March 1, 2004, Karen Evans of OMB's e-government office and John Graham of OIRA sent a memorandum to the President's Management Council asking agencies to make the public more aware of the online rulemaking website and the ability to comment on rules.[27] Specifically, the memorandum asked agencies to mention Regulations.gov in the "Addresses" section of their *Federal Register* notices, and to include a link to Regulations.gov on their websites. Attached to the memorandum was an "Addresses" template suggested by the Office of the Federal Register in which the public would be allowed multiple means of submitting comments (i.e., Regulations.gov, an agency website, e-mail, fax, mail, and hand delivery). In April 2007, OMB required agencies to process comments on economically significant guidance documents via Regulations.gov.[28]

In August 2007, the acting director of the e-rulemaking initiative reported that, from the launch of Regulations.gov through July 2007, 107,812 comments had been submitted via Regulations.gov.[29] About half of those comments were submitted in June and July 2007. The acting director did not explain why the number of comments had increased so significantly at the end of this period, and did not put the total number of comments submitted via Regulations.gov in context with the total number of comments that had been submitted through other means. Federal agencies issue thousands of proposed rules each year, and federal agencies sometimes receive thousands of comments on individual rules.[30] Therefore, the 107,812 comments

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[26] (...continued)
Regulations.gov. For example, while EPA got 300,000 comments through its own website on a new pollution control program rule, GAO reported that the agency got only eight comments on the rule through Regulations.gov.

[27] Jason Miller, "E-Gov Act implementation picking up steam," *Government Computer News*, March 11, 2004. To view a copy of this memorandum, see [http://www.whitehouse.gov/omb/inforeg/memo_pmc_egov.pdf].

[28] Memorandum from Rob Portman, U.S. Executive Office of the President, Office of Management and Budget, "Implementation of Executive Order 13422 (amending Executive Order 12866) and the OMB Bulletin on Good Guidance Practices," April 25, 2007, p. 6. To view a copy of this document, see [http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf].

[29] John Moses, Acting Director, eRulemaking Program, "Tapping Technology to Better Address Public Comments," presented at *Best Practices in Regulatory Development: A Conference for Federal Regulatory Professionals*, Washington, DC, August 21, 2007.

[30] For example, EPA reportedly received more than 540,000 comments on a proposed rule to control mercury emissions from power plants. See Steve Cook, "EPA Gets Detailed Analysis of Plans To Control Mercury From Power Plants," *BNA Daily Report for* (continued...)

submitted via Regulations.gov between January 2003 and July 2007 likely represents only a small fraction of the total number of comments filed on rules published during that period.

Electronic Commenting Options Vary. As noted earlier in this report, a few months after Regulations.gov was launched in 2003, GAO examined what commenting options provided to the public and discovered that agencies only rarely mentioned Regulations.gov as a commenting option (two out of 411 rules). To determine if this condition had changed, CRS examined the commenting options provided to the public in 59 proposed rules published in the *Federal Register* from August 1, 2007, through August 7, 2007. Almost all of the rules mentioned Regulations.gov, and most allowed a variety of commenting options — typically via regular postal mail, hand delivery, e-mail to an agency address, and Regulations.gov. However, the agencies differed substantially in the electronic commenting options provided to the public.

- Three agencies (the Centers for Medicare and Medicaid Services [CMS] within HHS, the Federal Energy Regulatory Commission [FERC], and the Legal Services Corporation) did not mention Regulations.gov as a commenting option.

- In several agencies (the Agricultural Marketing Service, the Animal and Plant Health Inspection Service [APHIS], and the Rural Utilities Service within USDA; the Internal Revenue Service; GSA; the Department of Homeland Security [DHS]; the Office of Federal Thrift Supervision; and the Department of Education [ED]), Regulations.gov was the only electronic commenting option available.[31]

- One agency (the Federal Mediation and Conciliation Service) offered no electronic commenting option (i.e., neither an agency e-mail address nor Regulations.gov); the agency only provided a regular postal mail address to which comments could be sent.

- Two agencies (the Securities and Exchange Commission [SEC] and the Nuclear Regulatory Commission [NRC]) permitted electronic commenting in three forms — by e-mail to the agency, to an agency website, or through Regulations.gov.[32]

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[30] (...continued)
Executives, August 27, 2004, p. A-13. An FCC media ownership rule reportedly resulted in more than 2 million comments. See Cheryl Bolen, "FCC Postpones New Rulemaking on Contentious Media Ownership Rules," *BNA Daily Report for Executives*, July 15, 2005, p. A-6.

[31] In most cases, the agencies simply did not provide another electronic option, but the Department of Education said, "We will not accept comments by fax or e-mail."

[32] SEC permitted electronic comments via the Commission's internet comment form at [http://www.sec.gov/rules/proposed.shtml], by e-mail at [rule-comments@sec.gov], or (continued...)

In some cases, there were differences in the commenting options available within departments and agencies. For example, as noted above, three agencies within USDA did not allow electronic comments other than through Regulations.gov, but the department's Grain Inspection, Packers and Stockyards Administration allowed commenting via both agency e-mail and Regulations.gov. The Federal Communications Commission (FCC) allowed comments via Regulations.gov or an agency website in one rule, but in other rules published the same day, FCC only gave the agency's street address. The Department of the Interior's (DOI) Fish and Wildlife Service allowed comments by mail, hand-delivery, or e-mail to the agency, fax, or Regulations.gov for two rules, but another proposed rule published the same day did not mention Regulations.gov.

Several other facets regarding these rules are also notable.

- In one rule, the Centers for Medicare and Medicaid Services (CMS) within HHS required comments on the information collection aspects of the rule to be submitted in a separate manner than the other parts of the rule (by mail to either CMS or OMB, with an e-mail address provided only for the OMB contact).[33]

- In the two rules published by FERC, those not filing comments electronically were required to mail or hand-deliver 14 copies of their comments to FERC in Washington — a clear incentive to file comments electronically.

- EPA generally allowed comments in multiple forms (i.e., postal mail, e-mail to the agency, Regulations.gov, and usually fax). However, in one case, the agency published a proposed and direct final rule on the same issue on the same day.[34] EPA only provided a regular mail address in the proposed rule (no mention of Regulations.gov or an e-mail address), and said anyone wanting to file comments electronically or by hand should look in the direct final rule for how to do so.[35]

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[32] (...continued)
through Regulations.gov. NRC allowed electronic comments e-mail at [SECY@nrc.gov], via the NRC rulemaking website at [http://ruleforum.llnl.gov], and via Regulations.gov.

[33] In addition to obtaining comments on the substance of the rule pursuant to the APA, the Paperwork Reduction Act (35 U.S.C. § 3506) requires agencies to obtain public comments on any information collection requirements in the rule.

[34] "Direct final" rulemaking involves agency publication of a rule in the *Federal Register* with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (e.g., 30 days). However, if an adverse comment is filed, the direct final rule is withdrawn and the agency may publish the rule as a proposed rule under normal rulemaking procedures. In some cases, to avoid delay, agencies publish direct final and proposed rules on the same day.

[35] U.S. Environmental Protection Agency, "Extension of Cross-Media Electronic Reporting Rule Deadline for Authorized Programs," 72 *Federal Register* 43212, August 3, 2007.

Also, EPA usually said that comments submitted via Regulations.gov were anonymous, whereas comments sent directly to EPA would not be anonymous (with commenters' e-mail addresses captured automatically and placed in the public rulemaking docket) — again, an implicit incentive to use Regulations.gov. Nevertheless, the acting director of the e-rulemaking initiative said in August 2007 that EPA received 95% of its comments via e-mail, not through Regulations.gov.[36] Therefore, to enter those comments into FDMS, they must be copied and posted into the FDMS Web form.

Module 2: Federal Docket Management System

Although the construction of a single, government-wide commenting system that became "Regulations.gov" was relatively quick and uncontroversial, the effort to build an electronic rulemaking docket — the second phase of the e-rulemaking project — has been a subject of continuing controversy and repeated delays in implementation. In early 2002, OMB reportedly contracted with a consulting firm to determine whether the electronic docket should be built as a single, centralized system, or whether a more "distributed" design should be used that builds on existing electronic docketing systems in certain agencies. OMB reportedly selected the centralized approach based on the consultant's conclusion that it would be more cost effective, more stable, and provide greater scope and functionality.[37]

Daniels Memorandum. On May 3, 2002, OMB Director Mitchell E. Daniels, Jr., sent a memorandum to the heads of all executive departments and agencies informing them of "our intention to consolidate redundant IT systems relating to the President's online rulemaking initiative" because they make it difficult to find and comment on proposed rules, create performance gaps, and lead to "duplicative spending."[38] The Director said OMB had already identified several potentially redundant systems related to rulemaking, including systems at DOT, EPA, and the Food and Drug Administration (FDA). The memorandum went on to say that OMB would review the business cases for the redundant systems and, based on the results, "a single, front-end Web application for receiving public comments on proposed agency rules will be leveraged and used by federal rulemaking agencies." Following the completion of this phase (which was then scheduled for the end of 2002), OMB said it would move to the development of a consolidated "back-end" docketing system by the end of 2003.

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[36] John Moses, Acting Director, eRulemaking Program, "Tapping Technology to Better Address Public Comments," presented at *Best Practices in Regulatory Development: A Conference for Federal Regulatory Professionals*, August 21, 2007.

[37] Ralph Lindeman, "Structural, Other Flaws Said to Impede Effectiveness of E-Rulemaking Website," *BNA Daily Report for Executives*, March 30, 2007, p. C-5.

[38] Memorandum from Mitchell E. Daniels, Jr., Director of OMB, to the heads of executive departments and agencies, May 3, 2002, accompanied by an OMB press release entitled "OMB Accelerates Effort to Open Federal Regulatory Process to Citizens and Small Businesses: E-government initiative removes barriers to public comment; leads to higher quality rules," May 6, 2002.

Change in Leadership. Also in May 2002, DOT contracted with Excella Consulting to conduct an independent validation and verification analysis of functional and technical characteristics of seven existing e-rulemaking docket systems.[39] The primary objective of the study was to identify the optimal platform to serve as the consolidated electronic rulemaking docket platform for the entire federal government.[40] Three months later, on August 23, 2002, Excella Consulting submitted its "Cross Agency eDocket Assessment" to DOT. Excella concluded that EPA's newly developed EDOCKETS system was the best suited overall to serve as the basis for a government-wide centralized docket system. Reportedly on the basis of this study, OMB replaced DOT with EPA as managing partner of the initiative.

However, another explanation for the shift in leadership was offered by Mark Forman, who served as OMB administrator for e-government from June 2001 through August 2003. In March 2007, Mr. Forman was quoted as saying that DOT officials at the time were "not willing to surrender their own agency approach" or "accept the advantages" of using a single docket system for e-rulemaking, and instead preferred the "distributed" design with links to agency websites.[41] Because EPA officials agreed to the centralized approach, Mr. Forman said the leadership of the initiative was given to EPA.

A Centralized Docket. In September 2003, EPA awarded an indefinite-delivery, indefinite-quantity contract to a team led by Lockheed Martin Corporation to "integrate federal online rule-making systems with the Regulations.gov portal."[42] The contract was reportedly for one year, with four one-year options, and was estimated to be worth up to $98 million.[43] As discussed more fully later in this report, EPA and OMB considered three general options for how the government-wide docketing system should be structured: (1) a single centralized system, (2) a "distributed" system in which agencies with their own electronic dockets would be linked to a main system used by agencies without such dockets, and (3) a "tiered" system in which "single systems are geographically dispersed but interface with a main system."[44] In February 2004, e-rulemaking executive committee members

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[39] The seven agencies whose docket systems were evaluated by Excella were EPA, DOT, the Occupational Safety and Health Administration, NRC, FCC, the Food and Drug Administration, and the Department of Energy.

[40] Some agency officials told CRS that the Excella study was not to identify the best existing docket system, but rather to identify the best elements of all federal systems that could then be incorporated into a single new government-wide system.

[41] Ralph Lindeman, "Structural, Other Flaws Said to Impede Effectiveness of E-Rulemaking Website."

[42] Jason Miller, "EPA hires Lockheed for rule-making systems," *Government Computer News*, October 1, 2003, available at [http://www.gcn.com/online/vol1_no1/23739-1.html].

[43] Other press accounts described it as a seven-year contract funded for five years at $98 million, and said it was "to develop a centralized federal docket management system." See Gail Repsher Emery, "Government defends e-rulemaking," *Washington Technology*, March 22, 2004, at [http://www.washingtontechnology.com/print/18_24/23061-1.html].

