Chapter 11
Administrative Law Tools for More Adaptive and Responsive Regulation

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The "ossification" of regulatory rulemaking is a serious impediment for pacing regulation with rapidly changing technologies (McGarity 1992). As the regulatory process increasingly becomes bogged down by procedural requirements, evidentiary burdens, judicial review and other legal obligations, the gap between technology and regulation has continued to grow (Marchant, Chapter 2, this volume). The problem has two aspects. First, agencies are too slow to adopt regulations in the first place. Second, regulations that are in place quickly become out-dated and are not revised in a timely and efficient manner in response to changing technologies and circumstances. Obsolete regulations can be the equivalent to, or even worse than, no regulation at all. Accordingly, there are two dimensions of the improvements needed to make rulemaking better adapted to address rapidly emerging technologies: (i) regulate when needed in a timely manner and (ii) ensure the regulations that are in place remain current and address new issues or applications as they arise.

A number of innovative tools of administrative practice have been proposed or attempted to make the regulatory process more adaptive and synchronized with changing factual circumstances. This chapter will explore four administrative law tools that have the potential to make the regulatory process more responsive and adaptive to rapid technological change. The four tools addressed are (i) negotiated rulemaking, (ii) direct final rulemaking, (iii) temporary legislation and sunset provisions, and (iv) online or "e" rulemaking.[1] A brief history of each of the various techniques is provided, as well as some examples of the techniques' successes and failures. The discussion of these four tools is preceded by a general discussion of the rulemaking process and the problems it faces trying to stay current with rapidly changing technologies.

[1] This chapter will focus on the United States as a case study, but similar innovations in regulatory processes are being implemented or considered in other jurisdictions.

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11.1 The Challenge of Timely Rulemaking in a Dynamic World

Regrettably, some lessons can only be learned the hard way. The soundest proposal might be fraught with problems that will not or could not be realized until the proposal is actually implemented. Attempts at improving the rulemaking process is an area full of such lessons. It is an endeavor where innovative ideas based on logic and common sense do not necessarily translate into efficiency and success in real-world practice. One conclusion is clear from the history of trying to improve rulemaking – there is no magic bullet. While no one method is going to provide all the answers, there are nevertheless some potentially effective administrative tools that can be used to make regulatory rulemaking more adaptive and responsive to the challenges of rapidly emerging technologies. The techniques and methods discussed are for the most part not new – they have been tried and tested, in some cases with success and in others without – it is their application in the new context of oversight of rapidly emerging technologies that is the focus of the discussion that follows.

Regulatory agencies need to be able to adapt to changing times, new decisions, and changes in administrations (Kalen 2008). Emerging technologies, with their rapid pace of development, make it extremely difficult for agencies to keep current. To exacerbate this tension, while technology is changing the world faster than ever before, the regulatory process has, over time, become less rather than more efficient and consequently is unable to stay current with rapidly changing circumstances (Marchant, Chapter 2, this volume). In administrative law, executive and independent agencies create detailed regulations through rulemaking. A critical aspect of the regulatory process, rulemaking is unfortunately a time-consuming process and is one of the reasons it is difficult for agencies to respond promptly to change. The Administrative Procedure Act (APA), enacted in 1946, is the most important U.S. federal law that governs the administrative practice of U.S. regulatory agencies (Reigel and Owen 1982). The APA specifies the procedures federal agencies must follow when they issue rules or adjudicate cases. Under section 553 of the APA, a regulatory agency may engage in informal rulemaking by drafting and publishing a proposed rule that is then subject to public comment, a process described as "notice and comment" rulemaking (Reigel and Owen 1982).

Notice and comment rulemaking has become the predominant form of administrative policymaking in recent decades. While case-by-case adjudication was the dominant model of administrative practice in the initial decades under the APA in the United States, the advent of many new environmental, health and safety statutes and agencies in the 1970s required a more legislative informal rulemaking process that was better fitted to creating new, expansive regulatory programs (Stewart 1975; Stewart 2003). As this new era of social regulation emerged in the 1970s and 1980s, Congress continued to task regulatory agencies to address a broad swath of problems that affected or involved almost all private and federal activities, and regulation via informal rulemaking quickly became the standard approach to address these problems (Baram 1982).

