

Group A -- Session 1 -- June 2, 2004
The George Washington University – eRulemaking Workshop 2.0

M: Moderator

R: Respondents

M1: One of the first things we want to know is your sense of the costs and the benefits of applying information technology to the rulemaking process. When I say “information technology,” we are talking about the wide range of information and communications technologies that are used in electronic rulemaking.

R2: I think that the benefit I would hope for are in terms of transparency and the chance for greater accountability all the way around. I hope that it would also mean more participation, but I believe there will be an enormous amount of outreach that has to be done. Agencies are going to need more money than they have to have background materials and ways to help people who are new to rulemaking take part. I think that the costs are unknown at this time, because we don't know how well the system is going to work yet. The costs to businesses and nonprofits is also unknown, because it opens up a whole new range of opportunities, and part of the costs is just in terms of how willing and able people are to take advantage of that.

R3: I've been writing rules for about 25 years. I think applying information technology to the process is a good thing. As a project officer, it is important that we fully develop the record on any rule that we are working on. So, the idea of being able to collect a lot of information from the public, getting all those people on the record saying what their needs and wants are, is good. For us government analysts, the thing I think of as a cost is how many people you will need and how will we sort through all that information. I have visions of people commenting on the comments on the comments, and that there will be millions of comments. How will we get all this done? We have a tiny staff of reg writers. How will we get through all that information and make sure that we picked up the very fine points, the rationale, the support that really turn the rule?

M1: A number of people have said that a potential benefit is comments on comments, but just to be clear, you are saying that could be a real burden in the end.

R3: It can be a burden to the agencies if you have time frames that you have to have rules out within. It is going to be a burden in terms of dollars. We will either need more people or have a way to sort through those comments and get that information in a way that we can handle it, but we have to be totally confident that we didn't miss a fine point.

M1: So, one possibility is that the technology enabled you to see what was a comment on a comment on a comment if they were all strung together the way a threaded discussion is on the web. That would potentially reduce the burden?

R2 also in sessions 2B (R6), 3B (R4), 4A (R8), 5B (R5);
R8 also in session 3B (R3).

R3: Yeah. I think it would. I also think that we might have to think about how we structure our rules in how you comment on a rule. Those comments have to come in on the points, specific to the issues, specific to the provisions, so that we can handle the information.

R4: So you are saying you really need a technology that is structured comments so that people comment and say, "I'm commenting on this section of the rule."

R3: I prefer that, because sometimes when you get a long letter, they will start out with one point, go through a bunch of issues, and then come back to that point. You've got to keep it all together. So, it has to do with structure.

R4: I write procurement rules. With the new eRulemaking, we may get more comments from companies that are being impacted, who are getting contracts with my agency. The population may be expanded to folks who generally weren't interested in procurement with my agency but maybe now are, because they see something out there in the rule docket. That translates to more comments, to more time and work, which might not be a benefit in one respect, but a benefit in getting more comments on the other side. In terms of costs, the opportunity to evaluate and assess rules is something that I would look forward to. I generally get comments, and I have to go through them and put spreadsheets together, trying to put all these comments in there. If there was a mechanism that would allow us to have that done automatically, that would be a great time saver.

M1: A number of people have said over the last few years that the types of things that were discussed in the presentation are only applicable to the large comment sets. What I hear you saying is, there may actually be uses for the more modest sized sets just to reduce some of the grunt work.

R4: Absolutely. I definitely think there would be an advantage there. Particularly when you get a lot of comments and they neatly fall into certain arenas. It took me four years to do my first rule. I would have liked to have done it faster. A tool like this would give me that opportunity.

R5: I think one thing that is ahead of me is the goal of the eRulemaking. Just to hear that succinctly is going to affect what the costs and benefits are of the program. In some sense we are talking about making something available to everyone, to facilitate additional comments. There are just different goals, and depending on how you define things, things may be somewhat different. Clearly, one of the costs from the regulating community side is time. If we are going to go back and start dealing with comments on comments, or on the simplest, most mechanistic sense, posting comments to different places. When we develop our comments they are developed in a Word document that might be 5, 10, 50 pages or whatever it is. If each individual comment has to be posted separately, someone's time is involved with that. That is a cost. If we can save ourselves time later on and be able to access what other commenters have said and understand what is in the docket, the underlying materials; that would be the benefit. So, I think the quantity that we are dealing with is time or man hours. You don't want to have systems to be more complicated and not get you any benefit. Until we actually see what comes into place, the question is out. I've had to submit comments where you have to give the line number, the page, your comment, your name, title, and email with each one, because that is going to be chopped up

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).

later on. It is cumbersome, and harder than writing just a unified letter. If you actually have to write them in a specific format, and then paste them up individually in different places, that could be cumbersome. It does need to be unified separately before it gets posted.