[44] Jason Miller, "E-Rulemaking team studies three technical directions," *Government*

(continued...)

reportedly decided by a vote of 15-2 to build a single federal rulemaking docket.[45] FCC and DOI reportedly voted against the centralized docket approach, with FCC saying its own system (in place since 1998) would cost less. Proponents of the centralized docket said its primary advantage over the other approaches was its government-wide docket searching capability. OMB also reportedly said the centralized docket would save $70 million over five years, and would cost about $20 million to build, plus $6 million a year to operate and maintain.[46]

Although OMB and EPA indicated that the centralized docket system was being built to meet the public's needs, some observers complained that the public had not been adequately consulted on its design or features.[47] In early June 2004, the School of Public Policy and Public Administration at George Washington University hosted a series of half-day workshops on the initiative designed to solicit input from various end-user communities (e.g., large and small businesses, state and local governments, good government groups, and the legal and lobbying professions).[48] On July 16, 2004, EPA published a notice in the *Federal Register* announcing a series of public meetings and an online dialogue on the three phases of the e-rulemaking initiative.[49] Specifically, EPA invited comments on the usability and features of Regulations.gov, the planned docket management system, and the "rulewriter's toolbox." The meetings were scheduled for August 2 (San Francisco), August 3 (Chicago), August 9 (Cambridge, MA), and August 12 (Washington), and the online dialogue was scheduled for August 9 (hosted by Harvard's JFK School of Government). EPA said that comments received through these discussions would be considered during the development and enhancement of these systems.[50]

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[44] (...continued)
Computer News, January 5, 2004, at [http://www.gcn.com/online/vol1_no1/24534-1.html].

[45] Cindy Skrzycki, "Project Aims for One-Stop Online Shopping for Federal Rules," *Washington Post*, March 30, 2004, p. E01. See also Jason Miller, "E-Rulemaking will use a centralized docket system," *Government Computer News,* April 1, 2004, at [http://www.gcn.com/online/vol1_no1/25467-1.html?topic=e_gov]. According to some sources, the agency representatives voting were primarily the agencies' chief information officers or their delegates, not representatives from the rulemaking elements of the agencies.

[46] Ibid.

[47] For example, Robert Carlitz of Information Renaissance said, "We have been disappointed that, although a major objective of the e-rulemaking effort is to enhance public involvement in the rulemaking process, EPA and OMB staff have not been willing to have any significant public input to their own development process in its early stages." Cindy Skrzycki, "Project Aims for One-Stop Online Shopping for Federal Rules," *Washington Post*, March 30, 2004, p. E-1.

[48] To view the presentations at this workshop, see [http://erulemaking.ucsur.pitt.edu/talks.htm].

[49] U.S. Environmental Protection Agency, "Forum on Public Access to Federal Rulemaking Through the Internet: Announcement of Public Meetings and Request for Comment," 69 *Federal Register* 42727, July 16, 2004.

[50] Ibid., p. 42728.

In September 2005, GAO reported that officials in the e-rulemaking program office had "extensively collaborated with rulemaking agencies" during the construction of FDMS, and most agency officials that GAO contacted felt their suggestions had affected the development of the system.[51] GAO also said that the e-rulemaking officials followed all but a few of the key practices for successfully managing an initiative, and other parts of the report discussed how the centralized design for FDMS was selected and how the $94 million savings estimate was developed (both of which are further discussed later in this report). However, GAO recommended that EPA ensure that written agreements between it and participating agencies include performance measures that address such issues as system performance, maintenance, and cost savings — measures that GAO said "are necessary to provide criteria for evaluating the effectiveness of the e-Rulemaking initiative as well as for determining if the initiative is operating in the most efficient and economical manner."[52]

Also in September 2005, the Regulations.gov website was upgraded and expanded to allow the public to access rulemaking docket contents for the agencies that had migrated into the system earlier that year. As discussed later in this report, though, subsequent implementation was put on hold from December 2005 until July 2006 because of restrictions placed in the appropriation bill funding OMB and other agencies.

Implementation Status. Because of funding difficulties and other issues, the pace at which FDMS has been implemented has been slower than originally planned. For example, according to the Administration's "E-Government Strategy" that was issued in April 2003, the migration of agencies with "legacy web-based" docket systems to the government-wide system was to have begun in July 2003, and was to have been completed by the end of September 2004.[53] According to an EPA "Capital Asset Plan and Business Case" that was submitted to OMB in September 2003, 12 federal departments and agencies were to be migrated into FDMS by the end of September 2004 (including some with substantial rulemaking activity),[54] with more than 100 other departments and agencies following in 2005. However, the first agencies did not begin to migrate into FDMS until May 2005. According to the business case for budget year (BY) 2008, a total of seven federal entities had been migrated into FDMS by July 1, 2006 — EPA, the Department of Energy (DOE), the Department of Defense (DOD), GSA, DHS (less the Transportation Security Agency

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[51] U.S. Government Accountability Office, *Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System*, GAO-05-777, September 9, 2005, p. 4.

[52] Ibid., pp. 21-22.

[53] U.S. Executive Office of the President, "Implementing the President's Management Agenda for E-Government: E-Government Strategy," April 2003, p. 26.

[54] U.S. Environmental Protection Agency, "Capital Asset Plan and Business Case," September 8, 2003, pp. 56-59. The 12 departments and agencies scheduled for implementation in 2004 included HHS, DOI, DOT, and EPA, which collectively account for a significant portion of all proposed rules published each year. This and other business cases discussed in this report are required by OMB Circular A-11, Section 300-17.

and the U.S. Coast Guard), APHIS, and the National Aeronautics and Space Administration (NASA).[55]

During 2007, the pace of implementation increased. According to performance measures published on the OMB website, 20 of 26 "Scorecard" agencies had implemented FDMS as of March 2007, with the systems providing supporting materials and public submissions for 43% of all regulations.[56] OMB also said that there had been more than 20 million downloads of rules and regulations through the e-rulemaking site. According to the Regulations.gov website, agencies brought onto the system in 2007 included the Department of Justice (DOJ) (June 15); the Bureau of Indian Affairs, the Bureau of Reclamation, and the National Park Service within DOI (June 25); and the Bureau of Industry and Security within the Department of Commerce (DOC) (August 17). At a conference in August 2007, the acting director of the e-rulemaking initiative said that 25 departments and agencies used the site, representing 44% of federal rulemaking output.[57] By the first quarter of FY2008, he said departments and agencies representing more than 90% of federal rulemaking output would be using FDMS. On September 24, 2007, DOT (the agency with the largest amount of rulemaking activity) announced that its own docket management system (DMS) would be replaced by FDMS effective September 30, 2007.[58] According to the acting director of the e-rulemaking initiative, the NRC and the remainder of DOI were scheduled to migrate to FDMS in the first quarter of FY2008, and FDA and CMS were scheduled for the second quarter of FY2008.[59]

Also, a major implementation milestone was reached in August 2007 when, according to NARA, a "Records Management Module" meeting DOD records management standards began implementation in FDMS, indicating that the system is compliant with NARA records management regulations.[60] Therefore, as agencies migrate to FDMS, NARA said they can mark their documents as records that will be

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[55] See [http://www.epa.gov/OEI/cpic/by2008/eRulemaking.pdf], pp. 8-9, to view a copy of the BY2008 e-rulemaking business case and implementation schedule. The agencies that were in FDMS as of July 2006 were EPA, DOE, DOD, GSA, DHS (less the Transportation Security Agency and the U.S. Coast Guard), APHIS within USDA, and NASA.

[56] To view this report, see [http://www.whitehouse.gov/omb/egov/c-7-22-b-erule.html].

[57] John Moses, Acting Director, eRulemaking Program, "Tapping Technology to Better Address Public Comments," presented at Best Practices in Regulatory Development: A Conference for Federal Regulatory Professionals, Washington, DC, August 21, 2007.

[58] U.S. Department of Transportation, Office of the Secretary, "DOT's Migration to the Federal Docket Management Systems (FDMS)," 72 *Federal Register* 54315, September 24, 2007.

[59] E-mail to the author of this report from the acting director of the e-rulemaking initiative, October 12, 2007.

[60] E-mail and telephone call with Nancy Allard, Senior Policy Specialist, Policy and Planning Staff, NARA, August 29, 2007. According to NARA, one of the ways that an agency can ensure that a system is fully compliant with NARA regulations (36 CFR Chapter XII, Subchapter B) is to have a DOD-certified (DoD 5015.2 STD) records management application as part of the system. To view the DOD standard, see [http://jitc.fhu.disa.mil/recmgt/p50152stdapr07.pdf].

managed in accordance with NARA's requirements. Agencies with existing electronic dockets may transfer those records into FDMS, and agencies with paper dockets may digitize them and send them to FDMS (although doing so is expensive). However, because FDMS is a "date forward" system, agency rulemaking dockets that are not transferred will still need to be maintained by the agency for as long as the agency needs them. As a result, the agencies will have to pay for existing electronic or paper docket systems in addition to FDMS.

In its *Report to Congress on the Benefits of the President's E-Government Initiatives, Fiscal Year 2008*, OMB said that as of January 15, 2008, 29 departments and independent agencies had fully implemented FDMS — representing 90% of federal rulemaking activity.[61] OMB also said that more than 3,900 federal agency users from more than 160 rulemaking entities were registered users of FDMS.

Performance Shortfalls. This progress notwithstanding, in September 2007, GAO reported that the e-rulemaking initiative at EPA was on OMB's June 2007 list of high-risk IT projects with performance shortfalls.[62] Specifically, GAO said that e-rulemaking fell short because the cost and schedule variance was not within 10% of expectations. Also on the list of high-risk projects were e-rulemaking migrations by ED and DOT (because of unclear cost, schedule and performance baselines) and DHS (because of unclear baselines, cost and schedule variance not within 10%, the project manager was not qualified, and the project was duplicative of another project).

E-rulemaking Implementation Issues

A number of questions have been raised regarding the implementation of e-rulemaking in the federal government, including how the effort has been funded, the centralized nature of the government-wide docket system, the estimated and actual costs and benefits of FDMS, the functionality of the system, and the effect of e-rulemaking on public participation. Each of these issues is discussed below.

Funding Through Agency Contributions

Although the E-Government Act of 2002 authorized the E-Government Fund to receive at least $345 million for e-government projects from FY2003 through FY2007, appropriations to the fund during this period were much less — $5 million in both FY2003 and FY2004, and $3 million in FY2005, FY2006, FY2007, and FY2008. The lack of direct appropriations for e-government has led to controversial funding mechanisms, in which at least 10 e-government projects (including e-

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[61] Office of Management and Budget, *Report to Congress on the Benefits of the President's E-Government Initiatives, Fiscal Year 2008*, p. 9, available at [http://www.whitehouse.gov/omb/egov/documents/FY08_Benefits_Report.pdf].

[62] U.S. Government Accountability Office, *Information Technology: Further Improvements Needed to Identify and Oversee Poorly Planned and Performing Projects*, GAO-07-1211T, p. 28.

rulemaking) have been funded by required "contributions" from participating agencies.[63] EPA and OMB officials told CRS that they did not know how the decision was made to fund E-rulemaking in this manner. According to one article, e-government projects funded in this manner have been less successful than projects paid for and managed by single agencies — in part because of the absence of a consistent funding stream.[64]

At least two funding-related issues have arisen regarding these collaboratively financed projects, one involving erroneous OMB budget instructions to the agencies and the other involving congressional opposition to the funding procedure. Before discussing these issues, however, the following section discusses the amount of agency contributions to the e-rulemaking initiative.

Agency Contributions to E-rulemaking. According to a "Capital Asset Plan and Business Case" for the e-rulemaking initiative that was prepared by EPA and submitted to OMB in September 2003, a "cost allocation model" was developed to determine the amount that each participating agency was required to contribute to the project, with relevant factors including the size of the agencies' budgets, the average annual number of rules and non-rule items that they publish, and the average annual number of comments that they receive.[65] Agencies were placed in one of five groups or "tiers," with planned annual contribution amounts ranging from less than $100,000 to nearly $900,000. In addition to these contributions to build FDMS, agencies were also reportedly "responsible for their respective costs to migrate into the new eRulemaking [docket] system and docket operation cost."[66]

An earlier, June 2003, version of the business case indicated that, when DOT was the managing partner of the e-rulemaking initiative, the department had requested $5 million in FY2003 for the initiative.[67] Following budget passage and the shift in leadership of the initiative from DOT to EPA, the document indicated that $4,847,500 was transferred from DOT to EPA via an interagency agreement. (According to GAO, DOT provided monetary funds and in-kind support in lieu of transferring the full $5 million.[68]) Also, eight other departments and agencies were reportedly "tapped" by OMB for $100,000 each in FY2003 to support the initiative. GAO reported that the Federal Elections Commission provided $185,000 (even

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[63] For a discussion of this funding arrangement in general, see U.S. Government Accountability Office, *Electronic Government: Funding of the Office of Management and Budget's Initiatives*, GAO-05-420, April 25, 2005.

[64] Daniel Pulliam, "E-Gov at Five Years, Part Four: Mixed Results," *GovExec.com*, August 31, 2006, at [http://www.govexec.com/dailyfed/0806/083106eg4.htm].

[65] U.S. Environmental Protection Agency, "Capital Asset Plan and Business Case," September 8, 2003, p. 24.