Over time, however, it has become clear that traditional regulatory processes have become increasingly burdensome and inefficient. The most frequently cited

drawbacks of the traditional APA rulemaking system were that it was slow, cumbersome, time-consuming, and resulted in too much litigation (Note 1981; Susskind and McMahon 1985). The notice-and-comment procedures encompass an adversarial process that has been referred to as the "regulate, litigate, regulate, litigate" syndrome (Coglianese 1997; Baram 1982; Holly-Walker 2007). As interested parties and their lawyers learned to strategically manipulate the rulemaking process and accompanying judicial review and regulatory analysis requirements, and as the technical and legal complexity underlying regulations increased, the regulatory process became increasingly slow and burdened. Over the past couple decades, Congress and the White House have added up to eighteen additional analytical requirements on agencies to consider the impacts of their regulations on entities such as small businesses, state and local governments, Indian tribes, environmental justice communities, and children, among others (Seidenfeld 2000; McGarity et al. 2010). While any given one of these requirements may seem reasonable, the cumulative effect has been to substantially burden and slow the rulemaking process. In addition, reviewing courts have frequently overturned or remanded rulemaking decisions on a variety of procedural or substantive grounds, creating what has been referred to as a "judicially created obstacle course" to regulation (Kalen 2008, p. 670).

These and other requirements resulted in the "ossification" of rulemaking, whereby promulgation of new regulations becomes increasingly delayed and difficult (McGarity 1992; Pierce 1995). As one commentator colorfully described this "sclerotic" regulatory process:

> The federal rulemaking process has become a lawyers' Elsysium, in which each regulatory proposal requires elaborate justification, generates voluminous comment, and requires in turn meticulous agency responses to every comment Any substantial change along the way requires a further comment period, and the full process often consumes years even prior to judicial review. Judicial review may add a further delay of years to the process of implementation . . .. If an agency error is found, the result is to remand the disputed regulation to the agency to start again, on the same glacial timetable. To describe this model is to mock it. It is a model that makes prompt regulatory action impossible; a model that dampens innovative approaches by the agency; a model that precludes timely correction or improvement of regulations once unfairness, mistakes, omissions, or better approaches are revealed; and a model that eliminates any vestige of the predictability or certainty that the regulated community seeks (Campbell 2008, 35).

It is these limitations and problems with the rulemaking process, including the length of time it takes to develop and promulgate regulations, that has spawned a variety of mechanisms to try to expedite and modernize rulemaking. While the outcomes of these various innovations are mixed, they do provide a set of tools that can and should be considered in trying to keep regulation current with rapidly developing technologies.

11.2 Negotiated Rulemaking

One of the most promising and innovative proposals to expedite and otherwise improve the rulemaking process was negotiated rulemaking or "reg neg" (Harter 1982). The underlying concept behind reg neg was simple but appealing – instead

of having the agency unilaterally draft a regulation and then battle it out with interest groups after key decisions had already been made (even if officially only preliminarily), it would be more efficient and harmonious for the affected interests to sit down with the agency and negotiate the regulation from the outset. Unfortunately, the promise of reg neg has generally not been borne out by the empirical record of its implementation, although this procedure may remain a viable option in some limited circumstances.

Negotiated rulemaking entered the limelight in the late 1980s and early 1990s as a promising alternative to traditional rulemaking procedures for federal agencies to address the ossification problem (Harter 1982; Holly-Walker 2007). Negotiated rulemaking was conceived to promote collaborative bargaining among interested parties in order to formulate a proposed rule more quickly and harmoniously (Shuck 1979; Harter 1982). The process of drafting a rule through negotiation among the parties provided an alternative to the traditional "notice and comment" informal rulemaking, where a federal agency would formulate the proposed rule internally and only after the rule had already been drafted would the affected parties have an opportunity to give the agency their input (Harter 1982; Holly-Walker 2007). The underlying concept of regulatory negotiation was quite simple and appealing: it would be faster and more efficient to have the parties seek to reach a consensus up front and forego all the subsequent disputes and litigation that characterized traditional notice and comment rulemaking.