M1: You want to be able to drop it in one place one time and not have to parse out sections of the comment to the particular sections of the rule.

R5: It saves us time.

R2: The only form of structured comments I've heard discussed is the idea it would come out that way automatically.

R5: That it would parse automatically.

R2: Yeah.

M1: That's part of what the research is looking at – whether or not we can do that reliably and accurately, and whether or not users will trust a system that does that.

R2: It is possible to envision technology in which you have the proposed rule and the person could just click (tape skip) their comments. You wouldn't have to do the page number and your email and all those things you mentioned each time. But, you would start your comment and identify yourself and that would take care of the whole thing. There are various ways that could be achieved, but I haven't heard anybody asking commenters to do a whole bunch more work.

R5: If we are talking about a threaded discussion, we raise the concept of that, which could be, if I close my comments today and the rulemaking period closes June 15, the next thing you know, someone is going to say, "Those stupid people don't know what they are talking about." I need to be able to monitor what people are talking about, day in and day out between now and June 15, to be able to respond, because, of course, I want to get the last word in. Then all of a sudden it's not just dropping it in the hopper at the last minute. You have to monitor the whole threaded discussion and protect your interests, because you don't want the last word to say that you don't know what you are talking about.

R6: I guess the costs are the development of the technology and the increased burden on the agency and the public to deal with all this information. For benefits, you have reduced paperwork, greater efficiency, ease of access to the process, and ultimately better rules. As to how much all that costs, I really don't know and am not qualified to say, because I haven't seen any really good estimates. I have seen from the OMB report to Congress on the eGovernment initiative, which just came out in March, they say that the federal government spends \$50 billion each year on information technology, which I thought was a staggering number. In addition, when we talk about development in deployment of technology, that not only you are talking about, but also the National Archives and Records Administration is talking about, the Library of Congress is talking about; we are talking about huge amounts of money. So, I don't know how much all this costs, but I think it is something that we really need to look into. I think the Department of Transportation was the first to really put all of their rulemaking dockets on line.

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);

R8 also in session 3B (R3).

They have numbers about the savings that they think the DOT saved. I don't remember the number, but it was millions and millions of dollars. They consider this to be hugely cost effective for the agency. Commenting on the comments: I think with the proliferation of technology that this is inevitable. You have the ability of people to put things up on the web site and allow others to freely exchange. This is just something we are going to have to learn to live with. I think it has the potential to fundamentally change the regulatory process. For instance, our comments to OMB on their peer review guidelines, we suggested that certain scientific documents could be subject to open peer review on the Internet. You could post these things up and let anyone comment on them. The agency, obviously, is the legitimate party with authority to go in and ultimately determine whose point of view prevails. That is difficult and that is a huge cost. But, that is part of this whole process. That is what we are trying to attain: transparency and sound science.

M1: Are we talking about a kind of Amazon.com rating system: 4 out of 5 reviewers found this peer review study to be legitimate?

R6: I think that "4 out of 5 reviewers" gets us to the postcard problem. It's not the volume of comments, it's the quality. You really have the regulated community and the highly interested non-governmental organizations that really are the ones possessing the huge technical understanding of these issues that really rivals the agency. Between the agency and those two groups, that's really the depository of the information. That is not to say, with the proliferation, that other groups can freely participate now. I have two more points I'd like to make. Executive order 12866 requires public participation. Most agencies call for early interaction with stakeholder groups, so that the agencies can identify issues well in advance and not be taken by surprise at the end of the process. I think the agencies are still learning to live with this. I think the public is still learning to live with public participation and these things. But, I would suggest that the model of the regulatory process that we have right now, which is the Administrative Procedure Act, was promulgated in the 1940's, a very different world. The agency would publish something in the Federal Register, people would file comments, and they'd issue a final rule. The level of complexity of the issues that we are dealing with now is so far beyond what they were dealing with then. We are talking about genetically modified foods and other organisms, pharmaceuticals that do things that people couldn't even conceive of, information technologies, all of these things. We need to really start thinking about the entire rulemaking process in a different way. This could really revolutionize the process. Over the last few years, you've had Executive Order 12866, the Regulatory Flexibility Act, the Data Quality Act, the Peer Review Act, the Negotiated Rulemaking Act, all these other things that are being piled on to APA. Out of this we are going to have a radically different regulatory process in 20 years. I don't think we can yet even conceptualize what that might look like.

M1: That's an excellent segue for the second question: If you were going to restructure the rulemaking process in light of the information technology, how would you improve the process? How would you define either an improved process or an improved outcome? Assuming that S6's comment that technology and the times that we've lived in are likely to revolutionize the rulemaking process itself, and maybe call for further updating of the APA beyond the legislation and directives he mentioned, how would IT improve the process? And how would you define "improved" in terms of process and outcomes?