[66] Ibid., p. 25.

[67] U.S. Environmental Protection Agency, "Draft Capital Asset Plan and Business Case," June 27, 2003, p. 31. This document was prepared pursuant to OMB Circular A-11, Section 300-17.

[68] U.S. Government Accountability Office, *Electronic Government: Funding of the Office of Management and Budget's Initiatives*, p. 27.

though no contribution had been planned from the agency), bringing the total of agency contributions that year to $5,732,500.

In each subsequent fiscal year, the e-rulemaking executive committee has decided how much agencies should contribute to the e-rulemaking project, with the amount based on the above-mentioned cost allocation model. Each year, EPA enters into a standardized memorandum of understanding with each participating agency for the funds transfer, and those funding amounts are approved by OMB as part of the budget "passback" approval process.[69] During testimony before the House Committee on Government Reform in July 2004, Kimberly Nelson, who was then EPA's Chief Information Officer and co-chair of the e-rulemaking executive committee, said this allocation model "covers start-up and development work," and indicated that a separate user-fee approach would be developed for ongoing operations and maintenance.[70]

As shown in **Table 1** below, federal agencies have contributed more than $53 million to the e-rulemaking initiative from FY2003 through FY2008. Some agencies have been consistently required to contribute to the development of FDMS, while other agencies have either not been required or instructed to contribute, or their contributions were delayed until late in the year. Notably, some major rulemaking agencies have not contributed any funds to the e-rulemaking initiative (e.g., FCC and the SEC), but will likely benefit from its implementation. Agency representatives told CRS that the agency contribution amounts for FY2009 were agreed upon in late September 2007, and in some cases are significantly higher than previous amounts. For example, DOT's contribution for FY2009 will reportedly be at least $1.1 million,

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[69] According to the acting director of the e-rulemaking initiative, the mechanics of the funds transfers are as follows. The E-rulemaking program management office (PMO) distributes an MOU and an Interagency Agreement (IAA) to partner agencies. Partner agencies sign both documents and return them to the PMO. The PMO signs both documents and forwards them to EPA's Office of Grants and Interagency Agreement group for final processing and acceptance. During the grant specialist's review of the package, the Office of the Chief Financial Officer is contacted to obtain a unique reimbursable account code. The account code is critical to the interagency agreement and is the tracking mechanism for obligations and expenditures incurred to perform the work requested in the interagency agreement. When the review is completed, executed copies of the agreement are distributed to the appropriate offices (i.e., the PMO, the partner agency, the budget office, and Chief Financial Officer). Reimbursable authority must be issued for each interagency agreement. Once the Interagency agreement is fully executed, the PMO enters a reprogramming request in EPA's Integrated Financial Management System (IFMS) by budget object class. The budget division reviews these requests and approves these reprogramming requests. Once approved, the Finance Office activates the account code in EPA's Integrated Financial Management System. Once the account code is activated in IFMS, funding documents to perform work under the Interagency Agreement can be executed. The Finance Office reviews all reimbursable Interagency Agreement obligations and expenditures recorded against the unique reimbursable account code to determine the amount to bill the partner agency. A bill is issued to the partner agency when the amount is reflected as expended.

[70] Testimony of Kimberly T. Nelson, Assistant Administrator for Environmental Information and Chief Information Officer, Environmental Protection Agency, in U.S. Congress, House Committee on Government Reform, *Federal Government Management of Information Technology*, hearing, 108th Cong., 2nd sess., July 21, 2004.

and may be as high as $1.8 million — significantly more than the department's $735,000 contribution for FY2008. (Prior to migration to FDMS, DOT's own docket management system reportedly cost about $550,000 per year to operate.) OMB officials said that the contribution amounts for FY2009 were simply recommendations to OMB, and are part of the FY2009 budget development process.

Table 1. Agency Contributions to E-rulemaking

Agency	Contributions to E-Rulemaking Initiative (in thousands of $)						
	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	Total
USDA	—	$0*	$885	$825	$855	$735	$3,300
DOC	—	$0*	$355	$825	$855	$735	$2,770
DOD	$100	$775	$355	$825	$615	$535	$3,205
ED	—	$0*	$180	$175	$155	$135	$645
DOE	$100	$186*	$355	$825	$280	$241	$1,987
HHS	$100	$775	$885	$825	$855	$735	$4,175
DHS	—	$750	$885	$825	$855	$735	$4,050
HUD	$100	$300	$355	$500	$280	$241	$1,776
DOI	—	$0*	$885	$825	$615	$535	$2,860
DOJ	—	$0*	$355	$825	$280	$241	$1,701
DOL	$100	$775	$885	$825	$855	$535	$3,975
State	—	$0*	$180	$365	$155	$135	$835
DOT	$4,848	$544	$1,100	$825	$855	$735	$8,907
Treasury	$100	$750	$885	$825	$615	$535	$3,710
VA	—	$180	$180	$365	$280	$135	$1,140
EPA	$100	$775	$885	$500	$615	$535	$3,410
FCC	—	$0*	—	—	—	—	$0
FERC	—	$0*	—	—	—	—	$0
Federal Reserve	—	$0*	—	—	—	—	$0
GSA	—	$0*	$180	$175	$280	$241	$876

Agency	Contributions to E-Rulemaking Initiative (in thousands of $)						
	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	Total
NASA	—	$0*	$180	$365	$280	$241	$1,066
NSF	—	$0*	$100	$175	$155	$135	$565
NRC	$0*	$0*	—	—	—	—	$0
OMB	—	$0*	—	—	—	—	$0
OPM	—	$0*	$180	0*	$155	$135	$470
SEC	—	$0*	—	—	—	—	$0
SBA	—	$25*	$180	$175	$155	$135	$670
SSA	—	$0*	$355	$175	$155	$135	$820
Other agencies	$185	$170	$100	—	—	—	$455
Total	$5,733	$6,005	$10,885	$12,045	$10,200	$8,500	$53,368

Sources: Agency contributions for FY2003 and FY2004 are generally from GAO's report on *Electronic Government: Funding of the Office of Management and Budget's Initiatives*, pp. 25-26. Contributions for FY2005 are from the acting director of the e-rulemaking initiative. Contributions for FY2006, FY2007, and FY2008 are generally from OMB's *Report to Congress on the Benefits of the President's E-Government Initiatives*. The acting director indicated that some of the amounts in the GAO and OMB reports were incorrect. For example, the GAO report indicated that the Department of Veterans Affairs obligated none of its $300,000 planned contribution for FY2004 because the planned amount was not reflected in the OMB passback. However, the acting director said that VA actually contributed $180,000 that year. He also corrected amounts in the OMB report for FY2006 for DOD, HUD, and EPA. The above table reflects those corrections.

Notes: Acronyms not previously introduced are HUD (the Department of Housing and Urban Development), State (the Department of State), VA (Department of Veterans Affairs), NSF (National Science Foundation), OPM (Office of Personnel Management), SBA (Small Business Administration), and SSA (Social Security Administration). "Other agencies" include the Federal Elections Commission, the Federal Trade Commission, the National Archives and Records Administration, and the Pension Benefit Guarantee Corporation. In FY2003, NRC asserted it was not subject to OMB's budget guidance because it derived most of its budget from user fees, so it did not make its planned contribution of $100,000. In FY2004, the amounts with an asterisk (*) generally reflect reduced amounts because the planned amounts (ranging from $85,000 to $775,000) were not reflected in the OMB passback. OMB did not provide GAO with a reason why it did not make its planned contribution of $85,000 in FY2004. In FY2006, OMB said that OPM did not obtain permission from its appropriations subcommittee to provide funds ($175,000) for e-rulemaking.

Flawed OMB Budget Instructions. In an April 2005 report on the funding of the e-government initiatives, GAO reported that 6 of the 10 e-government initiatives that relied on agency contributions experienced funding shortfalls in 2003,

and 9 had more serious shortfalls in 2004.[71] In particular, the e-rulemaking initiative received only 51% of its planned FY2004 contributions ($5.85 million instead of the planned $11.5 million). This gap in funding was reportedly caused by a mistake in OMB budget process procedures. Although the e-rulemaking initiative's funding plan for FY2004 called for adding new funding partners (from 9 agencies to 35), GAO said OMB did not reflect this expansion in its annual budget guidance ("passback") to the agencies. As a result, most of the new agencies did not contribute to the initiative, some of which were slated to make substantial contributions. For example, USDA was scheduled to contribute $775,000; DOI was to contribute $750,000; and DOC, DOJ, VA, FCC, FERC, and SEC were each to send $300,000. Eight other agencies were supposed to contribute $150,000 each (ED, State, the Federal Reserve, GSA, NASA, NRC, OPM, and SBA). Because of the funding shortfall, the initial migration of agencies into the new centralized docket system during FY2005 reportedly had to be scaled back.[72]

Congressional Opposition to Transfers. As mentioned previously, Congress has appropriated only a fraction of the amount authorized in the E-Government Act and requested by the Administration from FY2003 through FY2007.[73] Congress has also indicated that transfers from the E-government Fund cannot be made without prior congressional notification.[74] For example, the Consolidated Appropriations Act, 2004 (P.L. 108-199), enacted January 23, 2004, (one year to the day after Regulations.gov was launched) provided $3.0 million for the Electronic Government Fund — an amount that was characterized in the subtitle of the section as "Including Transfer of Funds." The legislation said that transfers of this money to federal agencies to carry out e-government projects "may not be made until 10 days after a proposed spending plan and justification for each project to be undertaken has been submitted to the Committees on Appropriations."[75] The Consolidated Appropriations Act, 2005 (P.L. 108-447), enacted December 8, 2004, contained the same funding amount and the same provision regarding transfers of

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[71] U.S. Government Accountability Office, *Electronic Government: Funding of the Office of Management and Budget's Initiatives*, p. 2.

[72] Ibid., pp. 25-26. Initially, 10 agencies were included for implementation in the first phase, including DOT, DOE, HHS, DOI, and GSA. As a result of this error, however, the first phase was scaled back to include only EPA, HUD, NARA, APHIS within USDA, and portions of DHS.

[73] The E-Government Act of 2002 authorized $45 million for FY2003, $50 million for FY2004, $100 million for FY2005, $150 million for Fy2006, and "such sums as are necessary for fiscal year 2007." The President's initial $20 million request was cut by Congress to $5 million for FY2002, which was the amount provided for FY2003 as well. Funding thereafter was held at $3 million for FY2004, FY2005, and FY2006. The President requested $5 million for FY2007 and Senate appropriators concurred, but the House approved the usual $3 million, as recommended in the House Appropriations Committee report. The final amount provided for FY2007 was $2.9 million.

[74] For a discussion of congressional restrictions in general, and on the transfer of appropriated funds in particular, see CRS Report RL33151, *Committee Controls of Agency Decisions*, by Louis Fisher.

[75] 118 Stat. 333.

funds to the agencies.[76] Both the 2004 and 2005 appropriations acts also contained provisions in the agency-specific sections stating that "None of the funds made available in this Act may be transferred to any department, agency, or instrumentality of the United States Government, except pursuant to a transfer made by, or transfer authority provided in, this Act or any other appropriations Act."[77]

In addition to these general restrictions on funds transfers, there have also been specific efforts to restrict the use and transfer of funds for certain e-government projects. For example, in the 108th Congress, Section 333 of the FY2005 appropriations bill for DOI (H.R. 4568) stated that "None of the funds in this or any other Act may be used by the agencies funded in this Act to implement Safecom, Disaster Management, E-Training, and E-Rulemaking." However, this legislation was never enacted, and the language was not included in the Consolidated Appropriations Act, 2005.

FY2006. At least two appropriations bills were enacted for FY2006 that contained restrictions on e-government projects — one which was applicable only to the agencies funded by the bill, and one that applied government-wide. Section 620 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006 (P.L. 109-108), enacted on November 22, 2005, stated that "Any funds provided in this Act used to implement E-Government Initiatives shall be subject to the procedures set forth in section 605 of this Act." Section 605 required that the Appropriations Committees in both houses of Congress be notified 15 days in advance of certain reprogrammings of funds.

The Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for FY2006 (P.L. 109-115, hereinafter the "Transportation/Treasury" appropriation) was enacted on November 30, 2005. As in the consolidated appropriations bills enacted during the two previous years, the legislation provided $3 million for the Electronic Government Fund, and had the same language regarding how the funds should be transferred to the agencies. In addition, one of the general provisions in the legislation (Section 705) contained the previous prohibition on funds being transferred "except pursuant to a transfer made by, or transfer authority provided in, this Act or any other appropriations Act." More specifically, Section 841 of the legislation said the following:

> No funds shall be available for transfers or reimbursements to the E-Government Initiatives sponsored by the Office of Management and Budget (OMB) prior to 15 days following submission of a report to the Committees on Appropriations by the Director of the Office of Management and Budget and receipt of approval to transfer funds by the House and Senate Committees on Appropriations.

