Rulemaking 2.0:
Understanding What Better Public Participation Means, And Doing What It Take to Get It[1]

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Part I. Introduction

Purpose of this Report

Rulemaking is the stealth engine of contemporary federal policy making. Its impact on individual and collective well-being is immense (Kerwin, 2003). Although Congress passes the statutes that restructure national health care or reform the financial system, administrative agencies craft the regulations that define the working content of these programs. These recent major national policy initiatives focused public attention on the important role of agencies, but broad statutory delegations are not new. After more than a century of regulatory legislation—about the environment, workplace and consumer safety, energy, communications, food and drug standards, transportation, and social services—administrative policymaking dwarfs that of Congress in quantity and rivals it in impact. Although agencies use many kinds of processes to accomplish their diverse regulatory missions, for many agencies rulemaking is the most significant.

As a policymaking process, rulemaking is a civic paradox in two senses:

1. It often has substantial direct effects not only on industry but also on individuals (including small business owners), state and local government entities, and non-governmental organizations. Yet relatively few people know about rulemaking, and even fewer understand how it works.

2. Rulemaking's formal legal structure is an open government ideal: it has broader transparency requirements and public participation rights than any other form of federal decision-making. Yet only a limited range of stakeholders—principally, large corporations and trade and professional associations—take advantage of their right to review the information on which an agency is making its decision, or effectively exercise their right to comment on the merit of the proposed rule.[4]

This gap between the great societal importance and broadly participatory formal structure of rulemaking on the one hand, and the lack of citizen awareness and limited actual participation on the other, has made rulemaking a prime target for e-government efforts. The Clinton Administration's National Performance Review urged the "computerization of rulemaking dockets" and the use of emerging communications technologies to "provide opportunities for early, frequent and interactive public participation" during the rulemaking process (National Performance Review, 1993). The E-Government Act, passed unanimously by Congress and signed by President Bush in 2002, singled out rulemaking for special attention. It requires agencies to accept comments "by electronic means" and to make available online the public submissions and other materials included in the official rulemaking docket (E-Government Act 2002). A major project of the George W. Bush Administration's "E-Government Initiatives" was a government-wide rulemaking portal, *Regulations.gov*, where users can find rulemaking materials and submit their comments (Office of Management and Budget, 2002).

This "first generation" of federal e-rulemaking essentially put the conventional rulemaking process online (Lubbers, 2012, p. 217-239). Materials that agencies previously kept in paper form in records rooms and public reading rooms are now available online in "e-dockets." The

[4] A large literature documents that the notice-and-comment process tends to be dominated by a limited range of mostly corporate participants (Balla & Daniels, 2007; Coglianese, 2006; Kerwin, 2003, p. 182-84; Yackee & Yackee, 2006).

traditional methods of submitting comments—sending a hard copy or fax to the agency—are being supplanted by email and online comment submission through Regulations.gov. These advances have indeed made it easier to review rulemaking materials and file comments, but proponents of e-rulemaking hoped that technology would lead not only to greater efficiency but also to greater citizen understanding and participation (Coglianese, 2004; Lubbers, 2012; Noveck, 2005). Numerous studies have confirmed, however, that first generation e-rulemaking efforts have not significantly expanded awareness of, or *meaningful* engagement in, rulemaking beyond the firms and groups that historically have participated (Balla & Daniels, 2007; Coglianese, 2006).

Now, the Internet has evolved from an environment in which people passively view pre-formulated content on their desktop computers to an interactive environment ("Web 2.0") in which users routinely create, transform, and share content—not only sitting at relatively fixed computing stations but also on-the-fly with mobile computers ranging in size from laptops to smartphones. The new technologies and use patterns of Web 2.0 have inspired a second generation of e-rulemaking proposals, including (Noveck, 2009, p. 112-121, 150-152):

- Blogging about proposed rules.
- Posting videos about the rulemaking process.
- Disseminating rulemaking information through social networking services like Facebook and Twitter.
- Offering group comment drafting via wikis and other collaborative-work software.
- Using visualization tools to present rulemaking information and results.

This "Rulemaking 2.0" movement has been fueled by the Obama Administration's determination to make government more transparent, participatory, and collaborative through social media and other interactive technologies (Obama, 2009). Still, three years after the Administration's Open Government Directive first required agencies to find innovative ways of using new technologies to inform and engage the public (Orszag, 2009), *there are still more questions than answers about what value social media and other Web 2.0 technologies can bring to rulemaking, and about how agencies can realize that value.*

This report begins to provide those answers. Its recommendations draw on theoretical insights from information science, communications, democratic theory, and psychology but, at least as important, they come out of actual experience in trying to make Rulemaking 2.0 work in the Regulation Room project. This academic-agency research collaboration, run by researchers of CeRI (the Cornell eRulemaking Initiative), has been experimenting since 2009 with how to most effectively use Web 2.0 applications and methods to improve public participation in selected "live" rulemakings.

Our conclusion is that, in carefully selected rulemakings, a deliberate strategy of Web-based outreach that brings people to a purposefully designed online participation platform can indeed add new voices and useful new perspectives to the process. But, we also emphasize, Rulemaking 2.0 is not sensibly regarded as a wholesale proposition—that is, as the next generation of technology that *all* agencies should deploy for *all* rulemakings. To get real value, agencies must make a real investment in:

- Clarifying what they are trying to accomplish.

- Identifying the right opportunities.
- Putting together the right elements of communication, website design and ongoing user support, and informational content.

In other words, *successful* Rulemaking 2.0 requires that agencies *pick the right rules* and *use the right tools.*

Based on the Regulation Room project, this report makes specific suggestions for how agencies can do this.

Outline of this Report

Part II considers the barriers to participation that have historically prevented effective commenting by many individuals and groups with a direct stake in rulemaking. We begin by presenting three very brief case studies based on rulemakings offered for public discussion on Regulation Room. These case studies provide concrete examples of what we refer to as "missing stakeholder" groups. We then identify three barriers to participation by missing stakeholders:

- *Lack of awareness* that rulemakings in which they have a direct interest are occurring
- *Low "participation literacy"*—that is, lack of knowledge that participation is possible and lack of understanding about how to participate effectively
- *Information overload* from the length and complexity of rulemaking documents

Broadening the range of meaningful rulemaking participation requires deliberate strategies to lower each of these three barriers.

Before discussing specific strategies, however, Part III provides guidance on *picking the right rules* for Rulemaking 2.0 efforts. Rulemaking 2.0 techniques should be understood as supplementing, rather than replacing, conventional forms of notice (e.g., the Federal Register) and opportunities for comment (e.g., Regulatioons.gov). Lowering the barriers to effective participation is possible, but it is not easy and it requires resource commitments. Not all rulemakings will justify this investment. Part III begins with a foundational proposition we call the "No bread and circuses principle": *A democratic government should not actively solicit participation that it does not value*. It then goes on to explain

- How to analyze when new participations are likely to have useful knowledge that rulemakings might not get through the conventional commenting process; and
- How to assess the feasibility, in a specific rulemaking, of providing different types of potential new participants with the support they will need to make comments that have value to rulemakers

Part IV focuses in on specific Web 2.0 technologies and techniques that the agency can use to lower the three barriers to participation. Accordingly, it has three sections:

- *Outreach* to alert and engage potential new participants, using social and conventional media in a communications plan tailored to the particular rule and the particular types of missing stakeholders whose participation is desired

- Using website design and human moderation techniques to convert *rulemaking newcomers into effective commenters*
- *Making important substantive information accessible* through a series of techniques that create a version of the rulemaking materials for the Rulemaking 2.0 site that participants can (and will) use to inform their commenting

Throughout, we will address potential institutional obstacles within the agency that can derail Rulemaking 2.0 success, but we particularly focus on this in Part V. Arguing that *a new culture of rulemaking participation must begin in the agency itself*, we consider what Rulemaking 2.0 success will require from

- Agency leadership;
- Members of the rulemaking team; and
- Agency counsel

Part II. Barriers to Rulemaking Participation

Consider three case studies, two involving Department of Transportation (DOT) rulemakings and the third involving a related set of Consumer Financial Protection Bureau (CPFB) rulemakings; these are three of the five rulemakings actually offered on Regulation Room to date.

Case 1 (EOBR rule): In 2011, the Federal Motor Carrier Safety Administration (FMCSA) proposed a rule that would require most federally regulated commercial motor vehicles to be equipped with an electronic onboard recorder (EOBR). This equipment (previously *required* only of those found to have seriously violated hours-of-service restrictions) would replace the driver-completed paper logs that have tracked hours-of-service compliance for decades. The purchasing, training and maintenance costs of the new equipment would be borne by firms over 95% of which are small businesses. More than 8 million CMV drivers would have to use the monitoring equipment at the risk of losing their operating licenses. Yet, despite the direct and significant impact this proposal would have on small business owners and individual drivers, DOT knew from experience that FMSCA would get relatively few comments from individual drivers or small business owners—and that most of the comments it did get from these stakeholders would be conclusory expressions of opposition or support, or generalized assertions of anticipated harm or benefit.

Case 2 (disability access rule): In 2011, the Secretary of Transportation proposed a rule that would require airport check-in kiosks and most airline and online travel websites to be made accessible to individuals with a wide range of physical and cognitive disabilities. The implications—both for the various industry sectors that would have to comply and for travelers with disabilities and their companions—were enormous. From experience, DOT expected that it would get extensive comments from airlines, trade associations of airport managers, equipment manufacturers, and disability rights groups—but little effective participation from individual travelers whose particular disabilities it was hoping to accommodate through the new regulation. Either the sporadic comments from individual travelers would be conclusory and generalized or, if an advocacy group decided to mount an online call-to-action, tens or even hundreds of thousands of duplicate or near-duplicate emails would flood the docket. Neither type of comment would offer much useful information to rulewriters, who had to base their final proposal on reliable factual information, detailed cost and benefit projections, and careful consideration of possible alternatives.

Case 3 (consumer mortgage protection rule): After the mortgage crisis, the Consumer Financial Protection Bureau (CFPB) was statutorily required to consider new mortgage servicing regulations under both the Truth in Lending Act and the Real Estate Settlement Procedures Act. In 2012, CFPB proposed an interrelated set of new regulations that included new notification requirements, targeted support for troubled borrowers, more stringent standards for error resolution, and other changes in the servicing of residential mortgages. Although CFPB had been aggressive in using Web 2.0 techniques in, e.g., developing new consumer notification forms, it had heard principally from consumer advocacy groups, rather than from borrowers themselves. Similarly, it expected participation from large mortgage servicers and trade associations, but was anxious to hear from small lenders, such as community banks, about how the new requirements would affect their distinctive operations and customer service relationships.

As these cases show, the pattern of little or no meaningful participation by individual and small-entity stakeholders can involve those whose behavior is being regulated, those who would benefit from regulation, or both.

If an agency wants to address the persistent absence of these voices in rulemaking (and Part III considers why the agency might expect value from doing so), the essential starting point is understanding why the problem exists in the first place. After all, the legal right to comment in rulemaking ensures that every participant's contribution will get at least some individualized consideration by government decisionmakers. This is a more robust participation right than what these stakeholders would get in almost any other decision process used in the legislative or executive branches. Why don't individuals and small entities who will be directly affected by proposed new regulations (whom we will refer to collectively as "missing stakeholders") take advantage of this important right—particularly when they can now do so online, for free, at any day or time during the several-week period the rule is open for comment?

The answer often given is that individual and small-entity stakeholders face "collective action" problems that don't exist for large firms and organizations (whom we'll call "sophisticated stakeholders"): That is, although there may be a large number of missing stakeholders who will be regulated by or benefit from the proposed rule, the actual burden or benefit to any *particular* individual or entity is too small to outweigh the costs of participating. By contrast, the economic, ideological or other costs or benefits of proposed rules to large firms and organizations are concentrated, and so justify expenditures on participation, especially for "repeat players" who have ongoing regulatory interests.

We don't dismiss this explanation—indeed, Section IVA (below) discusses the challenges of persuading members of missing-stakeholder groups why they should expend the time and energy required for meaningful rulemaking comment. But the collective-action problem theory cannot explain, for example, the historically predictable lack of participation by commercial trucking drivers and small business owners in the EOBR rule. When these stakeholders *did* become part of the discussion on Regulation Room through techniques we will describe, they consistently and vehemently painted a picture of individuals and small companies operating on a razor-thin margin. Many expressed the conviction that equipment costs and operating changes resulting from mandatory EOBR use would drive small truckers out of business. In other words, although many missing stakeholders are accurately described as small in size, that adjective does not necessarily describe their stake in the rulemaking. Clearly, the Regulation Room commenters perceived very large individual stakes in the outcome. Indeed, based on all the comments submitted in the rulemaking, the relative perceived impact on them was far greater than on large trucking firms, who generally supported the proposed EOBR mandate.

If, then, collective action problems are at best only a partial explanation, what else might account for the dearth of meaningful participation by stakeholders who are not large firms or organizations? Our answer, confirmed by experience on Regulation Room, is that individuals and small entities face three principal barriers to effective participation in rulemaking:

1. **Lack of awareness**. When we talk to government or private groups about the Regulation Room project, we often ask how many people are aware that they have had two opportunities (in 2008 and again in 2010) to speak directly to federal regulators about the seeming epidemic of long tarmac delays, late arrivals and flight cancellations, ticket oversales, baggage and other extra fees, and similar problems plaguing air travelers. Even in audiences

that tend to be atypically well-educated and attuned to national policy debates, only a handful of people raise their hands.

The government's official notification vehicle, the Federal Register, is a convenient, one-stop way for experienced, sophisticated stakeholders to stay abreast of proposals in their areas of regulatory interest. Even in its new user-friendly online form, however, the Federal Register is simply not effective in spreading the word to individuals and small entities with a stake in proposed new rules. To be sure, agencies often also issue press releases and other statements, and may hold press conferences for high-profile rulemakings. But even if the traditional media and the blogosphere pick up this information and relay it to their listeners or readers, the story is typically framed as reporting the fact of government action, without making clear that there is a period for public comment during which anyone can participate. The absence of this information implicates the second barrier.

2. **Low "participation literacy."** Most people have at least a general idea of what Congress, the President, and the courts do. Few people (at least outside the Beltway) know much about what federal agencies do or how regulations are actually made. Indeed, in our experience, even lawyers and people who work for the federal government tend not to understand the rulemaking process unless they have been personally involved in some way.

   The generally low level of rulemaking "participation literacy" (that is, knowledge that participation is possible and understanding of how to participate effectively) has two important consequences:

   First, even people who do learn about a proposed new regulation through the media, a favorite blog, or an email from a membership organization or advocacy group are unlikely to realize that rulemaking is an ongoing decision process in which the government actively seeks their participation. Hearing that DOT is proposing to require accessible air travel websites and airport kiosks sounds no different, to most people, than hearing that these steps are being considered by Congress or the President.

   Second, even people who somehow get the message that they can "comment" to agency decisionmakers about a proposed rule are likely to do so ineffectively. Americans have two dominant models for providing input into government policy: voting and opinion polls. Neither model prepares them to take part effectively in rulemaking. Mass email comment campaigns mounted by advocacy groups illustrate this consequence of low participation literacy. These comments are typically short, generalized statements of opinion exhorting the agency to do (or not do) something about the primary topic the rule addresses. The typical text looks remarkably like the emails that group members are urged, in other circumstances, to send to their Congressional representatives or to the White House. Few people who submit such comments realize that rulemaking agencies, unlike political leaders, do not have the prerogative to make decisions on the basis of either majority vote or bare expressions of citizen preference.[5]

[5] We aren't suggesting that the advocacy organizations themselves don't understand rulemaking. Indeed, these organizations often submit longer, more substantive comments to the agency. The institutional reasons (including

3. **Information overload.** Even if individual and small-entity stakeholders become aware of rulemakings that will affect them and understand the process enough to know what kinds of comments will have value, there remains a major hurdle. In the EOBR rulemaking, the NPRM (the "notice of proposed rulemaking" which explains what the agency is proposing and why) was 95 pages and written at a late-college/early-graduate school reading level.[6] The Regulatory Impact Assessment (the document explaining the agency's assessment of anticipated costs and benefits, which was particularly controversial in this rulemaking) was more than 170 pages. In the consumer residential mortgage rulemaking, the two interlocking NPRMs by themselves comprised 773, and tested at a comparable reading level.

   Effective comment is informed comment: that is, comment that addresses what the agency is actually proposing, that considers and reacts to the agency's factual assumptions and policy arguments, and that makes suggestions and criticisms consistent with the agency's statutory authority and mandate. All of this information is provided by the typical NPRM—but documents of this length and complexity are about as inaccessible to the average commercial trucker, consumer with a troubled home mortgage, or loan officer of a community bank as if NPRMs were written in hieroglyphics.