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).

R3: My thinking is that I don't want to have to deal with the main comments. So, I think that part of the problem is that we need to sort through the issues early on. We either need to do more negotiated rulemaking, we need to get at the affected parties, identify the problem appropriately. Although with the rules I'm involved with, we get the public involved early on. But I think that is part of it. I think what... the IT process might cause us to do some things better early on in the process. Then, using the technology to sort through the comments, to help us group them and analyze them, I think you'll know that it worked because the comments coming in will be poignant. They will either support or oppose a position, and they'll have the rationale. That will make it easier from the rulemaking point of view to write a final rule that can withstand the legal challenges that will no doubt come.

M1: What you are saying is: Improved process, more substantive comments, fewer irrelevant comments. If not, a general change in the composition of the comments themselves, the ability to sort and organize the substantive, on point, quality comments from the less substantive or mass produced generic comments somewhat automatically.

R3: Right.

R4: I kind of agree with your comments as to what I see as IT improvements. Basically, I see the benefits of whatever IT can do as being the improvements. Unfortunately, I also see this as a double-edged sword, because while the IT aspect of being able to capture and group comments, and make it better broadcast to the public, that is going to bring a lot of additional awareness, therefore additional comments, therefore additional work. So, the benefits I see is using the IT process to assimilate, assemble, capture and identify. I think by having the capability to capture the data in those formats, it will permit rules to hopefully be promulgated quicker, because the data will be more completely analyzed electronically rather than having the drudgery of having to through each and every comment manually to capture it. I truly see this as a double-edged sword the more I look at it. It is going to be a lot more work, because I envision a lot more comments. We will actually need the capability and benefits that IT provides us, unless we're going to just completely revamp the whole rulemaking process.

M1: Some people have said that the benefits of transparency are not clear to everybody. Some folks may benefit, whether they are inside or outside of government, from having things less easily accessible. Would that be part of the double-edged sword that you are describing, that some transparency may breed resistance?

R4: I can certainly see that happening. Absolutely. And, it is going to be on a case-by-case basis, depending on what the rule is. The more controversial it is, the more challenging it is going to be. The more vanilla it is, it probably won't make that much of a difference.

R5: One thing I think we are presuming is static is the entire rulemaking process. We're focusing on the comments. The rulemaking process is broader than that. One thing I would like to raise is the notion of through technology you may have more electronically channeled meetings. What that means, something beyond conference calls, you may be able to sift through and bring everybody together at once. So rather than just static drop-in comments at some

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).

points, or even if they are interactive through a thread, maybe if there were more electronic meetings, where we say that at a certain time we will be taking comments. But, everyone doesn't have to physically go to the meeting; they just need to be logged on. There is an opportunity to at one point in time exchange views.

R4: That would be an improvement.

M1: So, who do you think would come? The same actors that generally tend to show up for hearings or submit meaningful comments now? Or do you think you would have a hopefully broadening effect?

R5: It would definitely broaden. I'm not sure how much, but you would certainly save time. You are removing the challenge of travel. I see that happening in the future. We will also have to manage that process as well to make it a net positive.

M1: What about improved outcome? From your perspective, what is a better rulemaking outcome? Is it one in which everyone is reasonably content? How would you define good rulemaking?

R5: I think good rulemaking is one where the agency has all the information available and understands all the information. If you just drop it in the hopper, I'm not always sure that the agency understands everything. Sometimes the agencies are good at getting back to you and saying, "I didn't understand what you meant by comment XYZ." Sometimes the agencies don't really know what is going on.

M1: Could I summarize that as a higher level of interactivity between someone in your position and folks who are reading your submission? You are saying the follow-up where they engage with you to understand where you are coming from would be an improved process and lead to a better outcome.

R5: Yes.

R6: I'll go to the "improved" part, because I think that is a little easier to deal with. An improved process to me would be a process that ensures meaningful public participation, is transparent, leads to better rules based on sound science and rigorous technical analysis, and has less controversy as an outcome. I think something that leads us to those outcomes is an improvement. I think this technology does have the potential to lead us there, although I completely agree that it opens up cans of worms that we can't even imagine yet, because we don't know what it will look like when all of these documents are on the Internet and we've got various stakeholder groups commenting on comments and multiple layers. But, ultimately through that, there would be a synthesis of opinion that the agency could ultimately turn to. I mean if there was a raging debate in the scientific community that somehow ultimately arrived at some consensus, that the agency could use. I was just thinking that when the founders of the constitution were asked what they had done in Philadelphia, they said, "We've given you a Republic if you can keep it." They didn't know what this country was going to look like generations down the road. In fact, Jefferson thought we should have a new Constitution every

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);

R8 also in session 3B (R3).