The OMB report was required to detail (1) the amount proposed for transfer for any department and agency by program office, bureau, or activity, as appropriate; (2) the specific use of funds; (3) the relevance of that use to that department or agency and

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[76] 118 Stat. 3257.

[77] This language appeared seven times in the 2004 bill and nine times in the 2005 bill.

each bureau or office within, which is contributing funds; and (4) a description on any such activities for which funds were appropriated that will not be implemented or partially implemented by the department or agency as a result of the transfer. In explaining the rationale for this "report and obtain approval" provision, the House report for the legislation (H.R. 3058) stated the following:

> The Committee has expressed serious concerns about the continued forced implementation of this initiative on Departments and Agencies. Many aspects of this initiative are fundamentally flawed, contradict underlying program statutory requirements and have stifled innovation by forcing conformity to an arbitrary government standard. Most importantly, the implementation of this initiative has forced departments and agencies and offices and bureaus within each to transfer funds without the consent of the Committee and has used funds for activities for which funding was not specifically appropriated.[78]

The Bush Administration initially opposed this and other provisions in the appropriations bill requiring congressional committee approval before action by agencies, saying "they should be deleted or changed to require only notification of Congress."[79] OMB took the position that transfers of agency funds for e-rulemaking and other e-government projects were legal under the Economy Act (31 U.S.C. § 1535) because agencies were paying for services rendered.[80] The Economy Act states that the head of an agency or unit may place an order with a unit within the same agency or another agency for goods or services if "(1) amounts are available; (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government; (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise."

However, in a December 19, 2005, letter to the e-rulemaking executive committee members, the co-chairs of the executive committee (then, Kimberly Nelson of EPA and Don Arbuckle of OMB) said that, in light of the congressional funding restrictions, they and the OMB e-government administrator had decided to allocate the remaining FY2006 funds to "operate and maintain" the current system of e-government projects. The letter also indicated that "eRulemaking will suspend all further agency implementation and development activities, effective beginning second quarter FY2006." The letter went on to say that, "As funding is approved and

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[78] U.S. Congress, House Committee on Appropriations, *Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia, and Independent Agencies Appropriations Bill, 2006*, report to accompany H.R. 3058, 109th Cong., 2nd sess., H.Rept. 109-153 (Washington: GPO, 2006), available at [http://www.congress.gov/cgi-lis/cpquery/R?cp109:FLD010:@1(hr153)].

[79] U.S. Office of Management and Budget, *Statement of Administration Policy, H.R. 3058 — Transportation, Treasury, Judiciary, HUD and Related Agencies Appropriations Bill, FY2006*, October 19, 2005, p. 7, available at [http://www.whitehouse.gov/omb/legislative/sap/109-1/hr3058sap-s.pdf].

[80] David Perera, "E-government battered in conference bill," *Government Executive*, November 18, 2005, available at [http://www.govexec.com/story_page.cfm?articleid=32846&dcn=todaysnews].

received, the PMO [program management office] will resume agency implementation and system development activities to the extent that resources allow."[81]

In January 2006, Karen Evans, OMB's Administrator for the Office of Electronic Government and Information, was quoted as saying these appropriations requirements indicated that "Congress wants better transparency and wants to have a better understanding of what we're doing in E-Government," and went on to say "We believe they're entitled to that."[82] She asserted that the Economy Act authorizes agencies to use funds to contract with other agencies for services.

OMB filed the congressionally required report in January 2006,[83] and Ms. Evans and OMB Deputy Director for Management Clay Johnson III reportedly met with House and Senate Appropriations Committee staff that month.[84] However, OMB officials said that OMB did not seek release of the restricted e-government funds from the committees, but rather told the contributing agencies to meet with their individual appropriations subcommittees to secure the release of the funds (and for other purposes).[85] As a result, OMB said the agencies met with majority and minority staff in each House and Senate Appropriations subcommittee (other than the subcommittee for the legislative branch) and worked out an arrangement for the payments to be made to the lead agencies. These discussions took several months, though, and the agencies' contributions for e-rulemaking and several other initiatives were not allowed to be transferred until the end of June 2006.[86] As a result, the e-rulemaking initiative was essentially unable to proceed with implementation for the first six months of 2006.[87]

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[81] A copy of this letter was posted to the OMB Watch Website at [http://www.ombwatch.org/article/blogs/entry/1409/38].

[82] Ralph Lindeman, "OMB Struggles to Deal With Objections On Capitol Hill to E-Regulation Project," *BNA Daily Report for Executives*, January 9, 2006, p. A-6.

[83] U.S. Office of Management and Budget, *Report to Congress on the Benefits of the President's E-Government Initiatives*, January 6, 2006. To view a copy of this report, see [http://www.whitehouse.gov/omb/inforeg/e-gov/e-gov_benefits_report_2006.pdf].

[84] Ralph Lindeman, "OMB Struggles to Deal With Objections On Capitol Hill to E-Regulation Project."

[85] Meeting between the author of this report and OMB officials from the Office of Information and Regulatory Affairs, the Office of E-government, and the Office of the General Counsel, September 28, 2007.

[86] Jason Miller, "Delay in e-gov funding puts some projects in a bind," *Government Computer News*, July 24, 2006. See [http://www.gcn.com/print/25_21/41449-1.html].

[87] According to the e-rulemaking business case for 2008, in May 2006, the e-rulemaking executive committee voted to change the initiative's budget cycle from a fiscal year basis to a calendar year basis "to account for delays in partner Agencies' transmission of funding to the eRulemaking Project Management Office (PMO) at the beginning of each [fiscal year]" and "to insure that the program had sufficient funding while that year's funding was being received from each of the twenty-five contributing partner agencies." See [http://www.epa.gov/OEI/cpic/by2008/eRulemaking.pdf], p. 5.

In January 2006, a spokesperson for the House Appropriations Committee was quoted as saying that there was widespread concern among committee members regarding how the e-government programs had been implemented, noting "OMB announced it; we never funded it; and they coerced agencies to fund it. We said if you want to fund these projects, tell us how much and tell us why it is a good idea, come up with a plan, sell it to Congress, and we will [either] approve it or not."[88] The spokesperson reportedly said that these coercive transfers were particularly difficult to accept when an agency like the National Park Service, which has a lean budget for park operations, is "tapped for $1.5 million for e-government projects without congressional approval."[89] The same person was quoted in another article as saying OMB was "standardizing and imposing a one-size-fits-all [system] on agencies that have vastly different missions and objectives."[90]

FY2007. Section 839 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2007 (H.R. 5576) contained the same "report and obtain approval" requirements. However, this legislation was never enacted. The final continuing resolution for FY2007 (P.L. 110-5) did not include the restrictions on transfers and reimbursements from the E-Government Fund, but Section 104 of the legislation stated that, "Except as otherwise expressly provided in this division, the requirements, authorities, conditions, limitations, and other provisions of the appropriations Acts referred to in section 101(a) shall continue in effect through the date specified in section 106." Section 101(a) lists nine FY2006 appropriations acts, including the Transportation/Treasury appropriations act. Section 106 states that the funds made available were for the period ending September 30, 2007. Therefore, the "report and obtain approval" requirements that were in effect in FY2006 were also in effect for FY2007. OMB filed the congressionally required report in February 2007[91], and OMB officials said that the contributing agencies met with their appropriations subcommittees to permit release of the funds for FY2007.[92]

FY2008. As passed by the House and reported in the Senate, the Financial Services and General Government (FSGG) Appropriations Act, 2008 (H.R. 2829) provided $2.97 million for the E-Government Fund — $2.03 million less than the President had requested. Section 738 of the bill had the same "report and obtain approval" provisions restricting transfers and reimbursements to the e-government initiatives as were in P.L. 109-108 for FY2006. Also, the House report on the bill stated the following:

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[88] Jason Miller, "OMB delivers report to better sell e-government," *Government Computer News*, January 9, 2006.

[89] Ibid.

[90] Cindy Skrzycki, "Document Portal Sticks on Funding," *Washington Post*, January 10, 2006, p. D-1.

[91] To view a copy of this report, see [http://www.whitehouse.gov/omb/egov/documents/FY07_Benefits_Report.pdf].

[92] Meeting between the author of this report and OMB officials from the Office of Information and Regulatory Affairs, the Office of E-government, and the Office of the General Counsel, September 28, 2007.

> The Committee notes that it continues a government-wide general provision that precludes the use of funds for the "e-Government" initiative prior to consultation with and approval by the Committee on Appropriations. The Committee continues to be concerned about OMB using this initiative to force its management priorities on agencies that would otherwise choose different approaches to serving the public and other government agencies that are better tailored to meet the needs of their customers and meet their statutory requirements. The Committee urges OMB and all agencies to work directly with the individual appropriations subcommittees in advance of recommending e-Government transfers so that approved worthy initiatives can move forward without disruption.[93]

The House report also said:

> The Committee again does not include a general provision proposed in the fiscal year 2008 budget request allowing the Office of Management and Budget (OMB) to use $40,000,000 of surplus funds in the General Supply Fund to finance OMB's list of "e-Gov" initiatives across government. The Committee refuses to relinquish oversight of the development and procurement of information technology projects of the various agencies under its jurisdiction.[94]

Ultimately, the FSGG legislation was included in H.R. 2764, the Consolidated Appropriations Act, 2008 (P.L. 110-161). One of the government-wide general provisions of the act states the following:

> SEC. 737. (a) For fiscal year 2008, no funds shall be available for transfers or reimbursements to the E-Government initiatives sponsored by the Office of Management and Budget prior to 15 days following submission of a report to the Committees on Appropriations by the Director of the Office of Management and Budget and receipt of approval to transfer funds by the House and Senate Committees on Appropriations.
>
> (b) Hereafter, any funding request for a new or ongoing E-Government initiative by any agency or agencies managing the development of an initiative shall include in justification materials submitted to the House and Senate Committees on Appropriations the information in subsection (d).
>
> (c) Hereafter, any funding request by any agency or agencies participating in the development of an E-Government initiative and contributing funding for the initiative shall include in justification materials submitted to the House and Senate Committees on Appropriations — (1) the amount of funding contributed to each initiative by program office, bureau, or activity, as appropriate; and (2) the relevance of that use to that department or agency and each bureau or office within, which is contributing funds.
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> (d) The report in (a) and justification materials in (b) shall include at a minimum — (1) a description of each initiative including but not limited to its objectives,

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[93] U.S. Congress, House Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2008*, report to accompany H.R. 2928, 110th Cong., 1st sess., H.Rept. 110-207 (Washington: GPO, 2007), p. 36.

[94] Ibid., p. 68.

> benefits, development status, risks, cost effectiveness (including estimated net costs or savings to the government), and the estimated date of full operational capability; (2) the total development cost of each initiative by fiscal year including costs to date, the estimated costs to complete its development to full operational capability, and estimated annual operations and maintenance costs; and (3) the sources and distribution of funding by fiscal year and by agency and bureau for each initiative including agency contributions to date and estimated future contributions by agency.
>
> (e) No funds shall be available for obligation or expenditure for new E-Government initiatives without the explicit approval of the House and Senate Committees on Appropriations.

In response to a news report about these requirements,[95] OMB said "Provisions in the Act that purport to require congressional committee or individual leaders' approval prior to execution of the law shall be construed as calling solely for notification, as any other construction would be inconsistent with the principles enunciated by the Supreme Court of the United States in *INS vs. Chadha*."[96] OMB also emphasized that the funds provided by the agencies are not transfers, but instead are "reimbursable obligations as authorized under the Economy Act (31 U.S.C. Section 1535) where agencies provide fees for services rendered." In addition, OMB said that while it "provides recommendations and guidance on processes to follow when creating reimbursement agreements, ultimately it's the agencies who determine the appropriate manner in which E-Gov activities are reimbursed." Finally, OMB said that the E-Government Fund "was never designed to fully fund the Presidential E-Government initiatives," and instead has been used to "initiate additional government-wide initiatives (e.g., Lines of Business), support ancillary efforts such as IPv6, and help implement legislative requirements (e.g., Federal Funding Accountability and Transparency Act of 2006)."

Legal Authority for Transfers. Congressional appropriators have been quoted as saying that transfers of agency appropriations to pay for e-rulemaking and

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[95] Ralph Lindeman, "Lawmakers Seek to Retain Tight Reins Over Agency Spending for E-Government," *BNA Daily Report for Executives*, Dec. 19, 2007, p. A-19.