Broadening the range of meaningful rulemaking participation requires deliberate strategies to lower each of these three barriers. Readers with first-hand experience in rulemaking probably already realize the formidable challenges this will involve. Part IV offers specific suggestions for meeting these challenges with Web 2.0 outreach methods and participation tools, but we are not going to claim that these technologies offer quick fixes. Serious Rulemaking 2.0 efforts (i.e., those that might actually produce broader *and* better rulemaking participation) require serious commitments from the agency. The next Part offers help in deciding whether and when to make such commitments.

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membership-enhancement, fundraising, and demonstrating political organizing "clout") that lead advocacy organizations to generate large numbers of low-value comments are persuasively discussed in Shulman (2009).

[6] The page numbers given here refer to the double-spaced, 12-point manuscript format which is sent to the Federal Register. Readability levels are derived using the standard Fleisch-Kincaid readability calculator.

Part III: Picking the Right Rules: Identifying Value in Broader Rulemaking Participation

A recent Sunlight Foundation analysis of rulemaking comments on Regulations.gov found that in 2012, 89% of NPRMs that got any comments received 100 or fewer comments (Watzman, 2012). For a variety of reasons, these results may understate comment numbers to some degree.[7] Still, they are remarkably consistent with an analysis of comments received by DOT on its own, pre-Regulations.gov e-docket system; this study found that about 90% of proposed rules received fewer than 100 comments (Balla & Daniels 2007).

These data may look like an open-and-shut case for vigorous broad scale implementation of Rulemaking 2.0 to increase public commenting. We certainly agree that the "missing stakeholder" problem should be a real concern for rulemaking agencies. But, we caution, the mere fact of generally low levels of commenting activity does not mean that new participants could contribute useful information—or that the costs of getting this information would not be prohibitively large. Lowering the barriers to effective new participation is possible with Web 2.0 technologies and methods—but it is not easy.

This Part offers specific guidance on how agencies can assess when the value of broader participation in a particular rulemaking is likely to justify the cost of getting it. It has three sections:

A. The "No Bread & Circuses" Principle: A framework for thinking critically, at the outset, about the goal of more public participation in rulemaking.

B. Predicting Useful Information from New Participation: How to analyze when new participants are likely to have useful knowledge that rulemakers might not get through the conventional commenting process. Three types of possible new participants are considered: "missing stakeholders," members of the general public, and unaffiliated experts.

C. Assessing Feasibility: How to analyze the feasibility, in a specific rulemaking, of providing different types of potential new participants with the support they will need to make comments that have value to rulemakers.

How many of an agency's rulemakings are likely to be Rulemaking 2.0 candidates based on this analysis? We do not yet have the quantitative data to offer hard and fast percentages. However, our experience reviewing potential rulemakings with DOT (our longest agency partner in the Regulation Room project) has been that we can predict a good value-to-cost ratio in only a small subset. Put differently, in most rulemakings the investment in outreach and participation support needed to overcome the barriers to effective new participation just doesn't make sense.

Initially, agencies may be uncomfortable with the idea that some rulemakings would get a different notice-and-comment process than others, with additional outreach efforts and new participation tools. This report does not purport to give agencies legal advice about using social

[7] Agencies are not currently required to treat the Regulations.gov e-docket as the official docket of record; therefore some agencies still do not post all comments received through other submission methods. In addition, agencies generally will not post to the publicly visible docket comments that contain privileged information (e.g., intellectual property), sensitive information (e.g., identifiable personal health information), or defamatory or obscene content—and many agencies do not post a notice that such a comment has been received but is being withheld from view. Finally, some agencies batch comments received as part of mass email campaigns, so that they may show up as a single comment in a survey that simply counts postings.

media and other Web 2.0 technologies in rulemaking.[8] We simply make the following observation: Rulemaking 2.0 techniques *supplement,* not replace, conventional avenues for commenting. As long as some reasonable combination of these avenues (e.g., online at Regulations.gov, fax, email, express delivery, "snail mail") remains open, it is difficult to see how anyone's notice-and-comment rights are infringed by whether the agency chooses also to use Rulemaking 2.0 techniques in a particular case, or not. Therefore, we move on to how this choice ought be made.

A. The "No Bread and Circuses" Principle

In a democratic government, the value of more citizen participation in public policymaking seems self-evident. Indeed, the political cachet of open government is now so great that it may be difficult for agencies even to raise the question whether using social media and other Web 2.0 technologies to get more rulemaking participation is worth it.

This is unfortunate. In fact, the goal of open, participatory democratic government is most threatened when government officials are *not* willing thoughtfully to examine whether and when increased public participation is likely to be valuable. Mass email comment campaigns have proved that more participation does not necessarily help rulemaking. Indeed, it can harm the process if scarce agency resources must be expended reviewing tens, or hundreds, of thousands (or even, in a recent EPA rulemaking, millions) of duplicate or near duplicate comments that contain little or no useful information. Of course, agencies themselves aren't responsible for mass commenting campaigns, but the phenomenon is a powerful lesson: What's needed from Rulemaking 2.0 techniques is not more participation, but rather more participation *that provides information agencies can use to make better decisions.*

By focusing on the value to the agency of public comments we don't minimize the value that commenters individually, or society as a whole, can derive from rulemaking participation. Political psychology research confirms that individuals who are able to provide meaningful input into government decisions that affect them are more likely to view the process as legitimate—and to accept the outcome, even if it is not what they had hoped for (Langbein & Kerwin, 2000; Levi & Stoker, 2000; Tyler, 2006). Civic participation, in other words, has a relationship to trust in government and its institutions, and trust is a social good essential to a well-functioning democracy. Indeed, simply getting accurate information about the issues and what the agency is trying to accomplish can benefit individuals and society (Coglianese, 2004). Table 1, presenting cumulative results of post-comment period surveys in the five rulemakings done so far on Regulation Room, confirms that effective Rulemaking 2.0 techniques can have substantial civic educational impact.

[8] The Administrative Conference of the United States has commissioned such a report by Prof. Michael Herz. It will likely be available on the ACUS we bsite, http://www.acus.gov/research/research-and-recommendations/, at least in draft, by the time this report is published.

Table 1: Participant-reported educational impact of Regulation Room participation

Survey Question: ***Did you gain a greater understanding of***	**Response:**		
	Yes	**No**	**Other**
the rulemaking process? (n=166)	49.4%	25.3%	*Already knew about it:* 25.3%
the positions/arguments of others? (n=164)	77.4%	9.2%	*Not sure:* 13.4%
what the agency is trying to do in the rulemaking (n=153)	71.2%	13.1%	*Not sure:* 15.7%

However, it's one thing to recognize that individual commenters, and a democratic society as a whole, benefit from participation that increases citizens' sense of efficacy and their understanding of government actions. It's something very different to claim that there's democratic value in *any* kind of participatory activity that makes people feel good—even if it's just clicking a radio button to send a form comment.

A responsible agency keeps this difference in mind. We call this awareness the "no bread and circuses" principle: **A democratic government should not actively solicit public participation that it does not value.** At best, using new technologies to invite such participation is deceiving the public. At worst, it breeds anger and cynicism among those citizens who figure out what is really going on.[9] The "no bread and circuses" principle reminds us that there is an inevitable relationship between the value participation has to government decisionmakers and the value participating has to citizens.[10]

Before an agency uses social media and other Web 2.0 technologies to invite new rulemaking participation, it has a responsibility to determine that:

1. This is a rulemaking in which it's reasonable to predict that new participants might have useful knowledge to contribute; *and*

[9] We the People, the White House petition site is a good example of how soliciting public participation creates expectations about government response. Within a month of opening, 755,000 people had created or signed more than 12,400 petitions. The burden on officials of responding to the volume of petitions (many of which sought highly dubious policy changes) was soon matched by frustration on the part of participants, who perceived boilerplate responses and little concrete government action (Marx, 2011; Moorman, 2011).

[10] Having said this, we argue in the final part of this report that bringing new participants into rulemaking will challenge agencies to expand their conception of what constitutes "valuable" rulemaking comment.

2. This is a rulemaking in which the agency is reasonably confident it can provide these participants with the informational and other kinds of support they need to convey their information through effective commenting.

The next two sections provide guidance on how to make these determinations.

B. Predicting Useful Information from New Participation

Because public-comment periods are universal (i.e., open to all individuals, groups, and entities), agencies may not be accustomed to thinking in detail about the various kinds of commenters that might participate, and the different sorts of information they might have to offer. Certainly, the conventional commenting process is not tailored to attracting and supporting specific types of participants. By contrast, Rulemaking 2.0 outreach strategies and participation tools must designed specifically to meet the varying needs of different types of participants, if these strategies and tools are to be successful.

This section explains how to think about the types of participants who might be brought into the virtual room to comment, and the sorts of information they might have to contribute. We discuss three types:

1. Missing stakeholders who might have experiential "situated knowledge."
2. Members of the general public who might provide guidance on resolving value conflicts.
3. "Unaffiliated" experts who might broaden the range of expert opinion and vetting.

After discussing these types we consider the kinds of support each is likely to need to make effective comments.

1. Are there missing stakeholders with relevant situated knowledge?

When we brainstorm with one of our agency partners about offering a particular rule for comment on Regulation Room, our initial question is always: "Are there types of stakeholders who usually don't participate at all, or who don't submit very useful comments when they do participate?"

There are two very pragmatic reasons for starting with the missing-stakeholder question:

From the agency's perspective, if all the interests affected by the proposal already provide effective input through the conventional process, why expend scarce organizational resources on new outreach strategies or participation tools?

From the perspective of recruiting participants to a Rulemaking 2.0 process, what incentive is there for stakeholders who have been participating effectively in the familiar, conventional commenting process to switch to some new and unfamiliar set of Web 2.0 participation tools?

This is not to say that the commenting practices of experienced, sophisticated commenters are perfect. E-rulemaking advocates have long hoped that technology could promote more *interaction* among commenters, during which claims could be challenged, proffered data and models vetted, and possible areas of compromise explored (Brandon & Carlitz, 2003; Lubbers, 2012). We agree with this goal, but the behavior of sophisticated commenters is very difficult to change. In our experience on Regulation Room, commenters who are accustomed to submitting a long, complex letter or memorandum on the last day or so of the comment period are not anxious to engage in iterative discussion about their arguments or data with each other or with new

commenters. They resist being told they cannot "join" the discussion by simply attaching (or cutting and pasting the text of) a 10-15 page document.[11] Hence, the challenges of inducing sophisticated commenters to adopt better commenting practices are very different than those associated with bringing new kinds of participants effectively into the discussion. In this report, we focus on only the second set of challenges.

To illustrate the process of identifying missing stakeholders, here are types of stakeholders that we identified, working with DOT and CFPB, as historically unlikely to comment or comment very effectively:

- EOBR rule: Individual CMV operators (@ 8 million) whose operating license depends on compliance with driving log rules; small trucking company owners (more than 95% of firms in the industry); state and local police entities, who would need new equipment and training to access e-log information in routine compliance stops[12]
- Disability access rule: Individual travelers with disabilities and the families/friends who assisted them; travel agencies that catered to travelers with disabilities; managers of small airports, which might be distinctively affected by new kiosk hardware and software requirements.[13]
- Consumer mortgage protection rule: Individual consumers who have had trouble paying their mortgage or went through foreclosure; officials of small banks and community credit unions, on whom the impact of new requirements would be different than for the large mortgage firms; state and not-for-profit mortgage credit counseling entities[14]

Notice that in identifying missing stakeholders, we considered *direct* participation, not participation by some organization or association purporting to represent their interests. The reason for this becomes clearer once we consider what sorts of useful information these missing stakeholders might bring to rulemaking.

Sometimes, these new participants can bring information very much like that provided by sophisticated commenters. For example, in the EOBR rule, some small truckers challenged specific assumptions and values in FMSCA's cost/benefit estimates, and they offered "corrected" versions based on their own company's operating experience. To be sure, the style and tone of their communication was very different from that of experienced commenters—something we will return to in the last part of this report—but the nature and relevance of the information was the same. It simply represented an additional, and different, perspective.

In general, though, it is unrealistic to think that new participants from missing stakeholder groups will act like experienced, sophisticated commenters and contribute new data, models and studies, or engage in complex critique of the agency's technical, economic or legal analyses. These sorts of contributions require research investment or the acquisition of professional services—both of

[11] The Regulation Room platform now limits the length of any single comment to 3500 characters (roughly, one page of single-spaced text) to discourage "mega-commenting" behavior. Our moderators are also prepared to distill the salient points of mega-comments so these points can be more easily engaged by other commenters, and to discourage continued mega-commenting.

[12] We succeeded in getting members of the first two groups, but not enforcement agencies.

[13] We succeeded in getting members of the first two groups, but not small airport managers.

[14] We got comments from each of these groups.

which typically are too costly for individuals, small businesses, and small government or non-profit entities.

What missing stakeholders *might* be able to contribute is what we call "*situated knowledge*" (Farina, Epstein, Heidt, Newhart, 2012). This knowledge is based on their on-the-ground experiences with the kinds of problems, circumstances, or solutions involved in the proposed regulation. On Regulation Room, we have encountered at least four categories of this experiential situated knowledge. (The categories are important only as an aid to thinking systematically about situated knowledge; any given comment might fit multiple categories. We provide examples for each of the categories drawn from the three case studies. Appendix B contains actual illustrative comments from Regulation Room participants.)

Accounts of Complexity. Comments of this sort draw on the situated knowledge of personal experience to reveal and explore contradictions, tensions or disagreements within what may appear to be a unitary set of interests or practices. Here are examples:

- Disability access rule: Disability rights organizations emphatically supported DOT's plan to require redesign of automated check-in kiosks. Some individual travelers with disabilities, however, disagreed that focusing on accessible technology best served their needs. Explaining their own problems navigating the airport environment, they preferred additional human assistance, and worried that requirements for accessible machines would result in fewer customer service personnel. One gave bank automated teller machines as a case in point.
- EOBR rule: Small trucking businesses and operators almost universally opposed the proposal. Several commenters described, with personal examples, aspects of the structure of the trucking business that would make the impact of an EOBR requirement qualitatively different on them than on large carriers (many of whom already use automated fleet management devices and who, almost unanimously, favored an industry-wide mandate). However, one driver with 23 years' experience, who transported hazardous materials, argued that EOBRs could protect drivers in an age of litigiousness, by providing objective evidence that he/she had complied with maximum driving/ minimum rest time requirements.

Accounts of Contributory Context. Comments in this category draw on the situated knowledge of personal experience to identify contributory causes of the problem the agency aims to solve. The factors they identify may or may not be within the agency's regulatory authority, but rulewriters should be aware of them because they might affect the costs or efficacy of new regulatory measures. Here are examples:

- EOBR rule: Many commenters argued that the root causes of unsafe driving practices and exceeding "legal" driving time include: (1) the industry practice among large carriers of paying by the mile rather than hourly; and (2) the behavior of third-party shippers (over whom small companies have little control) that cause drivers to lose hours waiting at the loading dock for cargo they are contractually obligated to transport. Several commenters recounted detailed personal experiences with the second of these.
- Consumer mortgage protection rule: A major issue was how to ensure that borrowers in trouble were offered any available payment restructuring opportunities before foreclosure was instituted. Some borrowers recounted experiences of being denied payment restructuring only to discover, after it was too late, that the denial was based on erroneous calculations of

their home's net present value. Required disclosure of underlying calculations was not part of the proposed rule, but did appear in the rule as finalized.

Accounts of Unintended Consequences. Comments in this category draw on the situated knowledge of personal experience to identify possible outcomes and effects of the proposal other than those the agency is seeking to achieve. Here are examples:

- Disability access rule: The comments predicting that automated kiosks would, on balance, hurt travelers with disabilities by reducing personal assistance fits in this category as well.
- EOBR rule: Commenters argued that inflexible enforcement of hours-of-service rules through automated monitoring could result in absurd and even unsafe results when drivers encountered unexpected traffic, construction, or weather conditions. These included having to stop within a short distance of their destination or having to pull off the highway in an unsafe location because designated truck stop facilities were unavailable or full.
- Consumer mortgage protection rule: Although consumer commenters approved of CFPB's proposal to require lenders to respond to borrowers' oral (not just written) claims of error, several criticized the part of the proposal that would have allowed oral responses from the lender. They argued that borrowers could not safely rely on mere oral assurances which, they predicted, would lead borrowers to think the matter had been resolved when in fact this was not reflected in the lenders' records.