20 years. I mean, it is almost not for us to say what the rulemaking process will look like for the next generation. It will depend upon what is relevant to them at the time. We've seen the APA and all of these new layers of regulatory process and statutory requirements superimposed on the APA. I don't know what all this technology is going to do. Obviously, it is going to radically transform it.

R2: It is really interesting that a lot of people are talking about rather collaborative processes that would take place before notice and comment rulemaking. What is in regulations.gov is just that. It's notice and comment. It is not the early. It doesn't go on to permitting. It doesn't have a continuous electronic record. There are lots that are not there yet. The IT is just a facilitator. The process is what somehow or other we've got to figure out. I guess what I would support, in terms of doing that, is that everybody ought to be beating on Congress to get ACUS, the Administrative Conference of the United States. Because in terms of having a government-wide look at what's happening in regulatory processes, I don't know what else you are going to do. I think the negotiated rulemaking, all those things, are really interesting. I would love to have some money to do pilot projects that would think about how you do that online. But, I don't think we are there yet by any means. So, I guess in terms of what you do now, I think the rebuttal comments are a start. I think that making it easier for the agencies to deal with the material they get is tremendously important, because otherwise you have the equivalent of a mountain of unfounded mandates for what people are supposed to do. I think that trying to have the kinds of things that S5 was talking about, in terms of having people talk together early on and try and sort out what would work for everybody, I think that is interesting. I think sound science I have a little more trouble with. To me a better rule is a rule that is implementable. And the transparency and accountability and all that stuff is important as to how you get to an implementable rule. But, an implementable rule has got to be one that people agree with in terms of values as well as sound science, so you really do need some kind of a process that lets people sort out those things. I'm not sure that the agency is really equipped to be the adjudicator. That is what they end up being. They try to find a balance between all the different interests.

R6: Value judgments are things that Congress does. Values are embedded more in statutes. When Congress says, "We are legislating something." And then they tell the agency to go and implement it. But, I don't think the rulemaking should be as much of a value-laden process. That seems to be more of a legislative process.

R2: The problem to me is that you do get down things like EPA was dealing with in terms of what kind of value do you put on the number of years someone may or may not live. That is not something you can decide with sound science. That is something that someone has to decide a value to, to plug into a formula to calculate costs and benefits. So, I don't see how you get around having some kind of discussion when it comes down to an agency trying to make that kind of decision.

M1: This may not be something that the technology will work out. It will continue to be...

R2: That is my problem in terms of your question. I think there are enormous questions, and I think the technology can help, but it can't solve...

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).

M1: One of our computer scientists says that 5-10 years down the road we'll be a lot closer to automatically sorting value statements out from something closer to an objective, factual claim. But, we are not there now. And, I think a lot of people would have trouble with something that tried to do that, if you got too close to automating the analytical process.

R6: My organization clearly supports the use of cost-benefit analysis in promulgation of regulations. There is no question about that. We are very strong advocates of that. The issue of how do you value a human life is an extremely difficult and sensitive issue and is one that you certainly wouldn't want to be quoted in the media as defending someone that would attempt to engage in such an analysis. That said, OMB has issued guidelines, that are binding government-wide, that tell an agency exactly how you go about that, what discount rates you use. It is something that the agencies are obligated as a regulatory requirement, to engage in as part of this process. And, out of that analysis, which is an economic analysis of costs and benefits, it is not the basis of a rule; it is one tool among a variety of tools that the agency uses to consider various alternatives. There is a document that tells them how they do this. This is something that economists do all the time. So, it is not such a complicated, esoteric issue. It is politically charged. It looks terrible. You are valuing human life. Well, we value human life all the time. We make decisions, because government resources are limited. We make decisions about whether we should require airbags in cars, safety lights on the back dashboards of cars, all these things. When, at the same time, that money could be going into cancer research, or medical research of any kind, into education, into worker safety. The government has scarce resources, and they have to make judgments. And, cost-benefit analysis allows us to make judgments to allocate scarce resources.

R2: When that hits the newspaper, then everybody goes and beats on Congress, or the agency, or whoever, to change it. I'm not at all sure we are not asking the wrong question. Maybe it would be better not to ask about value, but when you ask people to discuss things, to ask about priorities, because, as you say, you have to allocate. So, maybe that is what you should talk about with the public.

M1: One of the things that is talked about being put in the Federal Docket Management System is greater access to tools that will allow you to play with models that are being used to come up with. So, if you changed the value on a human life or the discount rate, you can see the trade offs. Visualizations, and other types of IT applications that allow the lay person, as well as the expert, to see and use the same tools that the ultimate decision maker uses, has been talked about as an improvement, rather than just having it drop down on people. In the interest of keeping on time, I think we'll move on to the next question. When you see stakeholder groups using information technology to realize their objectives, how are they using it most effectively to influence the outcome of rulemaking? Perhaps more important, how do you think that use will change as we move to the consolidated electronic system and perhaps start rolling out some of the types of capabilities with regards to text analysis – sorting, classifying, giving different types of technology to slice and dice through the data? So the first half is, how do you see the IT currently being used by stakeholder groups participating in rulemaking? And then, what changes do you anticipate in light of the things that are coming down the pipeline?