Negotiated rulemaking became the spearhead of a movement for regulatory reform in the 1980s (Baram 1982; Note 1981; Harter 1982). Almost one decade later, after only isolated attempts at regulatory negotiation, Congress adopted the Negotiated Rulemaking Act of 1990 (NRA 1990) that, while not requiring agencies to use regulatory negotiation, encouraged the use of reg neg by federal agencies and outlined the process for agencies that opted to use it. The NRA listed several important aspects of a planned regulation that makes it amenable to regulatory negotiation, including that: (a) "there are a limited number of identifiable interests that will be significantly affected by the rule;" (b) "there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who – ... can adequately represent the interests identified" above; (c) "there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;" and (d) "the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule" (NRA 1990, § 563(a)). In addition to the NRA, Congress has adopted more than a dozen subsequent statutes that require specific agencies to use negotiated rulemaking to create certain regulations. Affected agencies include the Departments of Education, Health and Human Services, Housing and Urban Development, and Interior, and the Nuclear Regulatory Commission (Coglianese 1997).

Despite predictions that negotiated rulemaking would be the solution to the problems of the traditional regulatory processes, it appears to have never reached wide-spread use among federal agencies and has turned out to play a very minor and not very successful role in the promulgation of federal regulation (Coglianese 1997). The process for negotiated rulemaking as laid out in the NRA and subsequent

administrative practice is for an agency that has elected to utilize negotiated rulemaking to announce that intention in a notice of proposed rulemaking (NPRM) published in the Federal Register, inviting organizations with an interest in participating in the reg neg to contact the agency if they wish to be a part of the negotiations. The agency will next determine a proposed list of participants for the negotiating committee and the interests they represent. The next step is selection of a neutral advisor, referred to as a convenor, who gathers the interested parties into the committee that will together negotiate the proposed rule. This convenor is usually a neutral party skilled in facilitation and resolution of multi-party disputes.

The goal of negotiations is to decide on a draft of the rule that all parties agree on. That agreement is then drafted by the agency into the text of a proposed rule. The proposed rule is published in the Federal Register, the traditional public notice and comment process is carried out, and the agency decides based on the comments received whether to modify the proposed rule according to public comment. It is worth noting that an agency that chooses to use negotiated rulemaking to draft a rule is still accountable for following all other APA procedures, developing a rule within its statutory authority, and explaining the result.

Unfortunately, actual experiences with regulatory negotiation did not live up to the high expectations placed upon it. Empirical assessment of negotiated rulemaking, and in particular a 1997 study by Professor Cary Coglianese, found that Reg Neg was rarely attempted and when undertaken neither saved time nor reduced litigation (Coglianese 1997). Over the 13 year period (1983–1996) evaluated by Coglianese, the overall proportion of agency regulations adopted using negotiated rulemaking was consistently small – less than one-tenth of one percent. The average negotiated rulemaking took approximately two and a half years to complete, the time measured was the time from which the agency announced its intent to form a negotiated rulemaking committee to the time the final rule was published, which if anything extended rather than shortened the time to promulgate a new regulation. Reg neg also did not seem to reduce rates of litigation against adopted regulations. Coglianese found that while the frequency of judicial challenge to environmental regulations adopted by traditional notice-and-comment rulemaking in 1987–1991 was approximately 26 percent, the litigation rates for negotiated rules increased rather than decreased as expected to somewhere in the range of thirty-five percent (Coglianese 1997). Other empirical studies likewise have found that reg neg generally slows down and delays, rather than speeding up, rulemaking, although it may produce some slight benefits in terms of the participants' perception of the rulemaking process (Langbein and Kerwin 2000; Freeman and Langbein 2000; Balla and Wright 2003; but see Harter 2000 for a contradictory perspective).

An example of the problems encountered in applying reg neg can be found in the 1990 Clean Air Act requirement that the U.S. Environmental Protection Agency (EPA) issue a rule mandating the use of oxygenated fuel to reduce urban smog in nonattainment areas, which EPA chose to implement using negotiated rulemaking procedures (Coglianese 1997). The EPA selected representatives from the automobile, petroleum, and renewable fuel industries, as well as from the environmental NGO community. After lengthy negotiations, the parties reached what one report

described as a "nearly litigation-proof agreement" (Coglianese 1997, 1290). Yet within ten days of the rule's publication, the American Petroleum Institute (API) and Texaco, Inc. filed petitions for judicial review. Eventually an out-of-court agreement was reached and the EPA revised the rule. Shortly thereafter two other petroleum companies, both of which were represented (although indirectly) during the negotiations, challenged the rule. Again, an agreement was reached and the rule revised. Then the National Tank Truck Carriers (NTTC), a trade association representing approximately 200 common carrier fuel transporters, filed a petition for review against EPA. The NTTC had no representative, direct or indirect, during the negotiations. Yet again, the EPA and NTTC came to an agreement and the EPA agreed to revise the rule (Coglianese 1997).