[96] E-mail from Karen Evans of OMB to Ralph Lindeman of BNA, Dec. 21, 2007, as reported in Ralph Lindeman, "OMB Issues FY2008 Report to Congress On Benefits of 24 E-Government Programs," *BNA Daily Report for Executives*, Feb. 15, 2008, p. A-25. The constitutionality of such requirements is open to question, particularly in the wake of the Supreme Court's decision in *INS v. Chadha* (462 U.S. 919, 942 fn. 13 (1983)), which struck down as unconstitutional the congressional practice of subjecting various executive branch actions to a legislative veto. As pointed out in CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T.J. Halstead, "While Congress and its committees may not anticipate formal legal compliance with such provisions and often do not expect to be able to enforce them, pragmatic political considerations oftentimes result in substantive acquiescence by the agencies involved. In essence, the passage of legislative veto provisions subsequent to *Chadha* constitutes an attempt by Congress to leverage informal compliance from executive agencies, the implicit message being that the affected agency may face difficulties in the legislative, oversight or budgetary processes if it does not accede to congressional will in this context."

other collaboratively funded e-government projects are illegal.[97] GAO is one authoritative source of information regarding the propriety of transferring appropriated funds. Congress has charged the Comptroller General with settling the accounts of the United States (31 U.S.C. § 3526), and has directed the Comptroller General to investigate all matters related to the receipt, disbursement, and use of public money (31 U.S.C. § 712(1)). According to GAO, the decisions of the Comptroller General are conclusive on the executive branch (31 U.S.C. § 3526(d)), but executive agencies are responsible for implementing and enforcing those decisions.

Representatives from GAO's Office of the General Counsel told CRS that they had not rendered an opinion on whether the transfer of appropriated funds for e-rulemaking or any of the collaboratively-funded e-government projects was permissible under the Economy Act or otherwise, and said GAO could render an opinion only pursuant to a congressional request or a request from an agency.[98] GAO's *Principles of Federal Appropriations Law* defines a "transfer" as the shifting of funds between appropriations, and states that all transfers (whether within an agency, between agencies, or to a working fund) require statutory authority.[99] The *Principles* also state the following:

> In a few instances, the "pooling" of portions of agency unit appropriations has been found authorized where necessary to implement a particular statute.... However, pooling that would alter the purposes for which funds were appropriated is an impermissible transfer unless authorized by statute. E.g., B-209790-O.M., March 12, 1985. It is also impermissible to transfer more than the cost of the goods or services provided to an ordering agency. 70 Comp. Gen. 592, 595 (1991).

As discussed earlier in this report, in 2004, Kimberly Nelson, the co-chair of the e-rulemaking initiative at the time, said that agencies' contributions to the initiative prior to migration into FDMS were for "start-up and development work," and said that a separate user-fee approach would be developed for ongoing operations and maintenance.[100]

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[97] Daniel Pulliam, "E-gov projects again face cuts on Capitol Hill," *GovExec.com*, June 19, 2006, available at [http://www.govexec.com/dailyfed/0606/061906p1.htm].

[98] Telephone conversation with Thomas Armstrong and Hannah Laufe, Office of the General Counsel, U.S. Government Accountability Office, September 10, 2007.

[99] U.S. Government Accountability Office, Office of the General Counsel, *Principles of Federal Appropriations Law, Third Edition, Volume I*, GAO-04-261SP, January 2004, p. 2-24. See also 31 U.S.C. § 1532, which provides that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law." According to GAO, an unauthorized transfer would also violate 31 U.S.C. § 1301(a), which prohibits the use of appropriations for other than their intended purpose.

[100] Testimony of Kimberly T. Nelson, Assistant Administrator for Environmental Information and Chief Information Officer, Environmental Protection Agency, in U.S. Congress, House Committee on Government Reform, *Federal Government Management of Information Technology*, hearings, 108th Cong., 2nd sess., July 21, 2004.

The Economy Act reflected Congress' belief that private industry should not be called upon to do "what government agencies can do more cheaply for each other," and that federal agencies should turn to other agencies who are "especially equipped to do the work."[101] Orders were permitted only to agencies "in a position to supply or equipped to render" the goods and services requested. Originally, the Economy Act did not authorize the transfer of funds from one agency to another for the purpose of performing the work by contract.[102] (As noted previously in this report, in 2003, EPA contracted with Lockheed Martin Corporation for the construction of FDMS.) In 1982, however, Congress changed the law to allow agencies to obtain goods and services by contract in fulfilling orders under the Economy Act.[103] Among other changes made to the Act in 1982 was a provision added to 31 U.S.C. § 1535(c) that GAO said was:

> designed to preclude use of the Economy Act to avoid legal restrictions on the availability of appropriated funds. Originally recommended by GAO, it "prevents the ordering agency from accomplishing under the guise of an Economy Act transaction, objects or purposes outside the scope of its authority." B-2594999, August 22, 1995, at 8.[104]

Since Congress has required OMB to obtain the Appropriations Committees' approval before e-government transfers are made, it does not appear that (at least as a practical matter) the Economy Act can substitute for that approval.[105] OMB officials told CRS that they viewed the funds provided to the lead agencies for the e-government initiatives (i.e., to EPA in the e-rulemaking effort) as "reimbursements" for services rendered, not transfers. Nevertheless, they said the annual report helped improve the transparency of the projects, and have encouraged agencies to meet with their appropriations subcommittees to ensure that the reimbursements could be made.

OMB officials said that agencies contributing to the e-rulemaking initiative had received a "service" from the Regulations.gov website in that all of their regulations

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[101] H.R. Ref No. 1126, 72nd Cong., 1st sess. (1932).

[102] See, for example, U.S. General Accounting Office, "To the Acting Secretary of the Navy," B-7071, 19 Comp. Gen. 544 (1939).

[103] P.L. 97-332, 96 Stat. 1622.

[104] U.S. General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law, Second Edition, Volume IV*, GAO-01-179SP, March 2001, pp. 15-72.

[105] The constitutionality of such requirements are open to question, particularly in the wake of the Supreme Court's decision in *INS v. Chadha* (462 U.S. 919, 942 fn. 13 (1983)), which struck down as unconstitutional the congressional practice of subjecting various executive branch actions to a legislative veto. As pointed out in CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T.J. Halstead, "While Congress and its committees may not anticipate formal legal compliance with such provisions and often do not expect to be able to enforce them, pragmatic political considerations oftentimes result in substantive acquiescence by the agencies involved. In essence, the passage of legislative veto provisions subsequent to *Chadha* constitutes an attempt by Congress to leverage informal compliance from executive agencies, the implicit message being that the affected agency may face difficulties in the legislative, oversight or budgetary processes if it does not accede to congressional will in this context."

are available for comment in one place. They said they understood that some agencies may feel as if they had not received sufficient value for their contributions to date, particularly those agencies that had not migrated into FDMS and were not receiving many comments via Regulations.gov. However, they pointed out that, for the past two years, agencies have been required to vote on approval of the initiatives' budgets and business cases, which include the amounts of each agency's contributions, and that more than 80% of the agencies have approved those documents — thereby indicating that the agencies believe they are receiving good value for their e-government contributions.[106] Other explanations for these votes are possible. For example, an official familiar with the practice indicated that agencies are likely to find it difficult to oppose the Administration's position in these votes, and said that doing so could adversely affect the agencies' ability to meet objectives established for them under the President's Management Agenda.

Effect of Funding Difficulties on Implementation. The implementation of the e-rulemaking initiative has been affected by many factors, including difficulties in meeting the needs of diverse agencies and resistence to change from agencies accustomed to established modes of operation. The description of the American Bar Association group that is examining the initiative said the following:

> 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.[107]

Structure of the Government-wide Docket

As noted earlier in this report, e-rulemaking in the federal government began primarily as a very decentralized effort, with individual departments and agencies developing strategies to meet their particular needs. The E-Government Act requires "agencies" to ensure the development of one or more electronic rulemaking dockets, but does not require either a centralized or a decentralized docket system. The Bush Administration's e-rulemaking initiative, particularly its docket management system, is highly centralized, with a single system to replace agency-specific systems.

As mentioned previously, from 2002 through 2004, OMB, EPA, and agency officials reportedly considered three government-wide docket structure options: (1) a centralized design in which all standard hardware and software components are centrally located, and all existing agency systems are retired when agencies are placed on the system; (2) a "tiered" design that uses a centralized system, but with hardware and software also installed at different agency sites; and (3) a "distributed" design that integrates a centralized, government-wide system with existing agency

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[106] Meeting between the author of this report and OMB officials from the Office of Information and Regulatory Affairs, the Office of E-government, and the Office of the General Counsel, September 28, 2007.

[107] Available at [http://ceri.law.cornell.edu/documents/erule-committee-description.pdf].

systems using customized software (middleware) to permit interconnectivity. Although the May 2002 Excella study suggested that the centralized approach was best, the ultimate decision was reportedly based on three other contractor assessments, which GAO said "generally found that the centralized design was most cost effective, had the lowest risk for deployment and support instability, was the most secure, and was most likely to deliver the breadth and functionality sought by agencies and the public."[108]

The decision to construct a single, centralized rulemaking docket remains controversial among some agencies and other observers, and has affected each of the other implementation issues discussed in this report (i.e., funding, costs and benefits, and functionality). The most obvious effect is that agencies that took the initiative in the 1990s and developed their own electronic docket systems will have to shut those systems down — which appears to be the source of at least some agency resistence. Relatedly, some agency officials have reportedly said that the centralized docket has made it difficult for them to adapt their own rulemaking cultures to the new system.[109] Also, participants at a conference on e-rulemaking held at George Washington University in June 2004 said that the construction of a single system that is "all things to all people" would produce a "lowest common denominator" system that rulemaking agencies and stakeholders alike would reject or ignore.[110] While the centralized approach has certain inherent advantages, it also has certain inherent costs. As one author put it, "the centralizing tendency reflected in the federal docket management system and Regulations.gov has benefits in the form of economies of scale and making it easier for citizens to track and comment on any pending regulations, but it also reduces the chances that agencies will experiment with e-rulemaking initiatives on their own."[111]

The decision to develop a single, centralized rulemaking docket and eliminate agency-specific "legacy" systems differs from a more decentralized approach taken in another Bush Administration effort, the "lines of business" initiative. Some other e-government initiatives have reportedly been influenced by the lines of business effort. For example, the Grants.gov project was reportedly supposed to have a single website for finding and applying for federal grants. However, the initiative was reportedly later changed to one in which existing agency grants management systems are made available for other agencies to use.[112]

Effect on Presidential Power. Some observers have also commented on the effect that a centralized e-rulemaking system can have on presidential power. For

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[108] U.S. Government Accountability Office, *Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System*, p. 11.

[109] Ralph Lindeman, "Structural, Other Flaws Said to Impede Effectiveness of E-Rulemaking Website."

[110] Ibid.

[111] Stuart M. Benjamin, "Evaluating E-Rulemaking: Public Participation and Political Institutions," p. 899.

[112] Daniel Pulliam, "E-Gov at Five Years, Part Five: Pushing Forward," *GovExec.com*, September 1, 2006, at [http://www.govexec.com/dailyfed/0906/090106eg5.htm].

example, one such commentary said a centralized rulemaking docket developed with OMB oversight would "dramatize and enhance OMB's and OIRA's already central role" in the rulemaking process.[113] The authors went on to say the following:

> As agencies become more transparent, they become more transparent to the President as well as to the public. It used to be that the number of copies of materials in the docket was limited, and it was physically located at the agency. Now the docket is immediately available on equal and easy terms to all who want it, including the President, and politics will give him the incentive to use it.[114]

Similarly, Stuart W. Shulman of the University of Pittsburgh said "many of the tools employed by the OMB when it exerts control over federal rulemaking (e.g., monitoring, prompting, or early collaboration in drafting proposals) are likely to be enhanced by seamless IT systems for eRulemaking."[115]

Expected Financial Costs and Benefits

At different points in the implementation of the e-rulemaking initiative, EPA and OMB developed estimates of the expected financial costs and benefits (e.g., savings) associated with the federal docket management system. The cost estimates were consistently in the $18-$22 million range for the development of a single, centralized rulemaking docket. Estimated savings from the system were expected to be more than $90 million over three years when compared to allowing agencies to develop their own electronic dockets. As is the case in any cost-benefit analysis, the validity and reliability of the results depend on the assumptions underlying the analysis.

Cost Estimates. The June 2003 draft business case said that the creation of the "central online docket public commenting system supporting the federal government regulatory process will cost the federal government approximately $22 million plus $6 million in annual operations and maintenance costs."[116] GAO's September 2005 report on the e-rulemaking initiative indicated that the decision to adopt the centralized docket option was based on three assessments, two of which concluded that the centralized design would cost between $18.7 million and $20.1

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[113] Richard G. Stoll and Katherine L. Lazarski, "Rulemaking," in Jeffrey S. Lubbers, ed., *Developments in Administrative Law and Regulatory Practice, 2003-2004* (Chicago: American Bar Association, 2004), p. 160. The authors note that the section of this article on e-rulemaking was adapted from materials provided by Professor Peter Strauss of Columbia Law School.

[114] Ibid.

[115] Stuart W. Shulman, "E-Rulemaking: Issues in Current Research and Practice," *International Journal of Public Administration*, vol. 28 (2005), p. 628.

[116] U.S. Environmental Protection Agency, "Draft Capital Asset Plan and Business Case," June 23, 2003 pp. 7-8.

million.[117] (The third assessment focused on the risk, supportability, and security of the systems being considered, not cost.)