Reframing Accounts. Comments in this category draw on the situated knowledge of personal experience to reframe the regulatory issues, including the competing values at stake. Here is an example:

- EOBR rule: Numerous comments revealed that, for many small operators, concerns about expense, counterproductive inflexibility, and invasion of privacy were only part of the reason for strongly opposing the proposed rule. Equally important were: (1) the perception that the government was unfairly treating them as lawbreakers, a feeling heightened by a recently finalized rule that required flagrant HOS violators to install EOBRs; (2) a related perception that their professional competence was being impugned; and (3) the conviction that EOBRs would add pressure to what was already a high-stress occupation.

Situated knowledge can thus be a significant resource for rulewriters. Its value flows from the on-the-ground experience of stakeholders such as consumers who struggled with their lenders to work out a plan for avoiding foreclosure, travelers with disabilities, small trucking company owners, and loan officers of community banks.

This experience explains why proxies such as consumer or disability rights advocacy groups, or independent trucker or community banking associations, are not an adequate substitute for direct participation of these missing stakeholders. Such organizational commenters can of course be important sources of information for the agency. But organizations have their own agendas and priorities. They may not convey the range of views of those for whom they claim to speak—as with the travelers with disabilities who valued the adaptability implicit in human help over the independence offered by accessible technology. And, they inevitably cannot convey the rich and nuanced detail of individual experiences and operations—as with the small truckers and drivers who explained a variety of business practices around completing driving logs and who told context-rich stories to illustrate concerns about inflexibility.

There remains one important final point about situated knowledge: The mere fact that a type of missing stakeholder can be identified does not *inevitably* mean that such new participants could bring relevant situated knowledge to the particular rulemaking. Consider, for example, a hypothetical rulemaking to revise permissible levels of mercury in food fish. Women who are, or who plan to become, pregnant might be considered a distinct type of stakeholder because of the well-documented impacts of mercury on fetal development. And, we could reasonably characterize them as "missing" from effective participation in the conventional process. It is much harder, however, reasonably to predict that they have relevant experiential situated knowledge that would assist the agency is deciding whether, and how far, mercury levels should be set below the current 1 part per million.

These stakeholders might, of course, have a great deal to say about which values the agency should prefer and which risks a new rule should most vigorously reduce. Commentators have argued that agencies should use public comment processes not only to discover new "hard" data and scientific or technical information, but also to get democratic guidance on how conflicting values should be resolved (e.g., Mendelson, 2011). This suggestion more broadly implicates new participation by interested members of the public, the topic we take up next.

2. Interested members of the public and guidance on "values"

So far, we have not referred to interested members of the general public as potential new participants, even though the public might be considered a stakeholder in regulation generally and certainly has been missing from effective commenting. (In some rulemakings the class of beneficiaries is so large that it approximates the public as a whole; for example, those who travel the public highways, whose safety is the ultimate objective of the EOBR rule.)

Interested members of the public are always entitled to submit their comments through Regulations.gov or other methods, such as mass email campaigns, but recall that the question here is whether to *supplement* those methods. When, if ever, is an agency likely to get value from investing in Rulemaking 2.0 techniques aimed at actively recruiting members of the general public? What might such new participants bring to the process?

First let's consider one particular category of rulemakings: those initiated to determine the best form or content for conveying information to consumers. In such rulemakings, active recruitment of comment by ordinary members of the public may well be worthwhile. Here is an example:

- Consumer mortgage protection rule: One part of this large rulemaking involved redesigning several important notices that homeowners receive about their mortgage accounts. CFPB proposed specific language and formatting elements. Reaction to these changes from individual consumers, as well as from consumer organizations, could give the agency useful information.

There are, of course, other more systematic ways for getting consumer reaction to proposed new forms, labeling, packaging, etc. These include one-on-one cognitive interviews, formal usability testing, and focus groups. But these ways are often used early in the rulemaking to generate the proposal put out for notice and comment. The costs of using Web 2.0 tools to aggregate reactions to proposed designs are relatively low,[15] so an agency might consider it worthwhile to actively recruit members of the general public to comment.

[15] See Section C and Part IV.B2b.

Beyond this particular category of rulemakings, the case for using Rulemaking 2.0 techniques to recruit members of the general public as new commenters is far less clear. Consider the kinds of rulemakings that now draw mass public participation. They typically involve: setting environmental or other health and safety standards (e.g., greenhouse gases; particulate matter); conservation measures (e.g., designating polar bears as an endangered species; restricting snow mobiles in national parks); or some issue with high political salience to one or more powerful interest group (e.g., media decency standards; contraception coverage under the Affordable Care Act). The members of the public who participate typically have strong political, ideological or moral reactions to what the agency is proposing to do. But, lacking specialized training or relevant experiential knowledge that would enable them to offer specific criticisms, questions, or alternatives, they can do little more than exhort the agency to reach the outcome they prefer.

Should the agency nonetheless seek this kind of participation, not as a plebiscite on whether the proposed rule should be adopted but rather as democratic guidance on how competing value claims should be resolved or types of risk prioritized?

It depends. First, of course, the agency must have some discretion in these areas. If its statutes resolve competing values or specify risk priorities, then it has already received dispositive democratic guidance. Assuming the agency does have discretion, we believe that the usefulness of comments urging certain value or risk judgments depends on the degree to which the commenters have reasonably full and fair information about the range of competing claims and interests, as well as the likely consequences of the proposed approach and available alternatives.

This belief rests on a body of research from political science and deliberative democracy scholars. The research has found that people are often ignorant of, or flatly wrong about, the workings and outcomes of regulatory programs (Hoffman, 2012; Kuklinski, Quirk, Jerit, Schwieder, & Rich, 2000). Providing the opportunity to reflect on reasonably full and balanced information about complex policy questions can change their policy preferences, sometimes quite dramatically (Barabas, 2004; Fishkin, 2009; Kuklinski et al., 2000; Luskin, Fishkin, & Jowell, 2002; Muhlberger & Weber, 2006). To be sure, preferences don't always change when people become more informed (Denver, Hands, & Jones, 1995; Gastil & Dillard, 1996). Psychologists have confirmed humans' remarkable capacity for reconciling new information with their pre-existing beliefs (Kahan, Braman, Slovic, Gastil, & Cohen, 2009; Turgeon, 2009). But, the phenomenon of informed reflection changing people's policy preferences occurs often enough that agencies should be skeptical about getting "democratic guidance" from the value choices or risk priorities expressed in low-information comments.

Unfortunately, members of the public typically derive their knowledge about proposed rules from sources (e.g., advocacy organizations; issue- or ideologically-oriented blogs) that rarely provide balanced, nuanced information (Farina, Newhart, & Heidt, 2013). Hence, the only way the agency can be confident it is hearing citizens' informed value or risk preferences is by providing the necessary information itself. Assessing the feasibility of doing this is the topic of Section C. First, though we consider one final type of possible new participant.

3. Unaffiliated experts and broadening the range of expert information

Another hope of early e-rulemaking advocates was that Web-enabled commenting would elicit a broader range of expert opinion and discussion (Lubbers, 2012; Farina & Committee on the Status of Federal e-Rulemaking, 2008). This goal has even greater appeal now, as budget constraints limit agencies' ability to commission their own expert analyses and many agencies

are losing internally developed expertise through retirement of experienced regulators. Observers have become increasingly concerned that agencies may be victims of "information capture," as regulators must rely more and more on experimental data, studies, and other scientific and technical information generated by regulated industry itself (Field & Robb, 1990; Wagner, 2010). Because the costs of producing or even obtaining independent expert assessment of such information are usually beyond the means of other stakeholders (even large national public advocacy organizations), the result may be systematic information gaps and biases. Broadening the pool of expertise to include experts not affiliated with particular stakeholders might help level the informational playing field.

At present, the probability of successfully engaging unaffiliated experts as new rulemaking participants is largely an unknown. Some unaffiliated expert commenting has occurred on Regulation Room, but we have not thus far focused on attracting this type of new participant. In the disability access rulemaking, two accessible design experts made detailed comments about various specifics of the proposed equipment changes. In another rulemaking, in which peanut allergies became an unexpectedly controversial issue, two physicians and some other commenters produced nearly a page of citations to studies on incidence, severity, and triggering mechanisms.

These experiences convince us that further work on how to identify and motivate this type of new participant is worthwhile. Obviously, agencies will be concerned about the credentials and possible biases of those who purport to be experts—but these same problems exist in off-line commenting, and can be managed at least as well through online protocols. The greater challenge may be motivational: persuading experts (i) to put the required time into participation within the fairly short time-frame of the typical comment period, and (ii) to donate their expertise without monetary compensation. There are potential solutions to these challenges,[16] but experimentation and adaptive fine-tuning will be needed to identify the combination of regulatory circumstances, outreach techniques, and participation tools that maximize the likelihood of successfully engaging unaffiliated experts.

4. Bringing it all together

Table 2 presents a typology of possible rulemaking participants. As this Part has explained, these various types of commenters have different capacities to contribute useful information in rulemaking. So, the table is, in part, a summary of ground already covered.

But Table 2 also begins our focus on the differences between the kinds of support different types of participants are likely to need to overcome participation barriers and comment effectively.

[16] For example, to ameliorate the short time-frame problem, outreach to experts might begin when the impending rulemaking is announced in the agency's Regulatory Plan. With respect to motivation, online community research suggests the effectiveness of devising non-monetary, reputational incentives for participation, such as creating publicly visible hierarchies of valuable contributors and offering frequent contributors additional roles in the discussion (Lampe, Walsh, Velasquez& Ozkaya, 2010).

Table 2. Typology of Potential Rulemaking Participants & Their Likely Needs

	Sophisticated stakeholders	Missing Stakeholders	Interested Members of the Public	Unaffiliated Experts
Who they are	Directly affected by proposed rule (either because their conduct would be regulated or because they would directly benefit); experienced in interacting with the agency in RM and other contexts	Directly affected by proposed rule (either because their conduct would be regulated or because they would directly benefit); do not participate in RM or other agency policy interactions	Individuals who self-identify as interested in the proposal, but are not in previous two groups; some large beneficiary groups have such diffuse interests that they are like the general public	Scientific, technical or other professionals who are not direct stakeholders, and not employed or retained by a stakeholder in this matter
Examples	Trade association of large trucking companies; large mortgage lenders; major airlines	Small trucking company owners; drivers; consumers who went through foreclosure; travelers with disabilities	Highway drivers and passengers; consumers who have home mortgages; people who use travel websites and check-in kiosks	Researchers on driving fatigue or traffic accident prediction models; consumer behavior researchers; accessible designers
Awareness of relevant ongoing rulemakings	High	Typically, low	General awareness in high political-salience RM; otherwise, low to nonexistent	Typically low, but might vary with field and particular rule
Understanding of RM process and larger regulatory environment	High; often "repeat players"	May have patchy knowledge of regulations that immediately affect them; unlikely to understand RM process or larger regulatory environment	Low to nonexistent	Hard to predict; likely dependent on field and particular rule
Ability to comprehend meaning and implications of agency's proposal **without help**	High; often have staff that specialize in regulation; likely to have in-house or hired legal and technical experts	Low on deciphering NPRM; ability to comprehend meaning and implications after NPRM "translation" likely to depend on specific rule & group	Very low on deciphering NRPM; ability to comprehend meaning and implications after NPRM "translation" typically low	High for parts directly relevant to their expertise
Ability to produce effective comments **without help**	High (have acquired the needed help)	Low; likely to have relevant situated knowledge but communication is impeded by lack of knowledge of RM process or larger regulatory context	Very low	Likely high for parts relevant to their expertise

Table 2 of course oversimplifies, but it conveys a crucial point: *Potential rulemaking participants are not similarly situated*. Effective participation is informed participation, and several kinds of knowledge and types of skills are required. Knowledge and skills are not equally distributed across the range of individuals and entities who might participate.

For this reason, anticipating and providing ways to remediate predictable knowledge and skills gaps becomes a design imperative for Rulemaking 2.0. Before Part IV discusses how to find the right tools for the task, we must consider the final step in picking the right rules: How easy will it be to create substantively informed participants?

C. Assessing the Feasibility of Creating Informed Participants: The Continuum of "Information Load"

The ability of all types of potential new commenters to participate effectively can depend on the nature of the specific rule. As noted earlier, rulemaking is characteristically very information-intensive, and NPRMs are characteristically dense and long—hence, the participation barrier of information overload. Still, there are substantial variations across rulemakings in the amount and complexity of the substantive information participants need to comment meaningfully on issues of importance to them. We'll call this the "information load" of effective (i.e., informed) participation.

Some examples can illustrate the information load continuum:

- **Low Information Load.** In a rulemaking on new labeling and point-of-purchase materials to help consumers understand how choice of tire can affect vehicle fuel consumption,[17] the information load for effective participation by consumers was low: Participants needed to be able to see the label options and materials, and could then be guided by their existing life experience and preferences to answer agency questions about clarity and comprehensibility of content, and salience and convenience of location.
- **Medium Information Load**. The EORB rule presented a medium information load for drivers and small trucking company owners. Information about EOBRs, and the fairly complex "hours of service" regulations they sought to enforce, was widespread in the trucking community. What these missing stakeholders additionally needed to know was: who would be affected, what complying equipment was likely to cost, when compliance would be required, and how violations would be detected and punished.
- **High Information Load**. The disability access rule presented a reasonably high information load for most missing stakeholders. Participants needed to know what specific accessibility standards DOT was considering, when and how it proposed to phase-in implementation, what exceptions would be made, and what methods would be used to verify compliance.
- **Very High Information Load**. The hypothetical rulemaking proposing to change permissible mercury levels in food fish presents a very high information load both for women who are or plan to become pregnant and for interested members of the public. To get beyond general exhortations (e.g., lower the level and protect our children) to expressions of informed value and risk preferences, participants need to know such things as: the extent of health benefits anticipated from incrementally lowering mercury levels; the health and other costs associated with stricter requirements (e.g., impact on fishing industry and extent to

[17] This DOT rulemaking was used to run a very limited public beta test of the initial version of Regulation Room.

which higher fish costs would impede consumer healthy diet efforts); and the possibility and predicted efficacy of alternatives (e.g., required warning labels giving consumers recommended weekly consumption limits and identifying sensitive populations).

Here is the basic rule of information load: *As the information load for a particular type of new participant increases, the feasibility of successfully engaging such participants in effective commenting decreases.* This is so because the higher the information load, the more costly it is for both participant and agency to achieve effective commenting. Participants must invest proportionally more time and attention in becoming "informed" before they comment. Agencies must invest proportionally more resources in enabling, motivating, and supporting participants in this effort. (Part IV discusses the sort of resources involved.)

Note two important characteristics of information load:

1. **Information load may vary not only across rules, but also across types of participants in a given rule.** For example, although the information load of the Disability Access rule was fairly high for travelers with disabilities, for unaffiliated experts like accessibility designers it was fairly low. They needed to know the technical specifications DOT was proposing and, perhaps, the plan for transitioning from inaccessible to accessible devices. In the opposite direction, although the EOBR rule presented only a medium information load for truckers, it presented a high information load for useful contributions from members of the driving public. Understanding and engaging the comments of affected truckers required information about various practices, demands, and economics of long-haul trucking and at least some familiarity with the content and enforcement scheme of underlying "hours of service" regulations.
2. **Information load may vary across issues within a single rule.** For example, although the part of the tire labeling rule concerning new labeling and point-of-sale materials presented a low information load for consumer commenters, another part—dealing with the precise procedures and scales for measuring and rating tires for fuel efficiency—was extremely technical and would have presented a very high information load for consumers. (Illustrating the first characteristic, this part would have presented a fairly low information load for expert engineers.)

These characteristics mean is that a single rule often presents multiple information loads, depending on the type of new participant and the part of the rule being considered. Just as Rulemaking 2.0 techniques can (and should, in our view) be used in only some rulemakings, so we urge you to be open to the possibility that these techniques can be:

- Targeted to engage and support only some types of potential participants.
- Used to obtain broader comment on only some parts of the rule.

This does not mean that other types of participants would be unable to use the Rulemaking 2.0 participation tools provided. Similarly, it doesn't mean that those who comment on the issues featured on the Rulemaking 2.0 platform can't comment on other issues via Regulations.gov or other available comment methods. No one is being closed out; no one is being denied their basic legal notice-and-comment rights.

What it *does* mean is that agencies gain flexibility to maximize the value of whatever investment they decide to make in Rulemaking 2.0. By considering the various types of potential new

participants (with their attendant needs), the various parts of the rule (with their attendant degree of complexity, technicality, etc.), and the resulting information load estimates, the agency can find the rulemakings with the best opportunities for getting useful information from new participants. In other words, it can *Pick the Right Rules***.**

Part IV: Using the Right Tools: Purposeful Participation Design to Support Effective New Commenters

Let's assume (1) that an agency has identified an upcoming rulemaking as one in which there are one or more types of missing stakeholders, and (2) that these stakeholders seem reasonably likely to have relevant situated knowledge about one or more issues in the rule. Let's further assume (3) that the agency initially assesses the information load of effective participation, by these types of stakeholders on these issues, as not prohibitively high. What next?