Trouble for the reformulated gasoline rule continued when the API filed an administrative action against the EPA, which was ultimately unsuccessful, arguing the rule was inconsistent with the negotiated agreement and the Clean Air Act (Coglianese 1997). Lastly, the reformulated gasoline rule was the first U.S. regulation struck down by the World Trade Organization after Venezuela and Brazil successfully argued the foreign refiner baseline provisions in the reformulated gasoline rule enacted using reg neg were discriminatory and in violation of trade rules. Over three years after the rule's original adoption, the EPA was forced to revise it yet again. For a rule that was proclaimed to be a complete success story, it is clear that it was far from immune to controversy or helped to smooth the way for a faster, less contentious implementation (Coglianese 1997).

Another example is The No Child Left Behind Act of 2001 (NCLB), intended to "ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education," and which mandated that the Department of Education (DOE) use negotiated rulemaking to formulate every rule promulgated under Title I of the Act (Holly-Walker 2007). The intended purpose of requiring negotiated rulemaking under the NCLB was to cultivate a relationship between state and federal governments, establish a consensus among the interested parties, and thereby improve the substance of the rules and improve the public education system (Holly-Walker 2007). Professor Holly-Walker has evaluated the performance of mandatory negotiated rulemaking under the NCLB, and has found that rather than accomplish any of these intended goals, negotiated rulemaking has been a hindrance, not a help, to the NCLB's implementation (Holley-Walker 2007).

A major flaw in the implementation of negotiated rulemaking under the NCLB has been the DOE's failure to create negotiated rulemaking committees that adequately represent the interests of parents and students (Holley-Walker 2007). For example, the statute required DOE to ensure an "equitable balance between representatives of parents and students and representatives of educators and education officials" to insure "that the views of both program beneficiaries and program providers are fairly heard and considered" (H.R. Rep. No. 107-334, at 809; Holly-Walker 2007). Yet, DOE failed to appoint to the negotiated rulemaking process any independent representatives for program beneficiaries, representing a significant failure in implementation of the Act (Holley-Walker 2007). Holley-Walker argues that exclusion of these groups was an intentional choice by the DOE to avoid the

presence of parties whose views may conflict with the views that the DOE preferred to see promoted in negotiations. Such an intentional choice to exclude interested parties is in direct opposition to the negotiated rulemaking process (Holley-Walker 2007).

While negotiated rulemaking is theoretically sound, supported by valid intentions and intuition, the empirical implementation record of forming rules through negotiation is underwhelming, even downright disappointing. Forecast as the remedy for an ineffective and sluggish regulatory procedure, negotiated rulemaking seems to have fallen far short of its expectations. A vivid demonstration of the unpopularity of this tool is during the 2007 amendments to the Federal Food, Drug and Cosmetic Act, then Secretary of Health and Human Services Michael Leavitt wrote to Congress to oppose a proposed requirement for the FDA to use reg neg on the grounds that reg neg is too "time consuming and resource intensive" (Cited in Kobick 2010).

Notwithstanding the relatively dismal empirical record to date, it is conceivable that reg neg could be a potentially useful tool in limited situations (Note 1981). First, for a reg neg to work, all affected interests must be adequately represented in the negotiation process (Holley-Walker 2007). Regulatory issues that involve a large number of affected interests may therefore not be appropriate candidates for reg neg. Second, not only must all interested parties participate in the negotiations, they must be willing to negotiate in good faith, so some level of trust and spirit of engagement and cooperation is a necessary prerequisite for meaningful negotiation. Third, the subject of the reg neg must be ready and appropriate for negotiation, meaning that the subject matter must be sufficiently developed and narrow enough in scope that the parties can realistically resolve it. For at least some regulatory issues involving rapidly emerging technologies, these conditions may apply.

If these prerequisites for successful negotiation are met, regulatory negotiation may provide an opportunity for agencies to improve the slow, expensive, and ineffective traditional system of regulation in specific, appropriate contexts. Regulatory negotiation allows for informed debate, encourages parties to make concessions for the greater good, and provides a forum for stakeholders to advocate for what they consider to be important provisions, and most importantly, involves them in the decision making process. These aspects of negotiated rulemaking, when present, can improve the chances that a rule created through collaboration has a higher likelihood of acceptance by the parties that helped create it.