Benefits Estimates. EPA's and OMB's estimates of the financial benefits of the e-rulemaking initiative appear to have varied over time, as have the assumptions that underlay those estimates.

December 2002 Estimate. According to a draft "Capital Asset Plan and Business Case" that was submitted to OMB by EPA in December 2002, the e-rulemaking project team identified 145 rulemaking agencies and subagencies in the federal government.[118] (This count included multiple subunits within departments and agencies. For example, USDA accounted for 20 of these agencies.) EPA concluded that, if each agency (or even half of the agencies) created a docket system like EPA's, the cost would be as much as $113 million (not including $250,000 to $1.3 million in annual maintenance and operating costs for each system). EPA also said that creating a single, centralized docket system would cost about $21 million to build (not including $10 million in annual maintenance and operating costs). Therefore, EPA concluded that the e-rulemaking initiative would save the federal government $92 million by not allowing separate docket systems to evolve ($113 million minus $21 million), plus another $65 million in lower annual maintenance fees.

Although it is not clear from the data that EPA presented, the estimated cost for each agency to build and maintain its own electronic docket system appears to be based on the presumption that each subunit within a department or agency would develop its own system. However, large departments and agencies like USDA might do what DOT and EPA did, and develop a single docket system for each of its subunits to use. As a result, the cost of department or agency-specific systems would likely be lower than EPA anticipated, and therefore the expected savings from having a single system for the federal government as a whole would also be lower.

January/June 2003 Estimate. When Regulations.gov was launched in January 2003, OMB issued a press release indicating that the creation of a consolidated e-rulemaking system would save $94 million,[119] but OMB did not explain how that savings estimate was developed. However, the draft "Capital Asset Plan and Business Case" that was submitted to OMB by EPA in June 2003 appears to provide some explanation.[120] EPA started its analysis by stating that the e-rulemaking project team had determined that there were at least 312 federal entities

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[117] U.S. Government Accountability Office, *Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System*, p. 11.

[118] U.S. Environmental Protection Agency, "Capital Asset Plan and Business Case," December 28, 2002, p. 6.

[119] U.S. Executive Office of the President, Office of Management and Budget, "Regulations.gov to Transform U.S. Rulemaking Process and Save Nearly $100 Million."

[120] U.S. Environmental Protection Agency, "Draft Capital Asset Plan and Business Case," June 27, 2003, pp. 6-8.

that were involved in the federal regulatory process."[121] (As was the case in the December 2002 estimate, this count included multiple subunits within departments and agencies. The 15 cabinet departments accounted for 209 of these entities. USDA subagencies were counted 34 times, HHS and DOI accounted for 20 entities each, and EPA offices and regional offices were counted 17 times.) EPA said that "76 of the 312 federal regulatory agencies" had some type of electronic commenting system (including those which simply accepted comments by e-mail), and of the 76 agencies, 33 agencies had "Web-enabled" systems.[122] DOT's agencies and offices (e.g., Office of the Secretary, the Federal Aviation Administration, the Bureau of Transportation Statistics, and the Bureau of Transportation Statistics/Aviation) accounted for 14 of the 33 agencies with Web-enabled systems. However, as noted earlier in this report, all units within DOT have been served by a single electronic docket system (DMS) since 1998.

EPA said the centralized rulemaking docket system being developed as part of the e-rulemaking initiative would result in savings or "cost avoidance" of $94 million over three years by eliminating duplicate systems ($56 million) and annual maintenance fees ($38 million).[123] In developing these estimates, EPA said it assumed that "Over the next 2 years, 76 non-online agencies do NOT develop their own Web-based docket systems and 32 legacy system entities CEASE support of their legacy systems." It is not clear how EPA arrived at its estimate of 76 agencies not developing their own systems (since the 76 agencies mentioned previously were those that *already* had some type of electronic commenting system). EPA provided its assumptions of what it would cost to build and maintain new systems, and to manage a paper docket system, for large, medium, small, and "micro-scaled" systems. However, it is not possible to replicate EPA's cost estimates because EPA did not indicate how many of the 76 agencies fell into each size category.

The 32 "legacy" systems that would no longer be supported appear to have been drawn from the 33 agencies with "Web-enabled" systems (minus the EPA system, which would be maintained at the start of FDMS). However, as noted previously, 33 "agencies" with Web-enabled commenting systems is not the same as 33 rulemaking "systems" that would have to be maintained, since 14 of the 33 agencies (those within DOT) were on one system (DMS). Also, these systems were described as commenting systems, not docket systems (although some, such as the one at DOT, may have also had electronic docket capabilities).

Also, the analysis appears to assume that agencies' existing electronic or paper docket systems would be eliminated when the agencies were migrated to the new centralized docketing system. However, FDMS is being constructed as a "date-forward" system, and will not necessarily include records for rules that are no longer open for comment. Therefore, to the extent that the agencies are required or desire to maintain ready access to those records, the agencies may not be able to eliminate those existing records systems, and the expected savings may not occur.

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[121] Ibid., p. 7.

[122] Ibid., p. 18.

[123] Ibid., pp. 7, 30, 37, 54-55.

EPA e-rulemaking officials told GAO that they developed the $94 million savings estimate prior to the completion of the three contractor assessments described earlier. They also said there was a lack of data on how much it cost to develop and operate e-rulemaking systems, so they used information from EPA's own system and their "professional judgement" in developing the savings estimate.[124]

September 2003 Business Case. The September 2003 business case submitted to OMB, which was characterized to GAO as a final version of the June 2003 document, did not contain an estimate of the savings likely to occur as a result of the e-rulemaking initiative. Instead, the document simply said that the initiative "will save taxpayer dollars and make the federal government more efficient by consolidating redundant docket information technology systems across agencies and by reducing duplicative spending for these systems."[125] The "overall benefit" of the centralized docket system was described as "Unifies and simplifies the federal rulemaking process"; the overall benefit of the distributed and tiered e-rulemaking options were described as "None."[126]

The document also differed from its predecessors in other ways. For example, EPA said there were 173 federal entities involved in the rulemaking process (down from 312 in the June 2003 draft), and said that at least 42 of these agencies had some type of online commenting system (up from 33 in the previous draft).

September 2004 Business Case. In its September 2004 business case, EPA returned to the $94 million savings estimate in its June 2003 document, and again said that the figure included $56 million for "eliminating duplication of systems and $38 million for annual maintenance fees."[127] EPA also again said that the transition from paper to electronic dockets and the consolidation of reading rooms "could result in government-wide cost avoidance of approximately $58M that includes staff and space reductions."

More Recent Efforts to Show Cost Savings. On August 8, 2006, Karen Evans, OMB Administrator of E-Government and Information Technology, sent a memorandum to agency chief information officers requesting that the agencies develop information to assess any costs savings associated with e-government and lines of business initiatives.[128] Specifically, the memorandum said agencies should (1) identify IT investments being modified, replaced, or retired as a result of an initiative's implementation, (2) develop baseline cost estimates for each investment

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[124] U.S. Government Accountability Office, *Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System*, p. 12.

[125] U.S. Environmental Protection Agency, "Capital Asset Plan and Business Case," September 8, 2003, pp. 8, 25.

[126] Ibid., pp. 36-38.

[127] U.S. Environmental Protection Agency, "Capital Asset Plan and Business Case", September 13, 2004, pp. 11, 18-19.

[128] Karen S. Evans, Administrator, E-Government and Information Technology, "Cost Savings Achieved Through E-Government and Line of Business Initiatives," August 8, 2006, available at [http://www.whitehouse.gov/omb/egov/documents/m06-22.pdf].

identified, and (3) measure the actual costs of those investments on an ongoing basis. The memorandum went on to say that OMB anticipated requesting actual cost savings and cost avoidance in November 2006 for use in OMB's report to Congress on the benefits of the e-government initiatives.

OMB's *Report to Congress on the Benefits of the President's E-Government Initiatives, Fiscal Year 2007* asserted that the e-rulemaking initiative would result in "lowered costs," but provided no details on how those savings would be achieved. Instead, the report noted the number of "hits" and comments the website had received, the number of documents posted, and the number of pages downloaded by the public. The agency-specific e-rulemaking sections also had little in the way of specific cost savings attributable to the initiative.[129] Notably, each agency had exactly the same text in their sections of the report, saying that the agency "will benefit in savings through their participation and reliance on FDMS and Regulations.gov," and that "budget cost savings and cost avoidance will be the results" of the agency's transition to FDMS and Regulations.gov.[130] None of the agencies quantified those results other than noting the number of *Federal Register* notices and other documents that they had posted on Regulations.gov and the number of comments received through that system.

OMB's *Report to Congress on the Benefits of the President's E-Government Initiatives, Fiscal Year 2008* said that the e-rulemaking program provides several "process benefits" (e.g., agency management and dissemination of regulatory information) as well as "cost avoidance benefits over traditional baseline paper processes to a level of $30 million over five years."[131] The report went on to say that, based on calculations by an "independent economist" who was hired by the e-rulemaking program, the centralized docket system "is estimated to save a range of $106 - $129 million over five years" when compared to more decentralized systems. The agency-specific sections again had virtually identical language, and again noted the number of documents posted in Regulations.gov. Some of the agency-specific sections cited estimates by the above-mentioned economist, but others did not. Some of the anticipated five-year savings estimates seem high, but EPA did not respond to requests from CRS for further information.[132] Notably, the Department

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[129] Office of Management and Budget, *Report to Congress on the Benefits of the President's E-Government Initiatives, Fiscal Year 2007*, available at [http://www.whitehouse.gov/omb/egov/documents/FY07_Benefits_Report.pdf].

[130] These two phrases appeared 19 and 20 times, respectively, in the OMB report.

[131] Office of Management and Budget, *Report to Congress on the Benefits of the President's E-Government Initiatives, Fiscal Year 2008*, p. 8, available at [http://www.whitehouse.gov/omb/egov/documents/FY08_Benefits_Report.pdf].

[132] For example, the report (p. 42) stated that the economist hired by the e-rulemaking office concluded that, by using FDMS, the Department of Commerce (DOC) would "avoid costs of nearly $17 million over having the Department independently create alternative options that would provide similar services." However, DOC officials told CRS that construction of the department's own electronic rulemaking docket would cost about $2 million, and maintenance would cost about $500,000 per year. As indicated previously, by FY2008, DOC had contributed nearly $3 million to fund the construction of FDMS. Therefore, it is

(continued...)

of the Interior's section stated that while it had championed the development of FDMS, "initial costs of development and ultimate implementation to FDMS have been more than DoI would normally expend for its publication of rulemakings through a paper-based system or through minimal use of an electronic comment system for 2 bureaus."[133]

Ultimately, the benefits of the e-rulemaking initiative are likely to differ by federal agency. In August 2006, Kimberly Nelson, by then the former co-chair of the e-rulemaking executive committee, was quoted as saying that agencies without electronic docketing systems at the start of the initiative could have spent considerably more to build their own systems than the cost of buying into FDMS. On the other hand, she said agencies that had such systems already (e.g., DOT and FDA) "may not see significant benefits or savings" and "will wind up paying more than before, but the tradeoff is [that] the citizens are better served."[134]

Functionality of Regulations.gov

Several issues regarding the functionality of FDMS within Regulations.gov have been raised by different observers, including the general navigability of the website, the consistency and completeness of the data, whether the system allows users to adequately search existing dockets, and whether certain functions available in agencies' electronic dockets will still be available in FDMS. Each of these issues is discussed below.

The design of FDMS has long been a subject of interest to scholars of rulemaking. For example, in November 2004, a group of 55 scholars wrote to the administrators of OIRA and the Office of Electronic Government and Information Technology within OMB to suggest three principles to guide the design of FDMS: (1) consistency in data (both across agencies and over time), (2) flexibility in the use of docket fields for searches, and (3) ease of access.[135] They also enumerated specific data fields that FDMS should contain, and preferred types of search and download capabilities.[136]

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[132] (...continued)
not clear how FDMS would save DOC $17 million over five years when compared to the cost of constructing its own electronic docket.

[133] Ibid., p. 105.

[134] Rob Thomeyer and Jason Miller, "The test of e-gov: efficiency and effectiveness," *Government Computer News*, August 21, 2006, available at [http://www.gcn.com/print/25_25/41722-1.html].

[135] Letter to Karen S. Evans and John D. Graham, November 11, 2004, available at [http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/phpXZ.pdf].

[136] For a discussion of other e-rulemaking docketing issues (e.g., scanning and archiving of materials, copyright concerns), see Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking*, pp. 229-234.