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R8 also in session 3B (R3).

R4: Unfortunately, I don't have a lot of first-hand exposure or knowledge on how stakeholders are currently using the eGov IT arena. I can, I think, legitimately assume that they are using it as a tool to help them see rules faster and they may be sending them out to more members of their organizations to get interests, ideas, comments from the groups. But, I do see down the road, how it is going to change. Unfortunately, we are a litigative society. I do see groups who are opposed to rules using the IT accessibility, the information and the comments on the comments and so forth, as a mechanism to litigate wherever they see an opportunity to benefit their posture or position.

M1: So, even if the intent is to produce better rules that reduce the litigation, the unintended consequence may well be more opportunities to find avenues for litigation?

R4: Absolutely. I've seen this in my agency in the way contractors protest contract awards. They go after the kinds of issues that they know will be sustained, where in the past when that information wouldn't have been available, that would have never come up.

R5: I'm not sure how effectively it is being used right now. To me, right now, speaking from our own perspective, it is about the same. I don't think there is any greater effectiveness, right now than five years ago, in terms of the way comments are being prepared and information is being sent in.

M1: You mentioned collaborative writing within the association. That must be something that is facilitated by IT.

R5: Yeah. I was thinking more on eGov. What has happened over the last 15 years, for the same comment period, you end up working close to the deadline always. If you think back 15-20 years ago, when everything was done by US mail, when you would send out a draft for comments, then they would send back comments and/or have a conference call. Then we moved to faxes, and people could get back to you in a day or two. And people started expecting things "now". When you are submitting electronically you could be working on changing the comments on a 3:00 conference call or an electronic bulletin board discussion for submittal by 5pm that same day. All your lead times have collapsed. It has the net effect of putting the people who are actually submitting the comments under greater pressure, because you've taken all of the cushion out of the system, yet people still expect you to be able to make changes at the last minute. But, in terms of the eRulemaking side, on the receipt side, I don't know that IT has changed anything or not. We are waiting to see that. We do get regulations from the docket soon from the online register. So, you are not waiting for the register to show up in the mail.

M1: Is it the case where your organization asks the members to write their own comments ever, or do you act as a clearing house for all the members and aggregate the membership opinion into a single comment?

R5: We do the latter. The membership reserves the right to comment on whatever they want. There will be times where we are striving for consensus. There are times where it is not unanimous. We'll have one or more members who have a different view, and of course they'll

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take it. But, if things are so fractured we'll just step out of it and leave it. We're not going to submit 60-40 comments. We need to have a consensus.

M1: Does the business sector generally rely on the trade association to aggregate the comments and then submit a single comment, or do they often agitate members to make their own comments?

R6: Most trade associations represent businesses from the same sector. And, everyone pretty much has the same general feeling about most regulations. Generally, you could achieve consensus. With my organization, we have three million businesses of every size, sector, and region. So, very often we would have competing perspectives on various regulations between and among the membership. In that sense we are probably different than a lot of other trade associations.

M1: Do you send out action alerts?

R6: Yes: issue alerts, key vote legislation. We have very active outreach of information to the membership, but that doesn't mean that people are going to agree on all the same things. We have businesses on both sides of most issues. So that is an added challenge.

R4: Often the trade associations do send in what the trade association's consolidated opinions are, but I've received individual comments from entities, who are part of the trade association, and who have a differing opinion. So, that is very common for us.

R2: I suspect that now people are mostly using email for most things they were doing before by mail. I think in the future, there are lots of things that people probably could do. There is the whole big decision about what happens if more individuals want to start commenting. But, there is also lots of opportunities for different kinds of groups and associations to, say, work together to put up a web site with background information, or to use web services to get the data off the government web sites and start to analyze it themselves. So, again, it really just remains to be seen what is going to happen and to what extent the regulations.gov facilitates.

M1: Should it be the folks' at regulations.gov job to make those kinds of decisions? Or should that be left up to the associations and the commenters? I know that at the last workshop there was a fairly lively debate about who should structure the architecture that aggregates a lot of similar opinions. Should this be the responsibility of the NGOs or the regulative parties? Or, should the actual interface put out by the federal government attempt to facilitate that?