11.3 Direct Final Rulemaking

The second administrative tool to be discussed is direct final rulemaking (DFR). Pioneered by the U.S. Environmental Protection Agency in 1981, DFR was developed in the same time period time and for the same reasons (i.e., to make rulemaking more efficient) as negotiated rulemaking (Levin 1995). While negotiated rulemaking attempts to gather as much input as possible before proposing a rule and allow interested parties to participate in the drafting of the rule itself in order to reduce

the likelihood of disagreement, DFR seeks to essentially bypass the entire front-end of the rulemaking process by having the agency draft the rule and push it through without any public input or comment until the rule is final. While the philosophy underlying the two tools is somewhat inapposite, the overall goal of both policies is the same – namely to promulgate rules as quickly as possible by seeking to minimize disruption and controversy.

DFR begins with the publication of a presumptively final rather than proposed rule (Noah 1999). The agency publishing the rule specifies a period of time, typically thirty days, in which it will accept comments or notice of comments (Noah 1999). If no comments are received within the thirty day period, then after another specified period of time (e.g., sixty days), the rule goes into effect and has the status and force of law (Noah 1999). Alternatively, if the agency receives an adverse comment or even notice of intent to file an adverse comment, the agency must withdraw the final rule and revert back to normal informal rulemaking and the publication of a proposed rule (which agencies often publish simultaneously with the direct final rule to hedge their bets) (Noah 1999). DFR thus allows an agency to dispense with some of the procedural aspects of rulemaking for rules that it expects to be uncontroversial, thereby speeding up the rulemaking process for non-controversial regulation and preserving staff resources and time for more disputed rulemakings (Kolber 2009).

Praised by Vice-President Al Gore and recommended by the Administrative Conference of the United States in the 1990s, DFR has been touted as an advantageous tool that regulatory agencies should utilize whenever feasible (Levin 1995; ACUS 1994). There is also recent evidence to suggest that Congress favors abbreviated rulemaking. In the Energy Independence and Security Act of 2007, Congress called for "accelerated" rulemakings and "direct final" rules as long as the agency does not receive opposition (Kalen 2008).

There are two possible legal justifications for DFR under the APA rulemaking provisions. The first is the good cause exemption of the APA, under which an agency may avoid using informal rulemaking procedures if doing so is impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 553(b)(3)(B)). Under this rationale, if no member of the public desires to submit a comment, then providing an opportunity for such comment arguably meets the good cause exemption for "unnecessary" procedures. An alternative justification for DFR is that it may "substantially comply" with APA's informal rulemaking procedures and any technical non-conformance is harmless error (Levin 1995; Kolber 2009). Both legal defenses rely on the opportunity for an interested member of the public who disapproves of the substance of a proposed DFR to submit a negative comment, thereby forcing the agency to withdraw the rule and initiate traditional proceedings (Levin 1995). A direct final rule would therefore only be promulgated and finalized in cases where there were no negative comments, buttressing both the good cause and substantial compliance justifications. Nevertheless, neither of these two defenses has been judicially endorsed, and scholars have pointed to weaknesses of both approaches, which leaves the legality of DFR in question (Levin 1995; Kolber 2009).

The questionable legality of DFR has not stopped U.S. federal agencies from utilizing the procedure. DFR has been used most extensively by the EPA, which not only originated the concept, but also is the most prolific and longest user of DFR (Levin 1995). First used for revisions to state implementation plans (SIPs) under the Clean Air Act, which require frequent and often uncontroversial regulatory modifications, EPA experienced success with this first application of DFRs, having to withdraw fewer than five percent of 90 SIP revisions it proposed over a six-month period (Levin 1995; ACUS 1994). EPA also successfully used DFR to promulgate over 100 significant new use rules (SNURs) under the Toxic Substances Control Act (Levin 1995). In 1993 it was reported EPA experienced over a ninety percent success rate with DFR (Office of the Vice President 1993).