Navigability — 2007. As of October 2007, Regulations.gov had two main areas — one allowing users to "Submit Comments" on rules open for public comment, and one to allow users to "Search Documents." Within the "Search Documents" box, users were required to select what documents to search (i.e., only documents accepting comments or all documents); and were allowed to narrow the search by federal department or agency; document type (rules, proposed rules, notices, or "other"); and category. (Although the "Category" section was described as "optional," failure to identify a category prevented the user from proceeding.) The usable category options were "Docket Title", "Abstract", "Document ID", "Subject", "Legacy ID", "Submitter Info", and "Docket ID". It was not clear what several of these categories mean (e.g., the difference between "Document ID" and "Docket ID," or what "Legacy ID" refers to), or which users would be likely to have the requested identification numbers. An "Advanced Search" option allowed users to search by such factors as comment tracking number, document title or identification number, and *Code of Federal Regulation* title. A separate set of banner headings allowed users to "Search for Dockets" or "Search for Documents."

To test the system, CRS attempted to locate information on a proposed rule issued by the U.S. Agency of International Development (USAID) in July 2007 that would exempt a new "Partner Vetting" system of records from the Privacy Act.[137] The results differed depending on how the search was conducted. Using the "Search for Dockets" banner heading, identifying USAID as the issuing agency, searching for documents after July 1, 2007, and putting "partner vetting" in the keyword box yielded "no results." However, using the "Search Documents" function, identifying USAID, identifying the "Subject" category, and putting "partner vetting" in the associated box yielded two dockets, one of which contained the subject rule and related documents and comments. Two other items were of note: (1) the list of agencies in the "Search Documents" function varied from one search to another (sometimes USAID was listed and sometimes it was not), and (2) the "Back" button did not allow the user to return to the previous page.

CRS also attempted to locate information on an EPA rule changing the emission standards for mercury. Using the "Search Documents" function, identifying EPA, using the "Subject" category, and putting "mercury" in the associated box led to a list of possible dockets, the first of which was for a January 2004 proposed rule.[138] The docket contained a total of 6,902 documents across 277 pages of material. No index was provided, and the contents were not organized by type of document (e.g., agency-generated documents versus public comments) or chronologically.

Navigability — 2008. As of May 2008, the initial page of Regulations.gov had three main areas — "Search," "Comment or Submission," and "More Search Options." CRS attempted to locate the same "Partner Vetting" rule by putting the

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[137] U.S. Agency for International Development, "Privacy Act of 1974, Implementation Exemptions," 72 *Federal Register* 39768, July 20, 2007.

[138] U.S. Environmental Protection Agency, "Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Proposed Rule," 69 *Federal Register* 4651, January 30, 2004.

term "partner vetting" in the search box, which yielded 45 documents.[139] On that page, CRS had the option of narrowing the search in various ways, including by type of document (e.g., notices, proposed rules, and final rules). Selecting "proposed rules" narrowed the results to two documents, one of which was the July 2007 proposed rule. Selecting the associated docket identification number permitted access to all related documents. CRS then had the option of sorting those documents by date of posting (e.g., those posted within the previous nine months) and by various categories — e.g., the rule itself, notices, public submissions, and supporting materials. However, within those categories, no additional information was provided. For example, the public submissions were identified only by number and date of posting; if looking for a particular comment, a searcher would have to open each file, or go back and add additional information to the search parameters. In addition to these procedures, users can opt to use the search procedures that were available in October 2007, or search in other ways (e.g., all rules currently open for comment). Throughout this process, the "Back" button allowed researchers to return to the previous page.

CRS searches for the mercury rule proved somewhat less successful. Entering the word "mercury" in the search box yielded 17,485 documents, and narrowing the search to rules issued by EPA still resulted in 16,061 documents. Focusing on "proposed rules" narrowed the results to 303 documents, but closer inspection revealed that many of the listed documents were not proposed rules (e.g., they were notices of public hearings and final rules). Adding additional terms to the search box (e.g., "emission standards" and "electric utility") and again limiting the search to EPA proposed rules ultimately allowed CRS to locate the rule identified in October 2007, and then to sort the materials in the docket by document type (e.g., supporting materials or public comments) and by date of submission.

Consistency and Completeness of Data. Another set of concerns expressed about FDMS is a reported lack of consistency in how key data are submitted into the system. The Regulations.gov website states that "it is up to each Department or Agency to determine what information is made available on the site." E-rulemaking program officials have said that agencies were given flexibility in how information is submitted to the system to accommodate differing agency rulemaking practices and legacy systems. Robert Carlitz, director of Information Renaissance, said: "It's chaotic, there's no standardization," and said e-rulemaking program managers provided a few standard fields but allowed agencies to add any additional fields they wanted. He said this "led to a certain amount of anarchy because you can have the same information submitted in different ways by the agencies."[140] At a minimum, critics argue, OMB and EPA could have required agencies to include the same types of descriptors used in relation to other regulatory requirements (e.g., whether the rule is "significant" or "economically significant" under Executive Order 12866, and therefore must be reviewed by OMB before being published in the *Federal Register*). Other relevant information that some argue could be included

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[139] Putting the term "partner vetting" within quotation marks yielded 45 documents, but not using the quotation marks yielded 182 documents.

[140] Ralph Lindeman, "Structural, Other Flaws Said to Impede Effectiveness of E-Rulemaking Website," *BNA Daily Report for Executives*, March 30, 2007, p. C-5.

fairly easily (because of other requirements) include the rules' legal authorities, statutory deadlines, and anticipated impact on small entities. Carlitz has also said that there appeared to be little or no effort to ensure the accuracy of the information provided, noting there were "misspellings, invalid dates, blank fields, and inconsistencies." Other observers have also noted the lack of uniformity in agency practices, noting that "different types of documents in similar rulemaking proceedings may be posted on the Web site depending on the agency involved."[141]

Search Capabilities. Other concerns previously centered on the limited search capability in FDMS. In October 2007, the system only allowed searches within certain data fields (e.g., the titles of documents), not throughout the text of the documents in the rulemaking docket. Barbara Brandon, a law librarian at the University of Miami School of Law, was quoted as saying that, if the system is not going to provide full text searching, "then it has really been oversold."[142] She pointed out that the EPA docket system that the agency had before migrating to FDMS had full text searching, but FDMS did not. Cary Coglianese, a professor of law and political science at the University of Pennsylvania, said the lack of full-text search capability was "surprising" and, in the age of Google, "not up to the state of the art."[143] EPA officials said they were aware of this limitation, and said that full-text searching would likely be added, but must first be approved by a "change control board" (a group of agency IT and rulemaking representatives) and the 25-member executive committee. By March 2008, Regulations.gov permitted full-text searching of documents.

Loss of Certain Capabilities. At one of the public meetings in August 2004, a deputy assistant administrator in EPA's Office of Environmental Information, was quoted as saying that FDMS would provide at least the same utility as existing agency-specific electronic dockets, and reportedly said "No agency will lose any capability when we move to this system."[144] However, based on information provided by federal agencies and others, certain functions that had been available through the agency systems do not appear to be available on FDMS.

For example, in its 2003 report on the uses of IT in federal rulemaking agencies, GAO noted that DOT's Docket Management System (DMS) had:

> a "list serve" that permits members of the public to receive e-mail notifications when government documents are entered into the department's docket management system. Subscribers are instructed to create a "profile" that identifies the user by e-mail address and to create "agents" (automatic document hunters) to send search results to the subscribers' e-mail addresses. Subscribers

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[141] Ralph Lindeman, "Lack of Uniformity in Agency Practices Hampers E-Rulemaking Effort, Expert Says," *BNA Daily Report for Executives*, October 26, 2007, p. A-18, quoting Cynthia Farina of Cornell University's E-Rulemaking Initiative.

[142] Ralph Lindeman, "Structural, Other Flaws Said to Impede Effectiveness of E-Rulemaking Website," *BNA Daily Report for Executives*, March 30, 2007, p. C-5.

[143] Ibid.

[144] "Access to Public Dockets, Other Information, Slated for Major Improvements in Early 2005," *BNA Daily Report for Executives*, August 13, 2004, p. A-30.

> tell the agents what to look for and every 24 hours it will retrieve a list of documents matching the criteria entered. If a particular DOT agency is selected (e.g., FAA), the subscriber will receive notifications for all of that agency's dockets. Notifications can be limited in several other ways as well (e.g., only dockets with federalism implications, tribal implications, or small entity implications).[145]

However, when DOT announced in September 2007 that it was migrating to FDMS, the department noted that the FDMS list serve:

> will only allow users to sign up for specific dockets. Users will not be able to sign up for categories of dockets, such as all FMCSA rulemakings. Users will also not be able to sign up for the subject areas currently allowed in DMS [DOT's own docket system] (e.g., federalism). Some features that were available in DMS will not work in FDMS. For example, the list serve in DMS can search our Rulemaking Management System (RMS) for data necessary to respond to a list serve request. FDMS cannot search RMS for data because it is not allowed to go behind the DOT firewall.[146]

It is not clear whether other agencies with their own electronic dockets will also lose certain capabilities when migrating to FDMS.

Effects on Public Participation

Questions have also been raised regarding whether e-rulemaking is meeting its originally intended purposes — to "open up" the rulemaking process and allow more public participation (both in terms of number of participants and types of participants), to allow participation in a more meaningful way, and as a result, to improve the quality of the rules developed through that process. In January 2003, OMB said that Regulations.gov would "make the federal rulemaking process more accessible and enable citizens and small businesses to quickly access and comment on hundreds of open proposed rules from all federal agencies."[147]

From its earliest days of implementation, Regulations.gov has demonstrated its potential in this regard. GAO reported in 2003 that Regulations.gov did a better job of identifying rules available for comment than agency websites, and was more likely to allow the public to provide electronic comments.[148] However, GAO also reported that agencies infrequently mentioned Regulations.gov in their proposed rules, perhaps explaining why so few comments were being received through the website.

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[145] U.S. General Accounting Office, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved* (GAO-03-901), September 17, 2003, p. 17.

[146] U.S. Department of Transportation, Office of the Secretary, "DOT's Migration to the Federal Docket Management Systems (FDMS)," 72 *Federal Register* 54316, September 24, 2007.

[147] U.S. Executive Office of the President, Office of Management and Budget, "Regulations.gov to Transform U.S. Rulemaking Process and Save Nearly $100 Million," January 23, 2003.

[148] U.S. General Accounting Office, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved*, GAO-03-91.

As discussed earlier in this report, a review of proposed rules published in August 2007 indicates that agencies are more frequently mentioning the Regulations.gov website as a commenting option. Nevertheless, it still appears that relatively few comments have been coming to the agencies via Regulations.gov compared to other methods of commenting.

Regulations.gov may still be of value, however, in that the FDMS element of the Regulations.gov website can permit the public to obtain information about federal rulemaking (e.g., agencies' cost-benefit and risk analyses, and the comments of others) that was sometimes difficult to obtain — particularly in agencies that did not already have electronic dockets. The utility of FDMS in this regard, though, is directly proportional to the reliability of its information and the ease with which users can navigate its holdings. Comments from some familiar with online docket systems suggest that certain improvements in these areas are needed, particularly with regard to the consistency of information, searching, and overall navigability.

Literature on E-rulemaking. The professional literature on e-rulemaking was initially highly optimistic about the effects that e-rulemaking could have on rulemaking and democratic government. For example, one 1998 article suggested that the Internet would "change everything" about public participation in federal rulemaking.[149] Other authors advocated that agencies go beyond simple commenting and docket systems, and develop (at least for important rules) "electronic dialogues" between those commenting on rules and agency officials.[150]

More recent observations have been less optimistic, and some have been cautionary. For example:

- One author entitled his article "The Internet Still Might (but Probably Won't) Change Everything," and concluded that a series of focus groups suggested that e-rulemaking "may simply digitize established paper-based processes."[151]

- Another article by the same author indicated that, while e-rulemaking "may usher in a new era of more inclusive, deliberative, and legally defensible rulemaking, it may be just as likely to reinforce existing inequalities, or worse, create new pitfalls for

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[149] Stephen Johnson, "The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet," *Administrative Law Review*, vol. 50 (1998), pp. 277-337.

[150] Thomas C. Beierle, "Discussing the Rules: Electronic Rulemaking and Democratic Deliberation," Discussion Paper 03-22, Resources for the Future, April 2003, available at [http://www.rff.org/Documents/RFF-DP-03-2.pdf].