Here, we discuss specific Rulemaking 2.0 technologies and techniques the agency can use to lower the three barriers that have historically prevented meaningful participation by missing stakeholders. Recall that these barriers are: unawareness that the rulemaking is going on; low participation literacy; and information overload. Accordingly, this Part has three main sections:

A. Outreach to Alert and Engage Potential New Participants: Using social and conventional media to find new ways for reaching target audiences and crafting messages that motivate them to respond.

B. Converting Newcomers into Effective Commenters: Using site design and moderation to help new participants get past "voting and venting" behaviors and effectively contribute the situated knowledge they possess.

C. Making Important Substantive Information Accessible: Transforming the NPRM and other relevant materials into a Web-appropriate information structure that new participants are actually able and willing to use to become informed about the proposed rule.

N.B. This last set of activities may lead the agency to reassess its initial assessment of the information load and, hence, the suitability of this rule for Rulemaking 2.0 approaches.

Our main emphasis in this Part will be attracting and supporting missing stakeholders. Eliciting meaningful commenting from this type of potential new participant has been the focus of Regulation Room research to date, and we believe this is likely to be agencies' most productive approach (at least in the short term) to getting broader-and-better commenting. Still, we won't ignore other potential new participant types: At points, we will suggest how technologies and techniques might differ if either interested members of the public or unaffiliated experts were the targets.

The advice we offer here is based on what we do in Regulation Room, and we use screenshots of our platform to illustrate. We don't mean to suggest that our particular operationalization of Rulemaking 2.0 is the only one possible—but it is the one that has been developed and tested in the live rulemaking environment. Showing how our platform implements the technologies and methods we discuss will, we hope, make our advice seem less abstract. (More detail about what we do in Regulation Room can be found in Appendix A, which also lists law review and other articles we've published about our findings. Also, you can see the site in operation at www.regulationroom.org, where all the rulemakings used as case studies in this report can still be viewed.)

Before getting to specific tools and techniques, we reiterate an earlier point: *Getting meaningful new participation is not easy*. Serious Rulemaking 2.0 efforts require serious commitments from the agency. Carefully designed and deployed Web 2.0 tools are essential, but technology alone cannot lower the historical participation barriers. Human effort, also carefully designed and

deployed, is indispensable. The integral alliance of technological and human elements is why we call Regulation Room a "socio-computational" system. Someday, perhaps, technology will be able to take over some of the human tasks. Or, perhaps, online communities of participation will develop around substantive regulatory areas, and experienced user-commenters will emerge to provide the support new participants need. Both of these avenues should be explored.[18] For the present, though, agencies must be willing and able to either free up their own personnel or acquire outside assistance to make Rulemaking 2.0 efforts successful.

The following discussion assumes that the agency has made this commitment of resources, and that the Rulemaking 2.0 site is the agency's *official site*—either because its own staff run it or because outsiders have been engaged to operate the site explicitly on the agency's behalf.[19] One of the most important implications of this official status is how the agency treats public discussion on the site. Whether or not current law *requires* treating such content as part of the rulemaking record, the agency should plan to do so for one simple reason: *New participants have no incentive to invest the time and energy in becoming informed commenters unless they are assured that what they say is going to matter in the decision making process*.[20] Halfway measures—such as encouraging discussion on the Rulemaking 2.0 site but then directing participants to go to Regulations.gov to make a "real" comment—are likely only to deprive the agency of much of the value of its Rulemaking 2.0 investment. As the following sections show, assuring potential new participants that government decisionmakers *will* consider their contributions begins with outreach and does not end until the agencies' final decision about the rulemaking has been released.

A. Outreach to Alert and Engage Potential New Participants.

Creating a Rulemaking 2.0 site is, unfortunately, not like carving a baseball diamond out of an Iowa cornfield: Building it *will not* be enough to make them come. Additional, and different kinds of, outreach beyond what the agency traditionally does for its rulemakings will be needed to raise awareness among missing stakeholders (or, for that matter, any other type of potential new participant.)

This outreach must be designed with three objectives in mind:

1. **Use methods likely to come to the attention of the targeted missing stakeholder groups**. Even if missing stakeholders know that the agency is the source of regulations that affect them (a condition often *not* satisfied), they almost certainly do not routinely follow the agency's communications. New proactive efforts, tailored to reach the particular stakeholder types being targeted, are essential.
2. **Don't just announce the rulemaking; emphasize the opportunity to participate in the process.** Because most people don't know how rulemaking works, outreach must overcome

[18] And, indeed, members of the multidisciplinary CeRI research team are beginning to explore each of them.
[19] The question of the relationship of the Rulemaking 2.0 site to Regulations.gov is beyond the scope of this report. Adding Web 2.0 tools has been on the agenda of the Regulations.gov project management team. Until concrete steps are taken in that direction, it is impossible to assess whether the new functionality can be utilized in ways consistent with the recommendations of our report. At this point, we simply reemphasize that Rulemaking 2.0 techniques should be understood as *situation-specific supplements* to conventional notice and comment via the Federal Register and Regulations.gov.
[20] For how we handle this issue in Regulation Room, which is clearly presented to users as *not* being an officially sponsored government site, see Appendix A.

low "participation literacy" and tell people not only what the agency is substantively proposing, but also that their input is desired *and will be considered* before a final decision is made.

3. **Convince the targeted groups why the rulemaking matters to them and why making the effort to participate is worth it.** Sophisticated stakeholders understand why rulemaking participation matters; missing stakeholders need to be motivated to engage in an unfamiliar and demanding process. Outreach must be clear about how their interests would be affected by the proposed rule, so that they appreciate the risks of remaining silent.

Several guides to using social media have become available to agencies (e.g., Franks, 2010; Leighninger, 2011), so we won't offer a comprehensive introduction to blogging, Twitter, Facebook, etc. here. Instead, we'll focus on specific things to do (or not do) in order to further these three outreach objectives. And we'll describe what we do in Regulation Room.[21] Social media is certainly an important part of our outreach efforts, but you may be surprised at how much we also rely on traditional channels of communication as part of an integrated outreach strategy.

The tips below fall into two categories: the *medium* (where, when, and how) and the *message* (what). Because every aspect of outreach—especially message content—is tailored to alerting and engaging the targeted missing stakeholders specifically, it's worth reiterating that Rulemaking 2.0 outreach efforts *supplement* what the agency already does to provide notice about the rulemaking. Agency personnel may, at least initially, be uncomfortable with the notion of "singling out" only some types of stakeholders for enhanced outreach efforts. But because the agency will be doing everything it usually does to give notice of the rulemaking, any serious argument that a non-targeted stakeholder's notice rights were violated is unlikely. The more plausible argument is that targeted outreach indicates agency substantive bias. To the extent that this argument has any force, it is likely to come from the content of messaging, so we will consider it further there.

An organizational observation: Different agencies handle rulemaking publicity in different ways; sometimes, notice is managed by the rulemaking group itself without involvement of the agency's press/public relations office. Because reaching new participants requires multiple kinds of carefully crafted communication over the course of the comment period, it makes sense for the agency's communications professionals to be part of the outreach strategy—at least at the conceptual stage, and probably during implementation. Tasks such as message-framing, identifying the appropriate people to contact within a large organization, and "pitching" a request for outreach help to an influential blogger or other opinion leader require experience and skill. Still, our advice for alerting and engaging new participants departs in many ways from what the agency would "typically" do even in high-publicity rulemakings. Therefore, it is important for agency leadership to be committed to the Rulemaking 2.0 effort *and for this support be clearly conveyed to the agency's communications professionals* as well as to members of the rulemaking group. In our experience, agency press/public relations offices understand very well that the ability to engage the media and other influential communicators is a limited resource. Without clear signals from agency leadership, they may be unwilling to expend this resource on the particular rulemaking. If at all possible, the agency's communications professionals should be

[21] Outreach efforts, per se, are not visible by looking at our site.

recruited as willing, active participants who "take ownership" in the success of the Rulemaking 2.0 venture.

The Medium: Where, When, and How

DO develop a communications plan tailored to the rule and the specific types of missing stakeholders you are trying to engage. As noted, this plan is *in addition to* all the kinds of notice the agency usually gives. It should focus on identifying and, whenever possible, making use of channels of communication that: (i) the target missing stakeholders are likely to use in general; or (ii) through which they tend to get information about issues like those involved in the rule.

Americans live in an information-saturated environment. The Internet provides unprecedented opportunities to communicate, but it also has vastly increased the volume of material vying for people's notice. The first step in winning what has been aptly called the "battle for attention" is putting information about the rulemaking in places where missing stakeholders are likely to come across it. This could involve (i) direct communication with them or (ii) communication with individuals, entities and groups who are motivated to pass along the information to them (discussed further below).

On Regulation Room we create a communications outreach plan for each rule. Through conversations with the rulemaking team and independent online research, we try to discover where, and how, the missing stakeholder groups get information. We identify membership associations, recreational and trade publications, and influential individuals such as bloggers, and we reach out to them through email, phone, social media, and other online communications. We also identify and develop a list of keywords and phrases we believe would appeal to missing stakeholders for use in social media outreach and in advertising on Facebook and Google.

DON'T underestimate the power of conventional media. People used to think that print media would not drive traffic to websites. Now it's recognized that individuals can be led to engage in online activity by what they read in print, see on television, or hear on the radio. In the rush to use social media, don't neglect conventional media opportunities to reach missing stakeholders.

We were reminded of the power of conventional media when a story in the Washington Post travel section about a pending rulemaking created a notable spike of visitors to Regulation Room from the D.C., Virginia and Maryland areas. On Regulation Room, we *proactively* try to persuade conventional and online media to publicize both the rulemaking and the availability of Regulation Room. We also *reactively* reach out to these sources by setting up continuous automated searches and responding with comments (encouraging stakeholders to visit Regulation Room) when the rulemaking or its subjects appears on news sites or blogs. We also coordinate media outreach with our partner agency's communications office, matching the timing and content of our press releases whenever possible.

DON'T overestimate the impact or effortlessness of social media. Recent years have seen striking examples of how Facebook, Twitter, and other social networking tools can incite political action by rapid "viral" dissemination of information. It's easy to assume, from those examples, that agencies just have to make more use of their own blogs, Facebook pages, or Twitter feeds in order to obtain more participation. To understand why this is not a safe assumption, consider the larger picture (Pingdom, 2013; Pring, 2012, January 11; Pring, 2012, February 13):

The good news is that, by the end of 2012:

- 4 out of 5 Internet users visit social networks and blogs.
- Demographic disparities in use of social media use are diminishing rapidly.
- Twitter is growing at a rate of 11 new accounts per second*;* Facebook is the most visited site on the internet.
- YouTube gets 490 million unique visitors per month.

Clearly, there is an avid audience for social media. However, there's also bad news for those trying to win the battle for attention of new rulemaking participants. By the end of 2012

- there are 634 million websites
- there are 109 million blogs on the two most popular platforms (WordPress and Tumbler)
- 190 million tweets are sent *per day*
- On Facebook, *every minute* there are 510,000 comments posted, 293,000 status updates, and 136 images uploaded. 30 *billion* pieces of content are shared each month.
- In 2012, 2.5 million hours of news-related video were uploaded to YouTube. Considering all types of content, 1 hour of video is uploaded *every second.* At this rate, YouTube content increases by a century of new viewing time every 10 days.

In other words, if the Internet is the information superhighway, social media is the Los Angeles freeway at rush hour on the night of a Lakers home game.

Does this mean that including social media in the communications plan for reaching missing stakeholders isn't worth it? No, but it does mean setting realistic expectations for required effort and likely success.

Featuring the rulemaking on the agency's blog, Facebook page, and Twitter feed does make sense but, as noted earlier, missing stakeholders are unlikely to be following these particular social media outlets—if they were, they probably would not be systematically missing from rulemaking participation. Of course, the power of social networks is that people who do get information share it with others who may not have seen the original message, those people in turn pass it along to still others, and so forth. This is how information "goes viral" on the Web. For this reason, getting information to people who will share it with members of the targeted stakeholder types is a fundamental goal of outreach. But, the kinds of individuals, entities, and groups who regularly follow the agency's own blog, Facebook page, or Twitter feed may have little motivation to share information with missing stakeholders—again, if that motivation existed, these types of stakeholders would likely be more visible in rulemakings already.

This is why in Regulation Room we use social media to both proactively and reactively reach out to target stakeholders. We "like" or "follow" the social media pages of membership associations, recreational and trade publications, and influential individuals such as bloggers, where target stakeholders get their information. We also use keywords and phrases that would attract our targeted stakeholders (1) proactively in daily tweeting, Facebook posting, and (in the most recent rulemakings) Facebook and Google ads; and (2) reactively by responding with comments and tweets when the rulemaking or its subjects appears on blogs or Twitter. Figure 1 provides examples of Google and Facebook ads placed for rules on Regulation Room.

Figure 1. Google and Facebook advertising examples

Finally, it's important to be realistic about outcomes. Don't expect that even aggressive social media outreach can motivate the volume of sharing activity needed to cause information about the rulemaking "go viral." Even if it were possible to make messages about a rulemaking cute, simple, emotionally-evocative, trendy, funny, or shocking (characteristics variously claimed to be key to creating content that goes viral), agency communicators will rarely feel comfortable doing so. Web 2.0 success is so invariably expressed in numbers (e.g., visits, followers, likes, downloads, retweets, etc.) that it's easy to lose sight of the fact that outreach is a means to an end, not an end in itself. In the EOBR rulemaking, we knew that the number of potential participants in the group of CMV license holders was about 8 million. During that rulemaking, we had 5,328 unique visitors to Regulation Room; 104 registered as users and 72 of these actually contributed content to the site—a seemingly miniscule yield on outreach.[22] But the ultimate Rulemaking 2.0 goal was to add an important missing stakeholder perspective to the EOBR rulemaking, and that happened. The discussion on Regulation Room was rich in the situated knowledge of CMV owners and operators, and 3 out of 4 commenters had never before participated in a rulemaking.

If the agency truly believes that, when it comes to rulemaking participation, *more* public comment is not the same as *better* public comment, then quantity per se is a very incomplete metric for determining the success of outreach.

The Message: What

DO give information about participation as much emphasis as information about substance. Many times in Regulation Room, we've been discouraged to see a news feature or blog post that does a great job of explaining a proposed rule in comprehensible terms, but says nothing about the right to participate and gives no direction on where to submit comments. Unsurprisingly—given the barrier of low participation literacy—such coverage rarely produces a noticeable spike in site activity.

Urge news media, advocacy organizations, and subject-relevant bloggers not only to announce the rulemaking, but also to (i) explain that participation is encouraged and comments will be considered, and (ii) include a link to the Rulemaking 2.0 site. Of course agency communications

[22] In fact, the relative scale of Web 2.0 participation usually surprises people who are not actively engaged in online community research or marketing. The widely used rule of thumb is "95-5-.1". This means that 95% of site visitors will just read ("lurkers"), 5% will engage in some sort of participation, and 0.1% will participate actively. Because participation on even a well-designed Rulemaking 2.0 site requires more user attention and effort than the "typical" blog or other Web 2.0 site (see Section B1 below), achieving even a 0.1% conversion of visitors to commenters is respectable. (On Wikipedia, for example, where participation demands are fairly high, the observed ratio is closer to 99.8-.2-.003 (Nielsen, 2006). Still, converting a higher percentage of visitors to active participants is a persistent challenge for all online communities (Preece & Shneiderman, 2009), and it remains an ongoing research priority of the Regulation Room project.

personnel can't control what is done with the information they disseminate. But messages deliberately crafted with low participation literacy in mind will not look like the text of the typical press release, press conference, etc., which at most alludes briefly to the length of the comment period. All communication about the rulemaking—even that which is not specifically targeted to missing stakeholders—should treat the solicitation of public comment *as part of the story:*

- Messages should be drafted on the assumption that people don't understand what a "comment period" is—a safe assumption even for many reporters, subject-relevant bloggers, and communications directors of membership or advocacy organizations.
- Moreover, because the general level of public trust in government regulators tends not to be high, information about what the agency does with comments is important. On Regulation Room, both our outreach and our educational materials repeatedly convey the following three-part message to motivate new participants: You have a legal right to comment; the agency has a legal responsibility to read and consider your comments; a single comment that makes a good point can change the outcome in a rulemaking.
- Finally, the message should contain a live link if possible or, if not, at least the Web address of the Rulemaking 2.0 site. It should explain that this site is a place where people can easily find information about the proposed rule, discuss it with others who are interested, and give the agency the benefit of their comments.