Initially, EPA's implementation of the DFR procedure was very straightforward, beginning with a publication of a direct final rule in the Federal Register, allowing thirty days for comment and if no comments or notice of comments were received, the rule became law after sixty days (Levin 1995). In the mid-1990s, the EPA began to tweak its DFR procedure. The EPA began publishing two notices of proposed rulemaking: one of its intent to adopt a DFR and one of traditional informal rulemaking. In the event adverse comments are received in response to the DFR, the parallel notice of proposed rulemaking allows the agency to proceed uninterrupted with the rulemaking, but it must then follow the traditional notice-and-comment rulemaking protocol.

EPA has also been creative in expanding the use of DFR to cover some pieces (but not others) of major regulatory actions (Levin 1995). An example of such an undertaking was when EPA made significant revisions to its major reformulated gasoline program (RFG) mandated by the 1990 Clean Air Act Amendments just five months after it adopted the original regulation. The EPA argued the DFR made only minor modifications to the RFG rule, but when the agency received adverse comments, instead of withdrawing the DFR as a whole it withdrew only the portions of the rule to which the adverse comments were directed (59 Fed. Reg. 36,944, 1994; see also Levin 1995). Another example of EPA using DFR in a piecemeal way was regarding written exemptions from the acid rain program (Levin 1995). The DFR provided exemptions from the permitting and monitoring requirements for twenty-six plants. The agency treated the exemptions for the individual plants as severable, explaining it would only withdraw exemptions that received adverse comments, allowing the others to stand (60 Fed. Reg. 4413, 1995).

Other agencies have used DFRs, but with less frequency and success than EPA. For example, 40 percent of DFRs proposed by the FDA have had to be withdrawn due to significant opposition (Kolber 2009). It has been suggested that this high rate of unsuccessful deployment of DFR is due to the FDA's poor prediction of which rules will not be controversial and its use of the procedure in ways not intended (Kolber 2009). The FDA's poor record with DFR has led one critic to raise "real concerns about the value and wisdom of the innovation" (i.e., DFR) (Kolber 2009). Between the years 1993 and 1993, a total of 1,030 DFRs were proposed by federal agencies with only 62 published rules subsequently being withdrawn or removed in

whole or part (Noah 1999). Such statistics suggest that the FDA may be an anomaly with its poor track record with the procedure, lending credence to the argument that DFR can be used effectively if applied in the appropriate circumstances to proper material.

In summary, there is some disagreement among scholars as to whether DFR is a valuable and effective rulemaking tool (Levin 1995; Noah 1999; Kolber 2009). The most important factor in predicting whether DFR will or will not be successful seems to be whether the subject matter is appropriate for this type of procedure as well as being non-controversial. DFR seems best suited for minor changes in language or the adoption of Congressional mandates and may not be appropriate for entirely new rules. While the jury is still out on the ultimate utility of DFR, it can be a useful tool for expediting agency rulemaking in certain and limited circumstances. If DFR is going to be used more widely in the future, it has been recommended that federal agencies and the Office of Management and Budget produce some guidelines as to the procedure's intended uses and best practices (Kolber 2009).

11.4 e-Rulemaking

The rise of the internet, social media, and other forms of communication technologies are creating new opportunities for more responsive, dynamic and speedy regulation. According to one leading expert, "informal rulemaking ... is about to be transformed by the silent revolution of e-government, the widespread incorporation of Web-based technology in the public sector" (Noveck 2004). "e-Rulemaking" is simply the use of digital technologies to develop and implement regulations (Coglianese 2004). More broadly, it includes the use of information technologies to facilitate a number of activities related to the process of developing regulations, including expanding public comment and participation in the rulemaking process (Copeland 2008). The primary benefits of incorporating digital technology, specifically the internet, in the rulemaking process are twofold: first, access to a large quantity of information from a large number and variety of sources, the sheer volume and diversity of which would not be possible through traditional methods, and second, increased opportunities for public participation in the rulemaking process (Coglianese 2004; Noveck and Johnson 2008; Johnson 1998).

In the words of the American Bar Association's Committee on the Status and Future of Federal eRulemaking, "new information and communication technologies could be applied in federal agency rulemaking to enhance public participation, make the process itself more efficient for both the public and the government, and ultimately produce better decisions" (ABA 2010). Moreover, the new capabilities of online tools can also be used to increase agency transparency and accountability, which can help build trust and inspire public confidence (ABA 2010).