R2: I think who structures the comments is probably going to be fought out over time. And, it is partly going to depend on how groups react to what is happening. But, will the system that the eRulemaking initiative puts in place make it easier or harder for interest groups to do what they want to do? The problem is that since they are only now vaguely beginning to think about what they might want to do, it is kind of hard for them to be able to say, "We want to be able to do this." So, it is a dilemma. And, all you can say to the eRulemaking initiative is, keep it flexible

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).

and interoperable, do all those things that won't restrict what groups discover, ten years from now, that they would like to be able to do.

R6: You say that IT is used to denote the range of information and communications technologies that are used in eRulemaking. But, eRulemaking is much broader than eRegulation. eRegulation is Module 1 of the EPA effort to implement the eGovernment or eRulemaking initiative. They are currently working on Module 2 and 3 and so forth. So, this is a very preliminary deployment of this technology, which is simply to get the proposed rules up on the Internet and allow a single point of access and a single point to file comments. It is really very preliminary in its focus, and it is intended to be. So, I wasn't sure if by eRulemaking you were referring to the eRegulation site, or whether you were talking about the entire...

M1: We are more interested in the universe of eRulemaking.

R6: So, into that I would include the eDockets and agency web sites. EPA, for instance, for a lot of their rulemakings have public participation periods. They might do web-based early comment periods, where you can go on a chat room, share comments back and forth, and then file comments. This is all done prior to the notice of the proposed rulemaking. So, if you include the entire web package to this question of "How do we use information technology", I would say that we conduct research, access relevant information, participate in preliminary public involvement opportunities, identify parties that may be allies in the process, and we monitor the agency's actions. So, to that degree, I think that we do a lot more than we used to by using the Internet.

R3: The thing that keeps bugging me is; what do we mean by a better rule? I mean, by using IT everyone will have better access and be able to participate and we'll have lots of information; but how, in the end, does that become a better rule? Why would that be better than what we are doing now? It seems like we need to define what we mean. You don't know if it was a good rule, really, unless you go back and see if that rule was really needed to begin with. I mean, you are supposed to do this before you're in the rulemaking. To have a better rule, I guess you have to go back and follow the section 610 reviews and make sure that that rule accomplished what you set out to do. Even though there are reviews, I don't know. It seems like we need to have a way, at least initially, after you have all this new information for people to comment on what it means in the end.

R2: I wonder if less litigation would be a proxy for a better rule?

R3: I think there will be more. I always say the regulated community is much smarter now. There are all these opportunities sitting out there for them to slow down the rulemaking process. I think we need to speed it up. If there are people depending on the government to do things on their behalf we need to speed it up and do those things they need, not find more roadblocks. I guess you can look at it either as a roadblock or a balancing, but whatever this process does, if we're going to want better rules we need to think about what that means.

R6: You used the term "roadblocks", but I think there are many people that would argue that these are very effective checks on the process. I think, in particular, the Small Business

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).

Administration's Office of Advocacy is a very strong proponent of these reg flex analyses that look at the impact of proposed regulations on small business and require the agency to consider alternatives. The chief advocate for that office just testified up on Capitol Hill, and I believe he said they had saved agencies 8 billion dollars in the last year by requiring the modification of rules that had disparate impacts on small business. So, whether these are roadblocks or beneficial checks on the process that many people would argue were sorely needed, is debatable. Secondly, you asked how we would define improvement. From the last question, I had said: more meaningful public participation, a more transparent process, better rules based on sound science and rigorous technical analysis, and less controversy which deals with your litigation component. Thirdly, I would like to agree that the retroactive reanalysis of the costs and benefits and the impact of regulations would be very beneficial. Maybe three to five years after regulations are implemented, go back and look at what they really cost and what were the benefits.

M1: That is an excellent segue to the next question which is: If you wanted to do that kind of retroactive analysis, what types of IT, that doesn't currently exist, would make that possible?

R5: I was going to say that in the threaded discussion, one of the challenges we will have is, the benefits of regulations will be declining as you go forward in time, certainly in the health environments and safety area. Because, we've

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R5: When you look at the benefits of health environment safety regulations, you are now regulating for much smaller benefits. For any given rule, you are not saving hundred thousand lives. So, what we are talking about now are much smaller changes. So, the benefit side is smaller. That becomes a challenge in terms of will we get more litigious or less litigious on these things. As the benefits become clearer it may become more litigious because the cost-benefits are changing on these things in and of themselves. So, that is just something we need to factor in as we go forward. We are dealing with much more subtle type rulemakings.

M1: So, do keep mercury in that category?

R5: Yeah, until somebody tells me where the big source and the big impact is. Some of the things I've been involved with are accountability questions regarding whether we've seen the benefit we anticipated from a given rule.

M1: Is the data out there to do those kinds of studies?

R5: No.

M1: Can it be made more available through some of the IT applications that are coming on line or exist right now? Or, are we talking about not just new technologies, but also new and more systematic data collection under some of these data quality guidelines that have been mentioned?