DON'T assume that potential new participants recognize how a proposed rule would affect them or their interests. For agency staff steeped in the general regulatory program and the particular rulemaking, it can be hard to appreciate how little even people directly affected are likely to understand about the proposed rule. Section IVC presents techniques for making the substance of the proposal more comprehensible. Here, the focus is on outreach messaging that motivates missing stakeholders to at least investigate becoming involved. Communicating clearly and specifically how the proposed rule will affect their interests—positively or negatively—is a crucial part of winning the battle for their attention.

It may seem difficult (or at least impolitic) for outreach to focus on the proposed rule's negative impacts, but behavioral economics and decision-theory research shows that avoiding a loss ("loss aversion") is one of the most powerful motivators of human action (Kahneman & Tversky, 2984). Even negative impacts (e.g., increased cost from proposed new procedures) can be communicated constructively by emphasizing the agency's desire to get information from those who would be affected (e.g., urging small community banks to learn about proposed new procedures and provide details about how these would affect their current operations.) Communicating about positive impacts may seem easier, but simply describing potential benefits of the proposal may make message recipients complacent: "If the agency already wants to do this, I guess I don't need to do anything." This complacency can be combated by a subtle negative framing emphasizing that this is only a *proposed* rule and that, for example, the agency needs to hear more details about the kinds of problems people are having and whether the proposal would really solve those problems. The subtext of this sort of messaging is that the final rule may not be as good for recipients as the proposed rule if they don't participate.

The kind of motivational content discussed so far should be relatively uncontroversial, even though most agencies don't do this kind of messaging now. After all, the NPRM is likely to have raised these issues (often by explicitly posing questions) and it's a well-established principle of

rulemaking that those who are happy with the proposed rule risk a less favorable final outcome if they do not speak up during the comment period. More controversial, perhaps, is messaging that motivates by warning missing stakeholders that types of stakeholders with potentially adverse interests will participate. In Regulation Room, we have sometimes tried to motivate lagging participation in the closing days of the comment period by messaging along the following general lines: *"Only [**] more days to comment on the [proposed rule]. [Industry group(s)] will have their say about this proposal; you should make your voice heard too."*

This kind of messaging occasionally draws negative reaction from some agency staff, who see it as "taking sides" in the rulemaking. At Regulation Room we continually emphasize, both in training our student moderators and in interacting with participants on the site, that we are neutral as to the substance and outcome of the rulemaking; we believe this is the only appropriate stance, for we are often targeting and trying to support types of new participants with opposing viewpoints. Hence, we considered carefully before engaging in this sort of messaging, and we are extremely attuned to the precise wording. Each agency must, of course, reach its own conclusions about the fact or appearance of bias, but we offer our own thinking for whatever help it may be: Messaging such as this simply makes explicit for missing shareholders what everyone familiar with rulemaking already knows. Airlines *will* file comments about proposals for new passenger rights or protections; large motor carriers *will* file comments about proposals affecting CMV driver behavior and responsibilities; national mortgage servicers *will* file comments about proposals imposing new duties to home mortgage borrowers. Of the many predictions about behavior an agency makes in a rulemaking, these sorts of predictions are surely among the most well-founded based on historical data. And missing stakeholders *should* exercise their participation rights, for their own good and for the social good of well-considered regulatory policy. Candor about participation inequities is not partiality.[23]

DO recognize that organizations may need persuasion about urging their members to participate individually. Even with social media, it is often hard to reach missing stakeholders directly. Therefore, trade, professional, advocacy and membership organizations can be important gatekeepers to getting the message out to individuals in the targeted groups. However, in our experience, there can be several obstacles to eliciting organizational cooperation in outreach efforts:

- **Attention:** The "battle for attention" applies to organizations as well as individuals. In particular, it can be difficult to get the message in front of the right person, particularly in larger organizations.
- **Conflicting priorities:** Organizations often have limited resources; one of the most important of these is the ability to get attention and action from their members. Using some of this "attention-and-action" capital on the rulemaking may not obviously align with the organization's priorities.
- **Organizational self-interest:** Some organizations exist in order to amplify the power of the individuals they represent by speaking in a single voice; unions are the most obvious but not

[23] If precedent is helpful for the proposition that additional efforts to alleviate participation inequities do not equate with agency bias, consider 5 U.S.C.§ 567(c), which explicitly authorizes agencies to pay the participation expenses of an interested party in negotiated rulemaking if the party establishes lack of adequate financial resources and the agency determines that the party's participation is necessary to assure adequate representation on the negotiated rulemaking committee.

the only example. Even organizations whose mission is not constructed around exclusive representation may have a strong self-interest in being *the* vehicle through which their members' reaction to the rule is conveyed to the agency. This may be one of the services they "sell" to members, as with some trade associations. Or, as with some issue-advocacy organizations, being able to "deliver" thousands of comments in an orchestrated mass action campaign is seen as integral to fundraising and general political "clout" (Shulman, 2009). For any of these organizations, an effort to alert and engage individual members directly in the rulemaking may be highly threatening.

Still, agencies mindful of these potential obstacles have opportunities to induce organizational cooperation that we, as academic researchers, lack. For one thing, the agency can reassure the organization that it values any comments the organization itself plans to file, and emphasize that the agency is seeking individual participation to supplement, not supplant, what the organization can bring to the rulemaking. To raise the organizational priority of communicating with members about the rulemaking, the agency can emphasize how these members will be directly impacted; it can point out that they may consider it a benefit of membership for the organization to alert them about personal participation opportunities even if the organization plans to submit a comment. Organizations that have regular interactions with the agency may be motivated to appear helpful by cooperating in outreach the agency considers important. Even those that are not repeat players will likely to be more attentive to a request from a federal agency than from a research group.

Regardless of who is asking, however, in the end an organization is likely to help bring missing stakeholders into the rulemaking only if this aligns with the organization's own interests and priorities. Some organizations may never find this to be the case. Others may be led over time to see meaningful participation by individual members as an advantage. It is still early enough in the Rulemaking 2.0 effort that no one can really anticipate how success in engaging new participants would change the rulemaking landscape. For this reason, it is worth continuing to try to enlist gatekeeper organizations in outreach efforts, even if there is initially resistance.

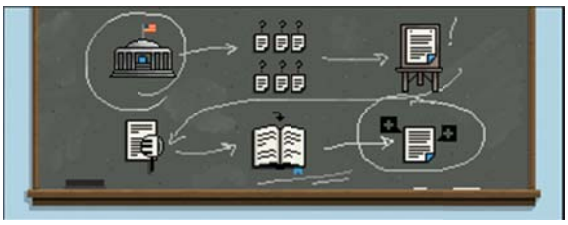
B. Converting Rulemaking Newcomers into Effective Commenters

Once outreach has alerted missing stakeholders and motivated them to come to the Rulemaking 2.0 site, what does it take to convert them into effective commenters?

If, as we've argued, a significant barrier for newcomers is lack of understanding about the rulemaking process and the role public comment plays in it, then the most direct response would seem to be education. Materials about effective commenting can increasingly be found both on agencies' own websites and on Regulations.gov. Instructional material can certainly play a role in overcoming low participation literacy. To be most effective, this material should:

- Be easily and prominently accessible from the same location at which commenting occurs.
- Explain enough about rulemaking that people can understand not only *what* they should do (e.g., give reasons, provide details, etc.) but also *why* this important in the process.
- Avoid formalistic phrasing in favor of a "plain language," conversational style that offers people advice about how to make their voices heard effectively.
- Ideally, be offered in multiple formats that respond to differences in how people most easily process information. (On Regulation Room, we use textual explanation, a series of cartoon-like graphics (illustrated in Figure 2), and both live and animated videos.)

Figure 2. Examples of graphics used to illustrate instructional information



However, no matter how clear, accessible and creative instructional materials are, few potential new participants will actually look at them. On Regulation Room, we've observed that only about 1.9% of all page views are to educational materials.

To some extent, the typically low level of user interest in effective-commenting materials is explained by people's general tendency not to read directions—behavior that (as noted below) is even more pronounced on the Web. More fundamentally, rulemaking newcomers typically do not realize that they don't know how to participate effectively. Instead, they come to a Rulemaking 2.0 site already primed with a set of expectations about participation—*expectations that actually work against effective commenting behaviors.*

In this section, we'll offer advice on how to design the Rulemaking 2.0 environment to "reset" the expectations of rulemaking newcomers about participation. And, we'll discuss techniques (beyond simply sending them to educational materials) that mentor newcomers in developing effective commenting behaviors. First, though, it's important to understand more about the nature and source of the counterproductive participation expectations that Rulemaking 2.0 designers must try to change.

1. Low expectations and "drive-through" participation

The following email came from an actual Regulation Room user:

"I am interested in this regulation but do not want to spend a lot of time reading or submitting comments. How can I just 'voice my opinion' in an easy way? I could not figure out how to do this. My suggestion is to state the section of the proposed regulation. Then, ask for votes, using for example 5 choices from strongly agree to strongly disagree, with the option of adding comments to any question. What you already have is useful but too time consuming for me."

It would be easy to write off this user as irredeemably shallow and lazy—were it not for the fact that his/her design advice reflects precisely the expectations about participation that are created by the familiar forms of democratic engagement, and reinforced by the dominant culture of Web 2.0.

As noted earlier, most Americans' experience of participation in public policymaking is limited to voting for government officials, responding to opinion polls and, perhaps, signing petitions. What all these experiences have in common is equating participation with (merely) communicating outcome preferences. Conspicuously missing are the behaviors associated with effective rulemaking participation:

- Demonstrating an understanding of the relevant facts, circumstances, and issues.
- Articulating reasons for preferences.

- Engaging with, and responding to, opposing points of view.
- Considering and evaluating a range of possible outcome alternatives.

In sum, the familiar forms of democratic participation have created low participation expectations in citizens by demanding very little of their time, attention, or cognitive effort.

Ironically—given open-government hopes for using the Internet to inform and empower citizens—Web 2.0 exacerbates the problem. Observations of online behavior have revealed the following patterns (Krug, 2006):

- Users tend to scan pages, rather than carefully reading content.
- They are likely click on the first button or link that might do what they want, rather than reviewing all the available options and then deciding which is best.
- They prefer to "muddle through," rather than read instructions or otherwise figure out how the site works.

Significantly, usability experts study these behaviors in order *to design for them, not to change them*. The cardinal rule of Web design is "Make it easy"—a principle memorably captured by usability expert Steve Krug in the title of his popular book, *Don't Make Me Think: A Common Sense Approach to Web Usability*. Hence, Internet users are now accustomed to websites designed specifically to allow them to engage rapidly and with little effort—the antithesis of the kind of engagement needed for effective rulemaking participation.

Users are also increasingly accustomed to online question-and-answer and review sites on which anyone can answer any question, review any kind of product or service, or rate the contributions of other users. Rarely do such sites condition participation on providing credentials or listing relevant experience. The theory of these sites is that the "wisdom of crowds" can emerge by aggregating contributions from a large number of diverse participants. But few users understand how crowdsourcing is actually supposed to work. Rather, what they *see* is an invitation to contribute whatever opinion they may have, unfettered by any corresponding responsibility to acquire relevant information or demonstrate germane knowledge or experience—once again, the antithesis of effective rulemaking participation.

These various cultural "signals" about what participation entails form the context for our Regulation Room user's email gently chiding us for not "getting it" when we designed Regulation Room. And, given those signals, his/her criticism was completely reasonable: Rulemaking newcomers, particularly when invited to engage in *online* participation, come primed to expect something that will be quick, simple, and low-effort—in effect, drive-through participation.

2. Designing the Participation Environment to Signal New Expectations

Here, then, is the challenge for Rulemaking 2.0 participation design. To become effective commenters, new participants should:

- Learn about what the agency is proposing;
- Reflect on this information and how it relates to their own experience, training, values, etc.;
- Communicate their reactions clearly, in the form of substantive details and explanations rather than mere voting or venting; and
- Engage with the analogous reactions of other commenters.

Accordingly, the participation environment should:

- Direct users' attention to information about both the proposed rule and the reactions of other commenters;
- Provide the opportunity for reflection by discouraging (or at least not abetting) the instinct to immediately type or click;
- Encourage a style of communication consistent with serious, thoughtful deliberation—i.e., (reasonably) clear, grammatical, correctly spelled, and civil; and
- Do all this without overwhelming, frustrating, or intimidating users so much that they leave.

In this section we'll discuss how these goals can be furthered through information structure, choice of participation mechanisms, and human moderator support. First, though, we offer some very pragmatic advice about the process of Rulemaking 2.0 site design.

Designing a rulemaking participation space involves continually managing a fundamental tension: making use of what usability experts know about typical online behaviors, *while simultaneously trying to discourage, alter, or redirect many of those behaviors.* On Regulation Room, the externally visible evidence of this tension is the constant evolution of our site design: each version embodies new ideas about how techniques for making participation *easy* can be redeployed to make participation *better*. Internally, this tension surfaces whenever new people join the team: We have a series of conversations in which (i) newcomers critique the site for violating *x*, *y*, and *z* canons of successful web design; (ii) existing researchers explain that these are intentional choices reflecting the particular goals of Regulation Room; (iii) everyone debates (not always with perfect equanimity) whether we have optimally resolved the tension between "easy" and "better"; and (iv) if we are lucky, some new design idea emerges that excites all of us.

We share our story by way of friendly warning: Whether the agency decides to use its own web professionals or to contract with outside designers in creating a Rulemaking 2.0 site, it's essential to plan for a period of mutual education between those who understand rulemaking and those who understand web design. This has to involve more than just creating a list of functional requirements or constructing use cases—important as those steps may be. It must be a series of far more fundamental conversations around the fact that successful design can be driven neither by what rulemakers are accustomed to getting through the conventional commenting process nor by what designers are accustomed to providing for the conventional website customer. What ideally will emerge in these conversations is a sense of collaboration in creating a truly innovative kind of site. If design does not occur within a continuing dialogue in which both kinds of expertise are respected yet also continually challenged, the result is unlikely to be successful.

a. Structuring Information

In our experience, the most important and difficult design challenge is how to structure the relationship between informatory text about the proposed rule on the one hand, and the comments of participants on the other. Effective comment is informed comment. Therefore, the design of the participation environment should clearly signal an expectation that users will learn about the agency's proposal and make it the focus of their discussion. (Here, we are considering only the *structure* of the informatory text; creating the *content* of this text is the subject of Section IV.C below). Moreover, if interaction among commenters is important—to test claims, refine arguments, reveal possible grounds for consensus, etc.—then users should have ready access to what other users have said.

The structure traditionally used in online rulemaking sites[24] has been to provide a link to the relevant explanatory document (typically, the NPRM) and a link to a comment submission form where users can type in or attach their comments. This is the simplest approach—and the least likely to produce meaningful comments by inexperienced rulemaking participants. It requires users to: (i) resist the urge to start immediately typing in the comment box; (ii) go to another location to read something of unknown content and length; (iii) return to the page on which they can comment; and (iv) remember enough of what they read to create a responsive and useful comment. Given typical online behaviors and existing low participation expectations, it's not surprising that this approach has not produced effective commenting from rulemaking newcomers.

An alternative approach is to use the standard blog structure in which a column of text is followed by a comment box. This approach has the decided advantage of familiarity: Most users will have encountered this structure on other sites, and they know what to do with it. Moreover, scrolling up and down to reference informatory text during comment writing is much easier than switching back and forth between separate documents and commenting screens. When something is easier, users will do more of it. Finally, the standard blog structure displays all comments in chronological or reverse chronological order, allowing users to see what others have said.

Still, the standard blog structure has disadvantages. Scrolling up to refer back to the explanatory text becomes more effortful as the column of text becomes longer. As it takes users more work to recheck a specific point to write a specific response, their comments are likely to become less focused and detailed. Moreover, because all comments are made below the text *regardless of which part of the text they address*, isolating discussion about a specific topic becomes difficult, especially as the comment stream grows. This is a disadvantage for participants while discussion is going on and for rulemakers after the comment period closes.

The approach we favor adapts the standard blog structure to enable users to attach their comments to specific sections of text. We refer to this as a "targeted commenting" structure.