Finally, and most relevant for the present purpose, e-Rulemaking has the potential to expedite rulemaking processes and outcomes. Digital technologies "may help streamline and improve regulatory management, such as by helping agency staff retrieve and analyze vast quantities of information from diverse sources"

(Coglianese 2004, 355). Indeed, one of the metrics proposed to measure the effectiveness of e-rulemaking is the amount of time it takes to develop a rule (Coglianese 2004).

E-rulemaking has been actively pursued in both the United States and the European Union over the past decade, with initiatives progressively getting more innovative and ambitious over time. It was first introduced in the U.S. on an individual agency basis, with the EPA and Department of Transportation (DOT) being the first to provide an opportunity for electronic submission of rulemaking comments. In 2002, Congress enacted the E-Government Act that required all federal agencies to accept public comments electronically and create one or more federal websites where the public can access those comments and other materials relevant to pending rulemakings (E-Government Act of 2002). There are two phases to the E-Government initiative, the first was the creation of a website in 2003 where federal rules currently open for comment could be located and comments made (www.regulation.gov), while the second phase, designed to allow the public to see other agency rulemaking materials, such as cost-and-benefit analyses for the rule, is currently being implemented (Sunstein 2010).

Most commentators believe the implementation of e-rulemaking in the United States has been limited and perhaps even disappointing to date (Noveck 2004; Benjamin 2006; Noveck and Johnson 2008; ABA 2010). To date, e-Rulemaking initiatives primarily consist of just accepting citizen comments at an online website. As currently implemented, e-rulemaking may actually slow rather than expedite rulemaking to the extent that the more convenient mechanism for submitting public comments will deluge the agency with more comments, much of them of a junk variety (Benjamin 2006; Noveck 2004; Noveck and Johnson 2008). But, e-rulemaking holds enormous promise for more creative, collaborative rulemaking approaches that may enhance and expedite regulatory decision-making (Coglianese 2004). Possibilities include online regulatory negotiations or juries, digital public hearings, improved data mining capabilities, integrative tools, and many other proposals (Coglianses 2004; Noveck 2004; Noveck and Johnson 2008). Some recent initiatives from the White House have been pushing greater emphasis and role for electronic rulemaking (Sunstein 2010). So, while e-rulemaking has yet to make a significant improvement in expediting regulation, it does hold significant promise for creative application to improve and accelerate rulemaking, and is thus a potentially valuable addition to the administrative rulemaking toolbox.

The European Union has also undertaken e-rulemaking as part of its Interactive Policy Making (IPM) initiative, which seeks to use the internet and other new technologies to improve communication between the EU, its member state governments, stakeholders, and the general public. The goals of the IPM initiative are to "assist policy development by allowing more rapid and targeted responses to emerging issues and problems, improving the assessment of the impact of policies (or the absence of them) and providing greater accountability to citizens." (European Commission 2010a). Started in 2001, the IPM initiative has evolved over time, with one of the more recent developments being the creation of a "single access point" called "Your Voice in Europe" that serves as a centralized site for all consultations,

discussions and other tools in which the public and stakeholder scan play a role using the internet in the EU's governance (European Commission 2010b). As in the United States, the EU initiative has consisted of a relatively simple one-way communication channel by which citizens can provide comments on government initiatives over the internet, although the potential for more creative and innovative forms of electronic interaction are being explored.

11.5 Temporary and Sunset Legislation

Temporary legislation may be one of the most overlooked and underutilized administrative methods for addressing rapidly changing fields or technologies (Gersen 2007). Temporary legislation is particularly apt for regulatory areas replete with uncertainty, which certainly applies to most emerging technologies. Flexibility is critical when dealing with the unknown. The key advantages temporary legislation provides are the opportunity for a quantity of information to be incorporated into legislation and allowance for initial experimentation and a subsequent adjustment of policies. Consequently, the appeal of temporary legislation is greatest in areas of newly recognized risks (Gersen 2007).

Temporary legislation is characterized as laws that will expire at a specific date, referred to as the sunset date, without affirmative legislative action. Designed to be an active tool, this natural expiration date is intended to force the legislature to revisit the issues and assumptions contained in the legislation to determine whether it is worthy of renewal as well as to make necessary revisions. For example, when the National Bioethics Advisory Commission proposed a ban on cloning humans, it recommended that "[i]t is critical, however, that such legislation include a sunset clause to ensure that Congress will review this issue after a specified period of time (three to five years) to decide whether the prohibition continues to be needed" (Shapiro 1997).