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);

R8 also in session 3B (R3).

R5: Some of it is very difficult and subtle data parsing. You are really trying to look at small differences and the statistics become very tricky. We had this whole issue where people were using a model of statistics, but they weren't using the correct degrees of freedom. It doesn't matter if the model is out there on the web for everyone to use, but all the investigators were using it with the wrong degrees of freedom. The next thing you know, everyone is getting one set of results. When you go back and analyze it again, and the net benefit dropped by 50%.

M1: The replicability of that analysis goes up in an eRulemaking environment, if these databases are more widely available.

R5: Databases should be available.

R6: I really agree with that. Great comments. The Data Quality Act, if you read the OMB data quality guidelines or the information quality guidelines, it says that the purpose of the administrative correction mechanism is to facilitate the public review of agency information practices. I think that this model goes to show that if this model was put up on the Internet and everyone could use it, presumably people would detect that there is an error because of the widespread running of the results. Things like that can be corrected, and hopefully that would be done well in advance of the agency getting to the point of where they are about to promulgate a final rule or have already promulgated a final rule. So, I think that is one of the benefits by the early dissemination of the models and the information.

M1: I was really new to questions on how to manage large heterogeneous databases. It is not what I studied in grad school. When I started going to these digital government meetings, this is what a large part of the researchers are doing on the computer science side: trying to figure out how to aggregate data from these databases that are structured in different ways, that have been collected at different times by different people, and to organize them in such a way that you can put a single front end on all of them that anybody can use. And, take all of these wildly different sources of data and make them accessible and amenable to more rigorous analysis. That is a lot of what is going on in digital government. Hopefully, it will lead to greater transparency and model building and model usage over time. Anybody else want to get in on the question of what specific things you'd like to see in the ideal world of eRulemaking?

R5: I think you said it, that all data that are used in the rulemaking be accessible. We've had this controversy with certain agencies, letting investigators keep data proprietary. It just makes it tough when rulemakings are based on that data.

M1: Is there a balance to be struck between proprietary sources and transparency?

R6: Our organization opposes the use of proprietary models as the basis of regulations, because they are not transparent or reproducible. And, the Data Quality Act, incidentally, requires that all influential scientific, financial, or statistical information used or relied on by an agency be both transparent and reproducible.

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);

R8 also in session 3B (R3).

M1: Other people, in the past, have said they want to preserve their right to submit these black box models, and not have them become part of public domain.

R6: If you own the rights to the models, I can understand why.

M1: Do you see sides of that in your work, at the agencies, where these issues arise?

R3: At our agency, that's probably more in the Health area, and I stay away from that. I'm more on the safety side. It is pretty cut and dry on the things I do. The others are more looking into the future and what's going to happen.

R6: EPA has really endeavored to make all of their models available on the Internet. There is a program they have called CREM, and all of the models have been put up on their web site now. I'm not sure that they are all fully accessible, but there is a web site where you can access many of them. I would consider that part of this eRegulation.

M1: These are the precedents you want the builders of Regulations.gov Modules 2 and 3 to be looking at; places where access to data is more seamless, transparent, and there are fewer mysteries in the process.

R3: The group that you don't hear from much are the individual people. I don't think they trust the government, and they maybe work through their organizations. But, they don't come to us individually. I think, in the future, they are going to come to us. They are going to come to us when the process doesn't suit their needs. When they start getting nervous about whether or not they are being protected or being overprotected, I think we'll hear from them at that point. Once they start getting involved with us, I think they'll continue doing that. Because I know I've been out lots of times talking to different individual groups, they don't like to comment, but once they get used to us in a negotiated rulemaking or another setting, then they become much more open. So, I think probably down the road we need to keep our flexibility because I think we are going to hear from that part of the government that didn't feel like they could or should participate now or in the past.

M1: It's that contractor, with the site-specific knowledge of how a rule affects them; that is information you need.

R3: That's the one I want to talk to. I want to talk to the people that really do the work and really know what's happening.

R2: That is my big hope for what IT might do someday. I think it is already starting. I've heard people at the Fishery Service talk about these fishermen in Alaska; each one's got a computer on board. So, once the Alaskan guy says "Well, you walk them through the process one time, and then they understand it," then, that's fine.

R6: In some instances there is concern among regulated entities of retribution from the agencies. So, they are afraid to interact with the agencies.

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).

M1: One of the things that is on the list is, “Will eRulemaking help level the playing field between large and small organizations or between urban and rural entities?” [Name], you mentioned a perception that the rulemaking process is biased. So, “level the playing field” probably means something different to you than it does to that group we had in the fall that saw the process somewhat differently. Do you see a playing field that needs leveling, and if so, how is the IT going to help?