One possible implementation of this approach allows users to open a comment box *below* each segment (e.g., paragraph) of text. The text appears to slide down to reveal the comment stream. On Regulation Room, we use a *side-by-side* implementation, in which the informatory text appears on the left side of the page while the comments appear on the right side. The user clicks on the section of text containing the issue on which she wants to comment; she then can see all other comments made on this section, and either reply to those comments or add her own. Because the left and right columns scroll separately, the side-by-side approach allows the user to continue to see and refer back to the explanatory text the entire time she is reading and replying to other comments, or writing her own. This is an advantage over an implementation that slides the explanatory text down to make room for the comment stream. On the other hand, the side-by-side commenting structure is unfamiliar to most users and, without careful implementation, it can easily overwhelm them by presenting large amounts of text on the page.

Figures 3a and 3b are screen shots of the implementation of side-by-side targeted commenting on Regulation Room at the time this report was written. Commentable sections of text are

[24] Agency-specific sites like DOT's former Docket Management System used this structure, and it is still the basic structure of Regulations.gov. The comment screen enables users to access the NRPM or other rulemaking documents from the e-docket.

numbered, given short descriptive titles, and divided by horizontal lines.[25] Figure 3a is the view when the user first lands on the page.

Figure 3a: Regulation Room topic post page, initial user view.

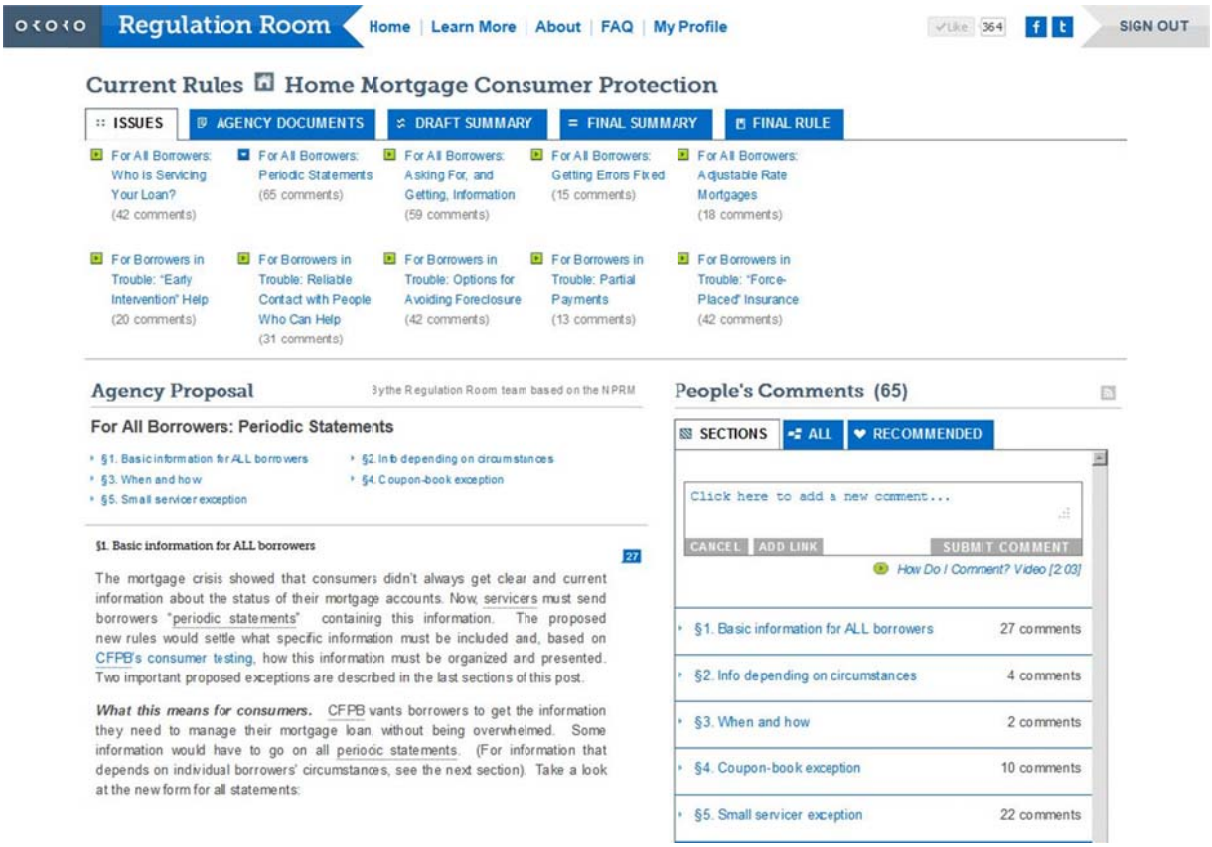
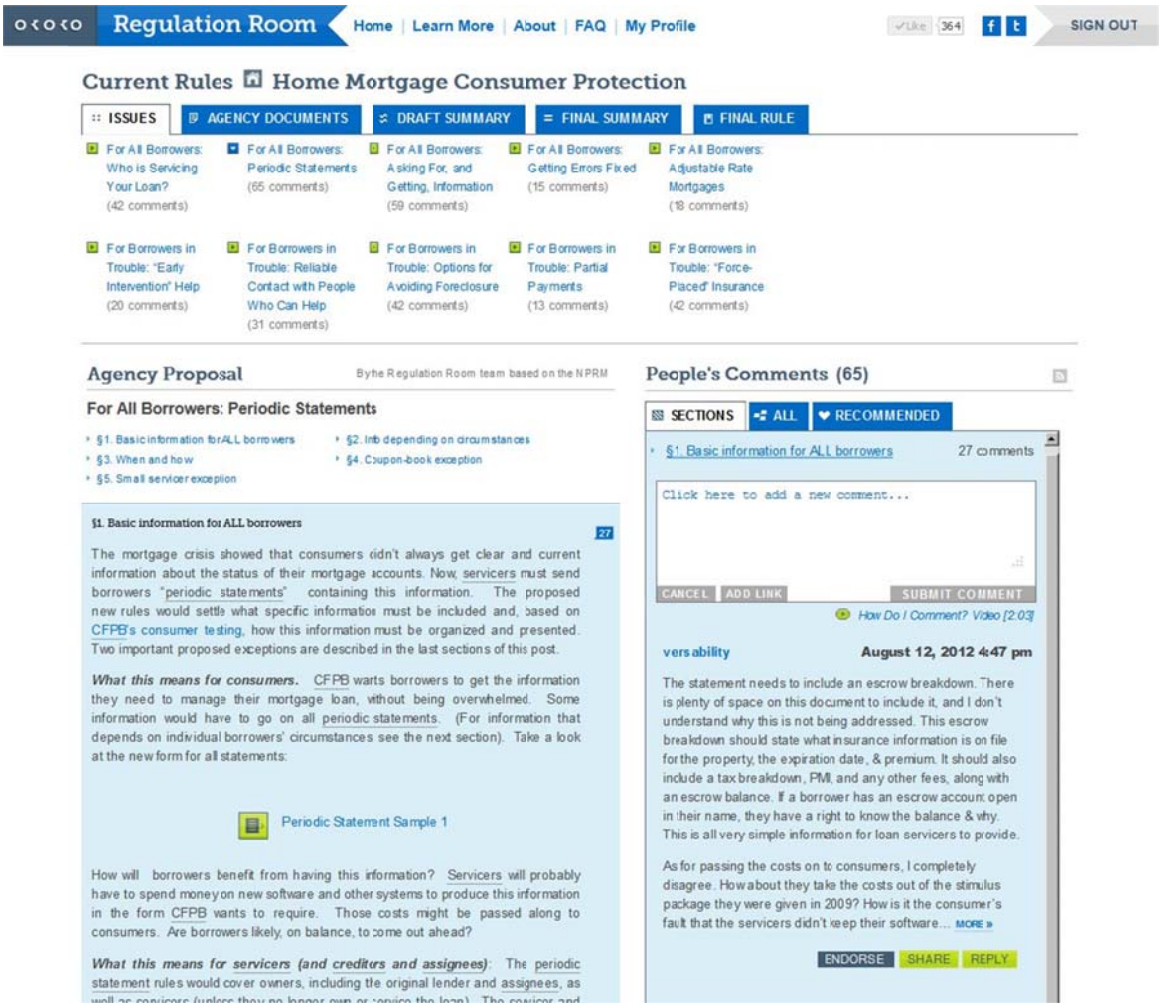


Figure 3b shows how clicking on a section of text opens up all the comments made on that section, and allows the user to add a new comment or reply to someone else's.

[25] Text can be sectioned into any length. After initially allowing commenting on each paragraph, we found it best to make a commentable segment a thematic unit of text (which usually requires more than one paragraph). See Part IV.C.

Figure 3b: Regulation Room topic post page, with section selected to allow for targeted commenting and to view (and reply to) other users' comments.



We have found that the advantages of side-by-side targeted commenting justify continuing efforts to refine and simplify the design.[26] This structure:

- Clearly signals the expectation that learning about the agency's proposal is part of the participation exercise.
- Promotes focused commenting on specific aspects of the proposal by requiring users to select a portion of text in order to comment.
- Automatically organizes comments by substantive topic, enabling participants (and the agency) to more easily find all comments about a particular issue.

b. Choosing (and Rejecting) Participation Mechanisms

Conspicuously absent in the Regulation Room design are mechanisms for users to vote on, rate, or rank either agency proposals or comments of other users. People reviewing the site for the first time are invariably surprised by (and often critical of) this because voting, rating and

[26] The evolution of our design efforts can be seen in the Archives section of Reg.Room.org. The version shown in Figures 1a and 1b will shortly be superseded by a simpler, cleaner design, although the described functionality remains the same.

ranking functionality is so common on Web 2.0 sites and so popular with users. However, the reasons for this design choice should now be clear.

These kinds of participation mechanisms can reinforce drive-through participation behaviors, and so undermine efforts to create a participation environment that signals very different expectations. Also, they tend to invite gaming: that is, campaigns by users (often relying on social networks) to solicit large numbers of others to come to the site for the limited purpose of voting up, or down, a particular proposal or idea. There is no way that an agency can ensure that *any* general public-commenting process—whether online or traditional—yields a representative sampling of positions and views. But agencies can, and should, avoid setting up participation opportunities that invite the online equivalent of stuffing the ballot box.

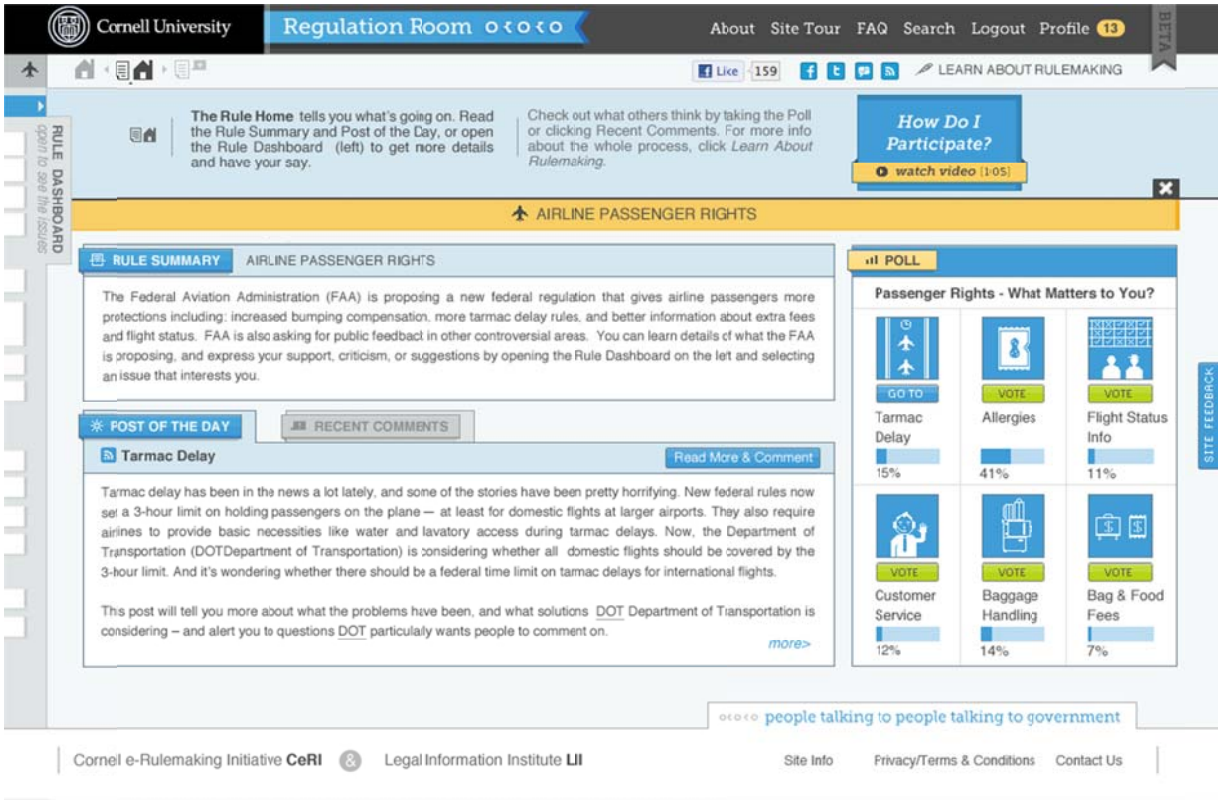
More fundamentally, a design that features voting, rating or ranking is likely to violate the "no bread and circuses" principle (i.e., A democratic government should not actively solicit participation it does not value.) If rulemaking is not a plebiscite, why would a Rulemaking 2.0 site routinely solicit people's votes? If understanding effective commenting is a problem for new participants, why encourage users to rate or rank other people's comments? Even if low participation literacy weren't a problem, could or should rulemakers pay more attention to comments that got high user ratings, or vice versa?

We believe these considerations are powerful enough to create a presumption that voting, rating, or ranking mechanisms should not be part of a Rulemaking 2.0 design absent a strong affirmative justification for their use. When, if ever, might such a justification be made? Here are two possible situations, which also illustrate the kind of contextual balance that may be required:

Rulemakings to determine the best format for, or content of, consumer information. In this special category of rulemakings (discussed in Part III B.2 above), simple voting or ranking mechanisms might be used to aggregate reaction by members of the general public to alternative proposed model notice forms, product labels, etc. Typically, these sorts of choices will not involve the strong ideological or emotional commitments that encourage gaming behaviors—although this risk should be considered, and judged minimal, before enabling voting or ranking. Even though this kind of input will not be dispositive, the general tenor of public reaction may confirm the agency's provisional conclusions or, conversely, suggest the need for further study. Functionality that prompts users briefly to explain their preferences can provide useful guidance, particularly if those preferences are not what rulemakers anticipated.

As an encouragement to more effortful participation. Psychologists have identified a strong human behavioral tendency to stick with an activity one has started (Atkinson & Birch, 1974). Many marketing strategies exploit this "action tendency" by asking consumers to make seemingly minor initial decisions that pave the way for larger commitments. Voting or ranking mechanisms, if very carefully implemented, might be used in this way. For example, in a rulemaking that proposed possible new airline passenger protections, Regulation Room designers placed on the home page the poll reproduced in Figure 2.

Figure 4. Airline Passenger Rights rule home page poll



The poll used visually compelling icons to represent various areas in which DOT was making recommendations. The question ("What matters to you?") was carefully worded not to suggest an outcome referendum. Selecting an icon recorded a "vote" but also offered a link to the post that explained the specific actions DOT was proposing. Clicking an icon satisfied users' urge to quickly engage in some activity on the site, but also channeled them directly to the information and discussion that was most likely to elicit more meaningful participation.

A more difficult question is whether to offer users voting-like mechanisms as an alternative to adding comments that simply reiterate what others have said. Repetitive commenting harms other participants as well as agency readers. Following the thread of the discussion becomes tedious, and productive interchange is far less likely to occur if participants have to scroll through heavily repetitive text to locate material worth engaging (Rafaeli, Ravid, & Soroka, 2006). Hence, there is a strong design incentive to provide ways for users to register agreement without proliferating content.

On Regulation Room, we are experimenting with a functionality that allows participants to "endorse" comments—explained as: "Endorse a comment that does a good job of making a good point." (The blue "endorse" button is visible in Figure 3b.) Only registered users can endorse, and no one can endorse a given comment more than once; both these conditions discouraging gaming. Moreover, the total number of endorsements received by a comment is not publicly visible—although, based on research showing that appreciation by other site users tends to increasing participation (Brzozowski, Sandholm, & Hogg, 2009; Leshed, Hancock, Cosley,

Mcleod, & Gay, 2007), the commenter herself can see on her profile page the number of endorsements her comments have received.