[151] Stuart W. Shulman, "The Internet Still Might (but Probably Won't) Change Everything: Stakeholder Views on the Future of Electronic Rulemaking," available at [http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking_final.pdf].

citizens wishing and entitled to influence the decision-making process."[152]

- At a December 2005 conference on e-rulemaking that was sponsored by the House Committee on the Judiciary's Subcommittee on Commercial and Administrative Law, Jeffrey Lubbers of American University's Washington College of Law said e-rulemaking may have the unintended consequence of giving industry groups and other commenters more influence over agencies' rulemaking activities by (1) initiating "form-email campaigns to demonstrate political muscle" and (2) submitting detailed, sophisticated comments that "will have to rise to the top of the agency's comment pile." Therefore, he concluded that "we need to think hard about the ramifications of technology here to our participatory democracy."[153]

- Another author wrote that empirical research "shows that e-rulemaking makes little difference: citizen input remains typically sparse, notwithstanding the relative ease with which individuals can now learn about and comment on regulatory proposals.[154]

- Still another author concluded in 2006 that "there are good reasons to believe that e-rulemaking initiatives' costs outweigh their benefits," but also advocated "modest experimentation" to allow additional data and evaluation. He characterized the empirical data on e-rulemaking as "discouraging," and said there is so much we do not know about how the public and agencies will be affected that it is unclear whether "it makes sense to undertake ambitious e-rulemaking initiatives."[155]

Some authors have commented on the federal e-rulemaking system specifically. For example, one author, writing in 2004, described the advent of Regulations.gov and the expected availability of agencies' rulemaking dockets, and then said the following:

> Transposing the notice-and-comment process as is on the Internet so that anyone can post a comment reduces the costs of participation. Unifying disparate agency procedures into a centralized "portal" removes the hurdle of learning agency practices. Automating the comment process makes it simpler for interest groups to participate using bots — small software "robots" — to generate instantly thousands of responses from stored membership lists. Suddenly, anyone or

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[152] Stuart W. Shulman, "E-Rulemaking: Issues in Current Research and Practice," *International Journal of Public Administration*, vol. 28 (2005), pp. 621-641.

[153] Ralph Lindeman, "Electronic Rulemaking Could Advantage Private Interest Groups, Top Expert Asserts," *BNA Daily Report for Executives*, December 6, 2005, p. A-30.

[154] Cary Coglianese, "Citizen Participation in Rulemaking: Past, Present, and Future," *Duke Law Journal*, vol. 55 (2006), pp. 943-968.

[155] Stuart M. Benjamin, "Evaluating E-Rulemaking: Public Participation and Political Institutions," *Duke Law Journal*, vol. 55 (March 2006), pp. 893-941.

> anything can participate from anywhere. And that is precisely the problem. Without the tools and methods to coordinate participation, quality input will be lost; malicious, irrelevant material will rise to the surface, and information will not reach those who need it. The current plan for e-rulemaking is nothing short of a disaster.[156]

A group of authors wrote in 2006 that "there is virtually no chance that the interface being constructed at www.regulations.gov will make regulatory government more transparent or accountable, and little chance that it will enable the public to participate in rulemaking more effectively.[157] The authors advocated that Regulations.gov be "substantially redesigned" to allow it to achieve those goals, including better guidance in locating the relevant agency or proceeding, and basic educational cues about the objectives and procedure of the rulemaking process.

The description of the American Bar Association group that is examining e-rulemaking in the federal government evidenced a similar conclusion. Although the panel praised the EPA working group in charge of the Administration's initiative as having "performed remarkably" in the face of uncertainty, criticism, and a cumbersome management structure, it concluded that e-rulemaking's potential to improve public participation in, and understanding of, the rulemaking process "has not been even modestly tapped by *regulations.gov* and FDMS."[158]

Concluding Observations

In the first sentence of a November 2001 article in *Federal Times*, agency officials were quoted as saying that "A plan to create a government-wide online rule-making process could wind up being more costly and work-intensive than the Bush administration envisions."[159] More than six years later, that statement seems prophetic. A regulatory commenting system that was constructed to handle up to 16,000 comments per hour had, after more than four and one-half years of implementation, processed an average of about three comments per hour, and about half of those comments were submitted in the last two months of the period.[160] A government-wide electronic docket system that was originally estimated to cost $20 million to build and be completed by the end of 2004 had, by FY2008, cost more

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[156] Beth Noveck, "Pubic Participation in Electronic Rulemaking: Electronic Democracy or Notice and Spam," *Administrative and Regulatory Law News* (2004), p. 7. See also Beth Simone Noveck, "The Electronic Revolution in Rulemaking," *Emory Law Journal*, vol. 53 (Spring 2004), pp. 433-518.

[157] Cynthia Farina, Claire Cardie, Thomas R. Bruce, and Erica Wagner, "Better Inputs for Better Outcomes: Using the Interface to Improve e-Rulemaking," in *eRulemaking at the Crossroads*, [http://erulemaking.ucsur.pitt.edu/doc/Crossroads.pdf], pp. 13-14.

[158] Available at [http://ceri.law.cornell.edu/documents/erule-committee-description.pdf].

[159] Dan Davidson, "Officials Work Out Kinks in Online Rule-Making Process," *Federal Times*, November 26, 2001, p. 1126.

[160] Cindy Skrzycki, "U.S. Opens Online Portal to Rulemaking; Website Invites Wider Participation in the Regulatory Process," *Washington Post*, January 23, 2003, p. E01.

than $53 million (not including staffing contributions from EPA and elsewhere) and is not yet fully implemented. Because estimates of cost and implementation have not been met, e-rulemaking was on OMB's list of IT projects with "performance shortfalls." Some experts predicted that the initiative would "transform" the rulemaking process, and would "level the playing field" between the general public and the politically well connected.[161] However, as noted previously, several academic and empirical studies suggest that e-rulemaking has not yet had, and may never have, that effect.

Also, recent claims notwithstanding, predictions in 2003 that the e-rulemaking system would save $94 million now seem unlikely to occur.[162] This savings estimate appears to have been based in part on questionable judgments regarding the number of existing online docket systems, and, therefore, the cost of maintaining those systems. Also, because paper and electronic "legacy" docket systems may need to be maintained, agencies may not be able to "retire" their existing paper or electronic dockets (thereby saving money as DOT did through reduced administrative costs). OMB now says that FDMS will be more expensive for some agencies than if they developed their own electronic docket systems, but will still cost less government-wide than allowing agencies to develop and maintain their own systems.

Nevertheless, the e-rulemaking initiative continues to be implemented. Agencies are more rapidly being added to FDMS, with some of the agencies representing the bulk of federal rulemaking activity having recently been migrated (e.g., DOT) or scheduled for migration in the near future. How e-rulemaking should be assessed, and even whether its effects can actually be measured, are matters of considerable controversy. For example, even if the costs of implementation are higher than anticipated, and even if the expected financial benefits do not occur, are the non-financial benefits of a more informed public worth those costs? Even if relatively few public comments on rules are receive via Regulations.gov, do the high number of "hits" and "downloads" indicate that the system is still valuable to the public? A number of areas of inquiry remain to be explored, some with immediate ramifications. Should the public be required to use Regulations.gov to comment on rules (as some agencies are currently doing), or should other commenting options remain available? How can the effects of e-rulemaking on the quality of rules and regulatory decisions be assessed? Some have suggested that these and other issues could be addressed by a reauthorized and funded Administrative Conference of the United States.[163]

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[161] Ibid.

[162] "Regulations.gov to Transform Rulemaking Process, Save Nearly $100M; E-Democracy Site to Improve Quality of Rulemaking Decisions," *U.S. Newswire*, January 23, 2003, p. 1.

[163] See, for example, testimony of Jeffrey S. Lubbers, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *The Administrative Law, Process and Procedure Project*, 109th Cong., 1st sess., Nov. 1, 2005. The Administrative Conference was established in 1968 to provide advice regarding procedural improvements in federal programs, and was terminated by Congress in 1995.

Legislative-Executive Branch Conflict

The reasons why the federal e-rulemaking initiative has had such an inauspicious first five years are many, but one reason appears to be a lack of direct, consistent funding. Congress appropriated less than $20 million to the E-Government Fund from FY2003 through FY2007 for all e-government projects — much less than the $345 million authorized in the E-Government Act for that period, and less than was requested by the President. Congressional reluctance to fund these projects stems in part from what has been viewed as OMB's effort to "force its management priorities on agencies that would otherwise choose different approaches to serving the public."[164] With regard to e-rulemaking, this appears to refer to the decision to have a single, centralized docket system rather than a decentralized system built on the foundations of the electronic dockets that were already operating in certain agencies. In reaction, the Administration developed a method of funding e-rulemaking and other initiatives through contributions from participating agencies to the managing partners of the initiatives. Congress has, in turn, expressed concerns that these contributions circumvent the congressional appropriations process and violate appropriations law. Therefore, for the past several years, Congress has instructed agencies not to transfer funds to the managing partners of these initiatives until the House and Senate Appropriations Committees have given their approval.

Kimberly Nelson, former co-chair of the e-rulemaking initiative, was quoted as placing much of the blame for the lack of progress on OMB's failure to build a sustainable infrastructure for the project. "In their haste to show success," she reportedly said, "they failed to establish a proper governance structure. The project lacks an adequate system for funding, policies, reserve funding for contingencies — and most importantly, a shared vision with Congress."[165] Similarly, one Senate committee staff member was quoted in 2005 as saying that "there needs to be better communication between OMB and the appropriators."[166]

However, a spokesperson for the House Appropriations Committee was quoted in the same article as saying that "OMB is intentionally going around Congress, and we've said multiple times that this program doesn't make a lot of sense, and OMB continues to do a poor job convincing us that it does make sense." Congressional appropriators point out that the Constitution gives Congress the authority to fund, or not fund, particular initiatives, and the President cannot decide to fund and operate them without congressional approval. Therefore, the conflicts between the Administration and Congress regarding the funding and management of e-rulemaking

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[164] U.S. Congress, House Committee on Appropriations, Financial Services and General Government Appropriations Bill, 2008, report to accompany H.R. 2928, 110th Cong., 1st sess., H.Rept. 110-207, (Washington: GPO, 2007), p. 36.

[165] Ralph Lindeman, "OMB Struggles to Deal With Objections on Capitol Hill to E-Regulation Project," *BNA Daily Report for Executives*, January 9, 2006, p. A-6. This article attributes the quotes to a "former manager" of the initiative. See also Ralph Lindeman, "As Dockets Go Online, E-rulemaking Confronts Objections from Congress, Users,"*BNA Daily Report for Executives*, March 30, 2007, which attributes the quotes to Ms. Nelson.

[166] Jason Miller, "Why does Congress hate e-gov?," *Government Computer News*, July 18, 2005.

and other e-government projects may be part of a broader, more fundamental difference of opinion regarding who should control the operations of government and how the two branches of government should interact.

Another part of the problem may be what one author called a "fundamental mismatch between the horizontal nature of government-wide e-government initiatives, and the vertical organization of government funding and oversight mechanisms."[167] The "stovepipes" that e-government initiatives are designed to eliminate are, he said, mirrored in the organization of congressional committee jurisdictions." An October 2004 *Federal Times* commentary sounded a similar theme. After noting that e-rulemaking and other projects would be delayed by provisions in appropriations bills, the author said that Congress, like these projects:

> is hostage to its own archaic organization structure. Cross-agency electronic government projects are necessary — a relatively easy and effective way to bring many agencies together for the common good. But lawmakers have no effective means to manage these projects. That must change.

The current arrangement, in which each contributing agency secures the approval of its appropriations subcommittees before contributing funds to the managing partner, is one way to strike a balance between executive and legislative control. How long this arrangement will continue is, at this point, unclear.

Long-Term Location of E-Rulemaking

Although the e-rulemaking initiative is frequently identified as a presidential initiative, it also has statutory underpinnings. Section 206(c) of the E-Government Act of 2002 requires agencies to accept rulemaking comments electronically "to the extent practicable." Section 206(d) of the act requires agencies, in consultation with the OMB Director and to the extent practicable, to (1) "ensure that a publicly accessible Federal Government Web site contains electronic dockets for rulemakings"; and (2) make available in those dockets all submissions under the Administrative Procedure Act, and all other materials that are usually included in such dockets, even if not submitted electronically. Given these statutory requirements, and assuming that Regulations.gov and the centralized docket system that has been constructed during the past five years is unlikely to be disassembled, even by a new presidential administration, it is reasonable to consider where the federal government's e-rulemaking effort should be housed long term.

One possibility is to have EPA continue in its lead agency role. After all, EPA has gained valuable experience in developing the initiative and is certainly familiar with both Regulations.gov and FDMS. On the other hand, reasonable questions could be raised as to whether the development and long-term maintenance of an electronic rulemaking system for all federal agencies is consistent with EPA's core mission of protecting human health and the environment.

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[167] Jeffrey W. Seifert, "Keeping E-Rulemaking on the Docket: Analog Challenges to Digital Government," in *eRulemaking at the Crossroads*, available at [http://erulemaking.ucsur.pitt.edu/doc/Crossroads.pdf], pp. 6-8.

Another possibility is the Office of the Federal Register (OFR) within the National Archives and Records Administration (NARA), which (along with the Government Printing Office) is responsible for publishing the *Federal Register*, the *Code of Federal Regulations*, and other documents.[168] As noted earlier in this report, OFR made the *Federal Register* and the *Code of Federal Regulations* available online in 1994, and suggested an "Addresses" template to standardize electronic public commenting options. NARA and OFR officials have also served on the e-rulemaking initiative's governing committees for years, and NARA established the records management standards that FDMS was required to meet to be considered an official "system of records."

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[168] For more information, see [http://www.gpoaccess.gov/nara/index.html].