R6: I don't know if I said the regulatory process was biased, and if I did, that is not what I intended. What I did say is I think there is a perception sometimes, in the business community, that the process is biased, that they confront a regulatory process that is somewhat unsympathetic and potentially hostile toward them, and that they face very organized and aggressive advocacy groups on the other side that are hostile to the interests of business. Business is the engine of the economy and creates all the jobs. I think, as I did say in my talk, I think business wants to know that it's a fair debate; that it's based on sound science, rigorous technical analysis, and that they are given a fair opportunity to participate.

M1: Any other folks want to chime in on leveling the playing field?

R4: From my perspective in the procurement world, where I deal with rules, I don't even see that as an issue. Because, we treat all comments equal, whether they are from small or large business, or are individuals, or whatever. I can envision how that may come into play with certain rules and certain areas, where the bigger commenter groups may get preferential treatment over the smaller groups. But from my own perspective, that is not even an issue.

R3: I think you have to have alternatives for the small businesses. I think the small businesses can't always do what big businesses do. Big business may put forth an idea or alternative that might not be good at all for small business. So, to hear from both sides it does have to be leveled, because you might have to have some type of tiering of the rulemaking. I think small businesses do get left out sometime. I do look at them as the backbone, and they don't have the resources. They are the ones that we have to make the special effort to get out and talk to, to get their input, and make sure that the rule will work across the board for everyone on an equal basis.

M1: Does anyone have a sense of how IT will work? What I'm hearing is that if larger businesses use their trade associations to aggregate and consolidate their comments into the most effective single submission, do you suspect, or do you find that the inverse is true for smaller businesses? Are they less likely to have a single position, and more likely to call on the membership to submit comments?

R6: Yeah. I completely agree with her comments. The Regulatory Flexibility Act specifically requires the agency to do a separate analysis that looks at the regulatory impact on small business, and the SBA Office of Advocacy came out with a report in 2000, called the Crane and Hopkins Report, which is currently being revised by Dr. Crane; and it showed that the compliance costs of regulations were significantly higher among small business than among large business. So, I think the Congress recognized this and put a particular mechanism in place to ensure that rule writers specifically consider the impact, because of these disproportionate

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).

costs. I guess that was a recognition that they don't have the same level or ability to actively advocate their interests in the process.

R5: I think the one thing you are going to have to watch out for, that IT may help you with, is this aberration of forms versus electronic postcards because that could be a significant thing. We say we need to treat every comment equally, but it could save you a lot of time and effort to know you have 100,000 identical electronic postcards, compared to opening 100,000 letters to know they are all the same. I think there is an advantage to that.

R3: The really tiny businesses that do not belong to any group, when they comment they tend not to understand the importance of providing the rationale and backup for the position they took. I still think we need to do more to get that portion of the public involved.

M1: You're talking about getting them to submit better comments.

R3: Right, and with the use of IT we can. But, they still need to understand the Rulemaking process, and what the agencies are required to have in their Rulemaking record, and where they're going forward with substantial evidence in the record, or whatever the legal test is.

M1: One of the outstanding things we all noticed was extent to which certain stakeholders couldn't actually care less about submitting substantive versus non-substantive comments. Their reason for doing Rulemaking was entirely different, whether it was building their membership lists, or getting into the Washington Post to get favorable publicity. That was much more important than submitting a meaningful comment. In fact, their sense of Rulemaking was such that even if they did submit meaningful comments, that the decision process would not reflect those comments in the end, and the best they could get out of the process was not a better rule, but a more, well established group, and more effective motivation campaign, better yearly income for the association.

R2: I guess in terms of leveling the playing field, I think that IT probably does a lot for urban versus rural with the fact that you don't have to come to the DC to read all that stuff. I think there are a lot of ways that it comes down to resources and interest. Small versus large organizations may be more than just businesses. I think it is going to be just like any types of organizations that are on the Internet. There are some really small universities that have really big, interesting web sites; somebody got interested and understood how to do it. So, I think you may have the same effect. Some organizations will play larger than they actually are, because they understand what resources they do have. There are probably a lot of trade associations for small businesses. I also have read that when the economy is not in such great shape, that the trade association membership is one of the first things that goes. So, there are a lot of issues that play into that question. I think that the thing IT does or can do is to make the background materials more available, so that if people have the time and the interest, they can do it themselves or their organization can do it. But, there again, how that works out in the long run is going to depend on whether agencies see the importance and have the money to put background materials that can help somebody figure out. That, to me, has been one of the real problems with Regulations.gov. For Regulations.gov not to have something up there that says, "This is what

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);

R8 also in session 3B (R3).

Rulemaking is, and this is why it is important, and this is how you do it, and this is how you find out what happened,” is weird.

(wrap up)

R2 also in sessions 2B (R6), 4B (R8), 5B (R5);
R8 also in session 3B (R3).