These conditions, along with the non-standard terminology of "endorse," help lessen the risks associated with a voting-like participation mechanism, but obviously some risk remains. Hence, we have been carefully monitoring actual use of "endorse." So far, "endorse" has not precipitated the volume of use that would suggest that users see it as a simple voting mechanism.[27] Even more interesting is the pattern of use. About 26% of users who endorsed a comment made no other contribution, suggesting that it does enable some participants to engage without duplicating content.[28] Another 26% of users who endorsed a comment did so and then subsequently made a different, substantive comment, suggesting that "endorse" may also serve an "action tendency" function that motivates further participation. We believe these results justify continued experimentation to discover the relative risks and benefits of such carefully designed quasi-voting functionality.

Finally, it is possible that voting, rating or ranking could play a legitimate role in the process of creating more complex participatory outputs such as consensus-building. At carefully selected points during in-the-room group discussions, trained facilitators sometimes use participant voting or ranking to advance the process, even though the ultimate goal is consensus rather than a majoritarian resolution. Online discussion might similarly benefit from such techniques, particularly if participants are moving through what is clearly framed as a multiphase process (e.g., discussion is followed by opportunities for collaborative drafting). Providing guidance on design to support such complex participation processes is beyond the scope of this report, but this is an area we are studying on Regulation Room.

3. Mentoring Effective Commenting Practices

Imagine that an agency has identified one or more missing stakeholder groups likely to have useful situated knowledge about a proposed rule, and that it has been able to persuade many members of these groups to come together *physically* in a room, for the purpose of discussing the proposal and giving comments. The agency procures a suitable space and sets it up in an appropriate manner, perhaps providing a series of round tables with pens and notepads at each place. It places in the room a set of written materials for each participant; these materials explain the proposed rule and also give some tips on effective commenting. Signs posted around the room indicate how long participants have to discuss the proposal and make comments. At the announced time, the doors are opened and all the participants enter the room. Then the doors are shut and no one from the agency (or working on its behalf) appears again until the end of the day, when discussion and commenting are supposed to have concluded.

[27] Our concern that we would see hundreds, if not thousands, of endorsements in a rulemaking has not materialized. In the three rulemakings where we have offered the functionality, there were 264 endorsements as compared with 574 comments.

[28] In post comment-period surveys in earlier rules, some Regulation Room users said they had not commented because "someone else already said what I would have said." Because repetitive commenting is costly, this is desirable user behavior. Still, online community research suggests that users who participate *in some fashion* are more likely to report a positive experience and to learn from material on the site than those who merely read. Hence, giving such users the opportunity to participate without imposing costs on others is an additional value of the "endorse" functionality.

Few agencies would even consider structuring a stakeholder engagement in this way. Yet, when the location of stakeholder engagement is an online *virtual* room, it is commonly assumed that the processes of commenting and discussion will run themselves.

Web 2.0 technologies make possible many remarkable things but they cannot magically confer, on a group of people with no preexisting relationship or bond, the ability to spontaneously engage in thoughtful, productive discussion. In the offline setting, agencies commonly engage a trained facilitator to run stakeholder engagement meetings. Faced with a large group of physically present stakeholders, it seems obvious that much of the potential value of the participation event will be lost without the guidance and support of a skilled discussion leader. Online stakeholder engagement is no different.

For this reason, facilitative moderation plays a central role in Regulation Room. Even with (i) site materials that explain how to comment effectively, (ii) careful design of the participation environment, and (iii) thoughtful selection of participation mechanisms, many new rulemaking participants struggle with the need to give reasons, provide factual support, and otherwise go beyond voting and venting behaviors. This should not be surprising: Exactly the same problems are observed in off-line public deliberation efforts (Susskind, 2009). Deliberative democracy practitioners and conflict resolution professionals recognize that facilitation is one of the tools that makes it possible for ordinary citizens to participate effectively in policy deliberation (Barber, 2003; Coleman & Gotze, 2001; Kearns, Bend, & Stern, 2002).

Facilitative moderation on Regulation Room is done by students trained and supervised by conflict resolution professionals. An evolving moderation protocol, summarized in Table 3 identifies several roles that moderators play over the course of the discussion. This protocol draws on both research about online communities and techniques of in-the-room group facilitation. It is designed primarily to mentor effective commenting by missing stakeholders.

The heart of the protocol is the set of "substantive" roles focused on facilitating thoughtful, productive discussion about the proposed rule. Through these interventions, moderators both model and reaffirm the set of new participation expectations the site is designed to convey. Every interaction with a commenter teaches norms of effective commenting, not only to the particular user being addressed but to also to other users who view the interaction.

Table 3: Facilitative moderation roles and related interventions

Roles:	Interventions:
Supervisory	
Social Functions	Welcoming Encouragement; appreciation of comment Thanks for participating
Site Use Issues	Resolving technical difficulties
Explaining the Role of Moderator	Providing information about the goals/rules of moderation Providing information about who we (CeRI) are
Policing	Redact and quarantine Civility policing Wrong venue (redirecting user who wants to do something other than comment on the agency proposal, e.g., file a complaint)
Substantive	
Clarity	Asking for clarification of comment
Wrong Information	Correcting misunderstandings about the proposal or clarifying what the agency is looking for
Substantiation	Pointing out characteristics of effective commenting Asking for more information, factual details or data Asking for examples of a personal experience Providing substantive information about the proposed rule Pointing the commenter to relevant information in primary documents or other data sources
Focusing Comment	Getting an off-topic commenter to engage the issue post Organizing discussion
Further Engagement	Asking for more information, factual details, or data Asking them to make or consider possible solutions/alternatives Asking for elaboration Stimulating Discussion Encourage users to consider and engage comments of others Posing a question or comment to the community Developing a story or experience

Facilitative moderation on Regulation Room is asynchronous—that is, we do not provide real-time moderation in which users receive immediate feedback from the moderator. Rather, moderators check in on the discussion from time to time and respond to new comments as appropriate. Still, moderating a 60-day (or longer) comment period is resource-intensive, and Regulation Room researchers are currently working on ways to automate some moderator

functions. We expect this work to result in tools that reduce the required human resources, but no reasonably foreseeable automation techniques will replace human facilitation.

Because facilitative moderation is costly, agencies may be tempted to try Rulemaking 2.0 without it—to, in effect, bring rulemaking newcomers into the room, give them a stack of materials and a deadline, shut the door, and hope for the best. We don't go so far as to say that such an approach will yield no comments of value; we simply point out that an agency should anticipate no better results than it would expect from an unmoderated off-line assembly of such stakeholders. In some contexts–where, for example, members of the general public are primarily reacting to some new consumer-information device, or the targeted participants are unaffiliated experts accustomed by education and training to analytical reasoning, logical argumentation, and other practices of rational thinking and claim-justification–valuable commenting may occur with little or no moderation. In most missing stakeholder contexts, however, moderation is what enables many participants to move beyond their initial, often emotional or rhetorical reactions to the sharing and discussion of relevant knowledge or experience.

As noted earlier, it is possible that a sustained series of rulemakings offered on a Rulemaking 2.0 platform might lead to emergence of a persistent group of user-commenters, who have developed effective commenting skills and who can assume the roles of moderating and mentoring newcomers. This phenomenon has occurred in some notable Web 2.0 communities, such as Wikipedia and Slashdot. It's important to recognize that this sort of role-differentiation among users takes considerable time to develop. Also, it typically occurs within a fairly complex, internal rule system that has evolved to structure how users advance to more responsible roles and how mentoring is done.[29] Hence, although the emergence of participant moderation and mentoring would be highly desirable for the sustainability of Rulemaking 2.0 efforts, this is a longer-term solution to the resource demands of moderation.

C. Making Important Substantive Information Accessible

Having discussed basic design and operation of the participation environment, we turn to the challenge of preparing substantive rulemaking content so that Rulemaking 2.0 participants can, and will, use it to inform their commenting.

Many factors outside the agency's control account for the length, complexity, and technicality of rulemaking documents. The many analyses required by statute and executive order, the demands of reviewing courts for explanation and justification, and the inherent difficulty of many regulatory problems all contribute to NPRMs and supporting documents that often run to hundreds of pages of fairly dense text. Rulemaking documents have thus evolved to satisfy the informational needs of the various participants in the traditional process. Unfortunately, this same evolution has made them utterly unsuited to the informational needs of rulemaking newcomers.

To be accessible to new rulemaking participants (except, perhaps, unaffiliated experts), information about the agency's proposal must be radically shorter and simpler. And, given the typical online user behaviors of scanning (rather than reading) text and rapidly selecting some element to act on (rather than studying the entire page), the information must be presented in

[29] These rule structures often are not immediately visible on the face of the site; those of Wikipedia and Slashdot, in particular, have been studied extensively by online community researchers (e.g., Bryant & Bruckman, 2005; Lampe & Resnick, 2004; Kriplean, Beschastnikh, McDonald, & Golder, 2007).

ways that enable participants to fairly quickly (i) grasp the topics covered by the rule and (ii) locate content on which they wish to comment. In Regulation Room, we accomplish this through four information design strategies—*triage*, *signposting*, *translation*, and *layering*—supplemented, as necessary, by human moderator assistance.

Because the whole point of these techniques is to create content for the Rulemaking 2.0 site that is differently worded and organized than the text of the NPRM and other rulemaking documents, agencies may be concerned about publicizing two "versions" of what they are proposing. Again, our purpose is not to provide legal advice about Rulemaking 2.0, but we note that the Rulemaking 2.0 site is open to all prospective commenters and should be prominently mentioned in the NPRM and other communications about the rulemaking. Hence, there can be no question of a "secret" version available only to some commenters. The more likely objection is a claimed deviation between what is said in the NPRM and something that appears (or doesn't appear) on the Rulemaking 2.0 site. Even in conventional rulemaking, it is not unusual for commenters to identify an apparent inconsistency in an NPRM or supporting analysis, or to ask the agency to clarify an ambiguity. There is no obvious reason why the same procedures could not be applied in the Rulemaking 2.0 setting. A cautious agency might ensure this by incorporating by reference in the NPRM all of the explanatory text it provides on the Rulemaking 2.0 site.

Triage. Information triage (as its medical origin suggests) is the process of assessing the full range of rulemaking material to determine relative importance and identify priority information. Triage is a highly contextual process undertaken from the perspective of the specific kinds of missing stakeholders (or other new participants) who are being targeted in the specific rulemaking. The guiding question is always: "What do *these* participants need to know to comment effectively on *this* rule?"

Triage is thus an extension of the initial work done in *picking the right rule* (Part III, above). It focuses on the nature of the targeted participants, the kind of useful knowledge or experience they predictably will bring to the rulemaking, and the extent to which technical, economic, legal, or other details of the agency's proposal are needed to prompt them to convey their knowledge or experience. Recall the basic rule of "information load:" As the information load for a particular type of new participant increases, the feasibility of successfully engaging such participants in effective commenting decreases. Actually engaging in the triage process may lead to a reassessment of whether the information load is prohibitively high. The result of such a reassessment may be to narrow the scope of the Rulemaking 2.0 engagement—that is, a decision to attempt to engage new participants on only some issues in the rule.[30] Or the result may be to decide that this is not, after all, the "right rule" for Rulemaking 2.0 efforts.

On Regulation Room, the triage process typically results in an information structure of 6-10 "topic posts." These are thematic units—that is, each deals with a particular subject (or a set of related subjects) that is likely to "make sense" to targeted participants as a discussion category. Because the object is to foreground substantive material that will engage *these participants*, the structure of the topic posts may differ from the way content is organized and discussed in the NPRM and supporting documents. The triage process should substantially reduce the amount of content that is initially presented to participants. (As we explain below, the technique of *layering*

[30] Remember that a decision to present only some issues in the rulemaking does not deny anyone their notice-and-comment rights, for the conventional opportunities to learn about the rule and comment on Regulations.gov will remain fully available.

allows the site to make available all the remaining content, but in a form that does not overwhelm users.)

Signposting. Because online users are not accustomed to studying large amounts of content before taking some action, Rulemaking 2.0 participants benefit from information structures that help them rapidly assess the scope of the discussion, and proceed quickly to the issues that interest them the most. At that point, cross-references and similar ways of suggesting related content can encourage them to broaden or deepen their engagement.

As Figure 3a shows, Regulation Room offers such "signposting" at multiple levels. An index of all topic post titles allows participants to get to the subject that has highest priority for them, while informing them of other subjects available for discussion. Within each topic post, content is subdivided into sections that present distinct aspects of the larger topic. This subdivision sets up the targeted commenting functionality. And, because the subtopic sections are each given a short descriptive title, a subtopic index at the beginning of the post previews content that users will find by scrolling through the post. Within sections, users are encouraged to explore other content by cross-reference links that take them directly to the most relevant subsection of another topic post.

Translation. The current recommendation for readability level of materials intended for use by the public is the 8th grade level (West, 2008). By contrast, all the NPRMs we have worked with on Regulation Room have scored at the late-college/early graduate school level. As noted at the outset of this section, there are many understandable reasons for the linguistic complexity of rulemaking documents. And actually achieving the 8th grade-level target is probably unrealistic. But, the content of most rulemaking materials requires considerable "translation" if it is to be accessible to new participants.

Translation is not simply a matter of providing additional background or explanation, although this may be necessary. It is more fundamentally about abandoning the formal, often legalistic style of long complex sentences liberally sprinkled with legal, regulatory, or other jargon. If rulemaking newcomers are presented with dense, convoluted, "bureaucratic"-sounding text, it undermines the message that government wants their participation, and reinforces negative stereotypes about regulation. On Regulation Room, our topic posts go through multiple edits aimed specifically at pruning unnecessary words and simplifying vocabulary and sentence structure. Especially on the Web, "plain language" efforts pay off.

Layering. Layering is the technique of using linking and other Web 2.0 functionality to provide information in a way that allows users, at their individual choice, to get deeper or broader information—or, conversely, to find more help triage and translation has already provided.

On Regulation Room, deeper and broader information is offered in several ways. Topic post subsections often end with a link to the NPRM or supporting analyses (e.g., "Read what [the agency] said") and to the rule ("Read the text of the proposed rule."). In all cases, we have created an HTML version of the primary documents that enables us a link directly to the relevant section of the document. References to statutes or other regulations, and to research studies or other data, are linked to those documents; references to federal or private entities are linked to the most relevant section of their websites. For users needing additional help, a mouse-over glossary defines acronyms and terms that might be unfamiliar. Also, links may give users access to separate pages on the site that offer brief explanations of regulatory background or other relevant topics.

Through information layering, all content in the NPRM and supporting documents is made available on Regulation Room. But it is structured to give users control, in a form less likely to overwhelm novices or to distract the more knowledgeable user.

After all the work that goes into preparing the NPRM and supporting analyses, expecting agencies to use the techniques of triage, signposting, translation and layering to create a different version of the same information may seem unreasonable. But providing manageable, comprehensible, non-intimidating information about the proposed rule is a crucial aspect of resetting participation expectations. If the only explanations offered to prospective commenters are documents that no one could seriously expect ordinary people to read, then it is hardly surprising if newcomers' comments reflect no more effort than voting and venting. The "no bread and circuses" principle (Government should not actively solicit participation it does not value) has an operational corollary: When government does solicit public participation, it must be prepared to provide the support people need to participate meaningfully. This is the commitment required of agencies by Rulemaking 2.0.

Part V. Concluding Thoughts: Building a New Culture of Rulemaking Participation—From Inside the Agency Out

This report has explained why Rulemaking 2.0 efforts must be purposefully directed at changing the participation expectations of rulemaking newcomers, and we have offered concrete suggestions for how effective commenting behaviors can be developed and supported in missing stakeholders. But public commenters are not the only actors whose expectations and behaviors must change if Rulemaking 2.0 is ultimately to succeed. Whether Web 2.0 precipitates a new culture of broader rulemaking participation depends far less on technology than on the attitudes and actions of rulemaking agencies.

Agency Leadership. At several points we've emphasized that the agency should "pick the right rules"—i.e., deliberately commit to using Rulemaking 2.0 technologies and methods in specific rulemakings that meet the criteria we've identified. This requires not simply approval from someone sufficiently senior to commit the necessary resources, but *approval informed by reasonable expectations*. Rulemaking 2.0 is very much a work in progress. In our view, it is still an open question whether the time and effort required to achieve meaningful new participation represent the best investment the agency can make in improving its rulemaking processes. This question won't be answered by the outcomes in one or two rulemakings. For a fair test, agency leadership should be willing to commit to a pilot project over the course of several (carefully selected) rulemakings—a commitment that provides for the additional time and effort, beyond the normal process, that will be demanded of the rulemaking team and agency communications professionals.[31]

Moreover, there should be some advance agreement about how success will be defined. For all the reasons previously given, quantitative metrics will tell only part of the story. More important, and in our experience far more difficult to measure, is the quality of what new participants bring to the rulemaking. This assessment rests primarily with the rulemaking team, whom we consider next.