Unfortunately, the empirical record suggests that Congress has often complied with the technical requirements but not the spirit of temporary legislation. If Congress so wishes, it can decline to meaningfully engage in reexamination of legislation and simply allow it to continue by giving it an empty blessing. An example is the Clean Water Act, which is required to be reauthorized every five years but it receives a rubber stamp approval every time it would otherwise expire because Congress is reluctant to address the significant policy issues and shortcomings of the current statute. To be truly effective, temporary legislation needs a hammer, a provision that forces regulators to deal with the substance of the regulation.

Temporary legislation and sunset clauses are included in a large number and diverse areas of subject matter, including environmental law, internet law, gun control, the PATRIOT act, and tax law. Sunset provisions have also been applied with some success in international agreements, such as the world trade laws. In 1947 the General Agreement on Tariffs and Trade (GATT) was formed by twenty-two countries, the United States among them (Gutterman and Brown 2009). Between 1986 and 1994, the "Uruguay Round" took place and included negotiations on

trade in goods and services in a number of areas, including agriculture, intellectual property rights and counterfeit goods, textiles, investment policies and dispute resolution. The results of the Uruguay Round included the establishment of a series of Multilateral Trade Agreements (MTAs). These MTAs are binding on the members of WTO and address a number and breadth of areas, some of which are subsidies and countervailing measures, sanitary and phyto-sanitary measures, technical barriers to trade, anti-dumping measures, trade-related investment measures, and safeguards. The Safeguards Agreement is where sunset clauses come into play. A WTO member is allowed to implement a "safeguard" action, an example is a temporary restriction on a particular product, in order to protect a domestic industry from serious injury from an unforeseen increase of imports. The WTO recognizes the need for a country to be able to provide itself such protection but recognized that these safeguards could potentially lead to unfair trade practices and so the Safeguards Agreement has some built in safeguards of its own in the form of limitations and sunset clauses. Every safeguard action has a built-in sunset clause as well as the general prohibition of any grey area safeguard actions. The Sunset Agreement allows a country to implement a protective safeguard but the safeguard must be specific, targeted to a specific product, and the safeguard will automatically terminate after a certain amount of time. The combination of protection and limitation strikes a balance that addresses the needs and concerns of both sides (Gutterman and Brown 2009).

A more limited form of temporary legislation is mandatory periodic review requirements. This type of provision requires the legislature, or the regulatory agency implementing the legislation, to conduct a review every two years (or some other specified period) to evaluate the progress and problems encountered under the legislation. An example is that the U.S. Clean Air Act requires the EPA to review each of the national ambient air quality standards every five years to ensure they reflect the most up-to-date scientific knowledge (Blais and Wagner 2008). Another example is California's zero emission vehicle mandate adopted in 1990, which required a biennial review process to ensure that the requirements were technologically and economically feasible (NRC 2006). While such a provision can provide a useful vehicle for midcourse correction, it can also destabilize regulatory programs and undermine certainty in the program due to the periodic re-examination and potential revision.

Indeed, the primary criticism of temporary legislation is that it undermines confidence and predictability in the regulatory scheme because the legislation is open to regular revision. But confidence in legislation simply because it is permanent may be pointless if that legislation is based on out-dated assumptions or facts. It is unrealistic for the public or for the legislature to have the expectation that they would get everything right the first time. Hindsight – not foresight – is twenty-twenty. Temporary legislation and sunset clauses are tools that can be used in certain areas when some action is needed, but there is a question as to what that something should be. Additionally, the natural expiration and affirmative renewal required by temporary legislation protect against erroneous beliefs and predictions about the future of a rapidly evolving area or emerging technology from being codified into permanent law.

11.6 Conclusion

This chapter has identified and discussed a number of administrative tools that have the potential to make rulemaking more expeditious or dynamic. Each of the administrative tools discussed in this chapter highlight one aspect of the rulemaking process and modifies it in some way. Despite these differences each of the distinct tools share a common goal – to improve a specific aspect of the overall regulatory process. The empirical record for each tool is more complicated and problematic than the theoretical case for the tool might have anticipated. Nonetheless, the real-life experience for each of the tools allows for a more realistic and nuanced view of the potential benefits and applications of each tool in appropriate cases.

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