The Rulemaking Team. We repeatedly encounter members of actual rulemaking teams who are highly skeptical of (if not openly hostile to) efforts to engage new commenters. This reaction is understandable. They associate more public participation—and, in particular, more online public participation—with mass email campaigns and similar high-volume/low-value comments. On them has fallen the burden of managing this material, along with all the other information generated in the rulemaking and, typically, without additional resources. Little about their experience with e-rulemaking thus far has led them to expect net value from efforts to use the Internet to increase public participation.

Although quite understandable, resistance by members of the rulemaking team is likely to be fatal to Rulemaking 2.0 efforts if it cannot be overcome. These people will have a central role in shaping the communication outreach plan and preparing the online substantive content.[32] Even more crucial, though, is their role in reading and considering the comments made on the site.

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[31] Compare the pilot project on negotiated rulemaking at EPA, which provided invaluable experiential guidance for ACUS recommendations on picking appropriate rules (Pritzker & Dalton, 1995) and, ultimately, for the procedural directives of the Negotiated Rulemaking Act.

[32] Ideally, someone other than a member of the team would actually perform the triage and translation of content. Team members are so immersed in the NPRM text that they may find it nearly impossible to create a new version from the perspective of a relatively unknowledgeable outsider. (As evidence of this, consider whether the January

The contributions of rulemaking newcomers will not sound like the comments that rulemakers are accustomed to get from sophisticated commenters. This is true no matter how effective site design and moderation are in resetting participation expectations. (The actual Regulation Room comments in Appendix B reveal this quite clearly.) In part, the explanation of the difference is the online environment itself. Writing on the Web is characteristically more informal, more personal, more emotive, and more stream-of-consciousness than the style used in the multi-page formal submissions of sophisticated commenters. Unfortunately for rulemaking newcomers, these characteristics are also ones we tend to associate with less serious, "light-weight" communication.

Even more significant than the medium they use, rulemaking newcomers sound different from sophisticated commenters because they *are* different from sophisticated commenters. They are not practiced in making formal legal or regulatory policy arguments. They do not have the vocabulary, the history, or the context. They are, in a real sense, outsiders to the rulemaking process— and even the most supportive Rulemaking 2.0 site cannot transform them into "insiders."

The individuals and small entities that typically constitute missing stakeholder groups are likely to approach the issues from a personal, experiential perspective. We have argued that this is, in fact, their strength and their value: They can bring to the process a rich situated knowledge that is derived from, and grounded in, life experience. The difficulty for rulemakers accustomed to conventional comments is the way this knowledge is often conveyed: These commenters often use personal narrative. They tell stories that communicate both what they know and how (or why) they know it. Like most stories, these comment narratives have a message, or make a point. But this is rarely spelled out as an objectively framed conclusion, preceded by "therefore" or a similar signal.[33]

For this reason, reading and considering the comments of rulemaking newcomers to extract the value in these comments requires both a particular attentional orientation—*active listening*[34]— and a particular mental state—*an open mind*. Of course, these qualities are desirable in reading all rulemaking comments. But they are essential in dealing with newcomer comments because of those comments' nonstandard style and form. Resentment about the burdens, or skepticism or hostility about the value, of new public participation is incompatible with active listening and open-mindedness—and is therefore likely to be a self-fulfilling prophecy: Rulemakers who don't expect to learn much, probably won't. And their qualitative assessment of the success of the Rulemaking 2.0 venture will be correspondingly negative. It is thus essential that the agency do

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2012 OIRA memorandum that directs agencies to provide "straightforward executive summaries" in order to enhance public understanding and commenting has produced substantially simpler, clearer explanations of proposed rules.) Still, based on our own experience, whoever prepares content for the Rulemaking 2.0 site will need to consult closely with the team.

[33] In fact, as we have shown in examining comments submitted in the EOBR rulemaking (Farina, et al. 2012), sophisticated commenters also tell stories. However, these are typically corporate stories that sound objectively "factual" rather than personally experiential. Moreover, they are embedded in the standard, formal commenting style that typically includes citations to statutes and other regulations, references to prior regulatory participation, and other indicia of familiarity with rulemaking.

[34] For group facilitators and mediators, active listening is a highly developed professional skill. Here is a good definition for ordinary people: Active listening is a conscious effort not only to hear the words that another person is saying but also, more importantly, to try to understand the complete message being communicated.

whatever it can to create active support among the rulemaking team for using Rulemaking 2.0 in the particular rulemaking.

A final point concerns drafting the preamble to the final rule: It is particularly important to explicitly acknowledge and address the comments of rulemaking newcomers. Just as outreach must expressly assure new commenters that the agency desires their participation and will attend to it, so the outcome must clearly demonstrate that the agency in fact read their comments and considered them. Specifically calling out new commenters' concerns throughout the preamble is proof that government listened (even if it didn't always do what the commenters wanted.)

This powerful reinforcement of participatory behavior is the first step in training missing stakeholders to do what sophisticated commenters already do: pay attention and engage when future proposed rules affect their interests. On Regulation Room, when a final rule is issued in one of the rulemakings offered on the site, we email the news to all registered users, inviting them to return to the site to learn about the outcome. On the site, we not only offer (i) links to the entire notice document and (ii) a bulleted list of the principal provisions of the final rule, but also we identify (iii) all the places in the preamble where Regulation Room comments were mentioned or our commenters' concerns were addressed.

Agency Counsel. We've repeatedly disavowed offering legal advice about Rulemaking 2.0, but agency lawyers cannot be omitted from any discussion of the importance of agency attitudes and actions to a new culture of rulemaking participation.

Rulemaking is a high stakes venture for agencies; judicial reversals or remands can tax scarce resources, delay needed actions, provoke political criticism and cause embarrassment. A general attitude of risk averseness about any significant change in the process is thus very understandable. Still, *there is no informed, realistic case to be made that missing stakeholders and other potential rulemaking newcomers can participate effectively in the process as it currently stands.* Unless action is taken affirmatively to lower the barriers that cause participation inequities, those inequities will remain. Period.

The challenge for agency counsel is to decide whether they can become advocates of Rulemaking 2.0 within and, if necessary, outside of the agency. This advocacy could involve identifying, and seeking action on, obstacles that can be overcome within the agency itself (e.g., changes in internal policies or procedures) or by entities such as the Office of Management and Budget or the Office of Information and Regulatory Affairs.[35] It could involve action within good-government organizations such as the Administrative Conference of the United States or the Administrative Law Section of the ABA.[36] It could even involve preparing a litigation strategy if the agency's Rulemaking 2.0 efforts are attacked as part of a challenge to a new rule.

Our experience has been that agency lawyers can be powerful champions for Rulemaking 2.0—or they can be powerful stumbling blocks. These are not easy times to be a visionary within government, but particularly those who believe in the potential of regulation to advance social welfare should see the value of citizens who understand what regulators are trying to do, and

[35] Several such actions (e.g., guidance on Paperwork Reduction Act issues in social media and online surveys) have already been taken (Sunstein, 2010a; Sunstein, 2010b).

[36] Both these organizations have already been engaged in e-rulemaking through the sponsorship of programs and, in ACUS' case, the preparation of reports and recommendations (*Administrative Conference of the United States: Current Recommendations (2010-Present)* [Database]. Available from ACUS Web site, http://www.acus.gov/recommendations/current-recommendations-2010-present).

who contribute relevant knowledge to the regulatory enterprise. Rulemaking 2.0 may not succeed, but it deserves a fair trial.

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Appendix A: More on Regulation Room

Technology

Regulation Room (regulationroom.org) is a customized version of the WordPress multi-user platform; it uses several customized WordPress plugins including Digress.it, the application that allows for targeted commenting. The site is modified after each rulemaking to incorporate what we have learned about facilitating public participation. We are currently working on its 6th design generation. This a major redesign that includes moving to the Drupal open source content management platform. Among other advantages, the new design allows us to host public consultations in contexts other than rulemaking. The first of these will be Planning Room, which can host public comment on planning exercises such as strategic planning. For research purposes, we maintain an archive that tries to preserve each rule in the format and design of the site during that rulemaking.

Agreements with agency research partners

To date, we have worked with the Department of Transportation (DOT) and the Consumer Financial Protection Bureau (CFPB); as this report goes to press, we are beginning to work with the Office of the National Coordinator for Health Information Technology.

In order to prepare site materials and train student moderators, we get pre-publication access to the NPRM. This occurs under a pledge of confidentiality that is part of a carefully negotiated Memorandum of Understanding. Under the MOU, we also have access to the agency personnel actually working on the rule until the comment period formally begins. This lets us learn about the underlying regulatory program, ask questions about the NPRM (including what issues the agency anticipates to be most controversial), identify the range of stakeholder groups, and so forth.

The agencies we have worked with so far consider contact during the comment period to be problematic under their internal ex parte contact policies. Therefore, we have no direct access to rulewriting personnel once the comment period opens, although we can speak with our primary liaisons in the Office of the General Counsel as needed.

Also, our current agency partners have been unwilling to accept "raw" Regulation Room comments into the rulemaking record. Therefore, we prepare a very detailed summary of discussion, which we submit via Regulations.gov on the final day of the comment period as an official comment by Regulation Room. Prior to submitting the summary, we post a draft on the site and invite registered users to review and react to the draft. A file of the entire online discussion is available to the agency on request. We do not report any individually identifying information that is not publicly available on the site.

Assuring commenters what they say on Regulation Room matters

Regulation Room is presented to users as *not* being an officially sponsored government site. On several pages (including the "About" and "FAQ" pages) users are told that the site is built and operated by CeRI and is not connected with the federal government. We also inform users throughout the site that federal agencies collaborate with CeRI in selecting and presenting the rules on Regulation Room and that those agencies who partner with CeRI are interested in using the Web to improve policymaking. Further, moderators often reinforce the message that the agency is interested in what commenters have to contribute.

User questionnaires and surveys

When users register, they are asked if they have previously participated in a rulemaking; they are also asked to agree to the terms and conditions of the site (see Human Subjects Research below). When a user makes his/her first comment, he/she is asked to complete a short survey about the nature of his/her interest in that rule. This information helps us determine the effectiveness of our outreach. We report the number of commenters in different categories as part of the final summary, and we may use this information in summarizing the comments of different categories of commenters. All registered users are invited via email to voluntarily participate in a post-comment survey; the survey link is also available on the site for visitors who have not registered. In more recent rules, we have offered an incentive (a drawing for Amazon gift certificates) to increase survey responses.

Human subjects research

Federal regulations and Cornell University policy require that all research involving intervention or interaction with human participants (regardless of whether or not identifying information is being collected) be submitted for review to Cornell's Institutional Review Board (IRB) prior to beginning the research study. CeRI received IRB approval on September 30, 2009; and to revisions on February 19, 2010, April 12 2010, February 16, 2011, August 18, 2011, and February 28, 2013.

Users who register are asked to consent to participate in the research of which Regulation Room is a part (see our Terms and Conditions). Also, all CeRI researchers and students are required to complete training for the ethical conduct of research with human participants.

Rulemakings offered on Regulation Room to date:

March 31 – May 2, 2010. *Limiting the Use of Wireless Communication Devices*, proposed by the Federal Motor Carrier Safety Administration (FMCSA). (DOT. Limiting the use of wireless communication devices. 75 Fed. Reg. 16391, 2010). Final rule issued September 27, 2010. 75 Fed. Reg. 59,118.

June 2–September 20, 2010. *Enhancing Airline Passenger Protections*, proposed by Office of the Secretary of the Department of Transportation. (DOT. Enhancing airline passenger protections. 75 Fed. Reg. 32318, 2010). Final rule issued April 25, 2011. 76 Fed. Reg. 23,109.

February 6–May 22, 2011. *Electronic On-board Recorders and Hours of Service Supporting Documents,* proposed by the Federal Motor Carrier Safety Administration (FMCSA). (DOT. On-board recorders and hours of service supporting documents. 76 Fed. Reg. 5537, 2011). Final rule still pending.

September 19, 2011- January 9, 2012. *Non-Discrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports*. (DOT. Nondiscrimination on the basis of disability in airtravel: Accessibility of web sites and automated kiosks at U.S. airports. 76 Fed. Reg. 59307, 2011). Final rule still pending.

August 10 to October 9, 2012, 2012. *Truth in Lending Act (Regulation Z) Mortgage Servicing* and *2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal*, proposed by the Consumer Finance Protection Bureau (CFPB). (CFPB. 2012 Truth in lending act (regulation z) mortgage servicing. 77 Fed. Reg. 57318, 2012 and CFPB. 2012 Real estate

settlement procedures act (regulation x) mortgage servicing proposal. 77 Fed. Reg. 57200, 2012). Final rules issued February 14, 2013. 78 Fed. Reg. 10,901; 78 Fed. Reg. 10,695.

Table 1 App: Regulation Room: Basic data for five rulemakings

	Limiting the Use of Wireless	**Airline Passenger Protections**	**EOBR**	**Disability Access**	**Consumer Mortgage Protection**
Days Open	34	110	106 112 60		
"Visits"	3,729	24,441	8,855	12,631	12,665
"Visitors"	1,999	19,320	5,328	7,949 8,908	
Registered Users	54	1,189	104	53	144
Total Comments	32	931	235 103 236		
Rulemaking Experience	98% none/unsure	94% none/unsure	73% none/unsure	64% none/unsure	79% none/unsure

CeRI (Cornell eRulemaking Initiative) publications & working papers

Solivan, J. and Farina, C.R. (2013). Regulation Room: How the Internet Improves Public Participation in Rulemaking. *Proceedings of the Marine Safety & Security Council*, *69*(4) and *70*(1), 58-82.

Epstein, D., Vernon, R., & Newhart, M. (in press). Not by Technology Alone: The "Analog" Aspects of Online Public Engagement in Policymaking. *Government Information Quarterly.*

Farina, C.R., Epstein, D., Heidt, J.B. and Newhart, M.J. (2013). *Regulation Room: Getting "More Better" Civic Participation in Complex Government Policymaking*. Manuscript submitted for publication. (Paper available from authors on request.)

Farina, C.R., Epstein, E., Heidt, J., and Newhart, M.J. (2012). Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation. *Wake Forest Law Review*, *47*(5), 1185-1241.

Farina, C.R., Heidt, J., & Newhart, M.J. (2012). *Designing an Online Civic Engagement Platform: Balancing "More" vs. "Better" Participation in Complex Public Policymaking*. Manuscript submitted for publication. (Paper available from authors on request.)

Park, J., Cardie, C., Farina, C.R., Klingel, S., Newhart, M. & Vallbé, J.J. (2012). Facilitative Moderation for Online Participation in eRulemaking. *Proceedings of the 13th Annual International Conference on Digital Government Research.* College Park, MD: ACM.

Farina, C.R., Heidt, J., Newhart, M.J., & Vallbé, J.J. (2012). RegulationRoom: Field-Testing An Online Public Participation Platform During USA Agency Rulemakings. In M. Gascó (Ed.), *Proceedings of 12th European Conference on eGovernment.* Reading: Academic Publishing International.

Farina, C.R., Newhart, M. & Heidt, J. (2013). Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts. *Michigan Journal of Environmental & Administrative Law, 2(1),* 123-217.

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Farina, C. R., Miller, P., Newhart, M. J., Cardie, C., Cosley, D., & Vernon, R. (2011). Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking. *Pace Law Review,* 31(1), 382-463.

Bruce, T.L., Cardie, C., Farina, C.R. & Purpura, S. (2008). Facilitating Issue Categorization & Analysis in Rulemaking, *Proceedings of the 9th Annual International Conference on Digital Government Research.* Montreal, Canada: Digital Government Society of North America.

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Cardie, C., Farina, C.R., Rawding, M. & Aijaz, A. (2008). An eRulemaking Corpus: Identifying Substantive Issues in Public Comments. *Proceedings of the 9th Annual International Conference on Digital Government Research.* Montreal, Canada: Digital Government Society of North America.

Purpura, S., Cardie, C & Simons, J. (2008). Active Learning for e-Rulemaking: Public Comment Categorization. *Proceedings of the 9th Annual International Conference on Digital Government Research.* Montreal, Canada: Digital Government Society of North America.

Committee on the Status and Future of Federal e-Rulemaking (U.S.), & American Bar Association. (2008). *Achieving the Potential: The Future of Federal E-Rulemaking.* Chicago: Section of Administrative Law and Regulatory Practice, American Bar Association.

Cardie, C., Farina, C.R., Bruce, T., & Wagner, E. (2006). Using Natural Language Processing to Improve e-Rulemaking . *Proceedings of the 7th Annual International Conference on Digital Government Research*. San Diego, CA: Digital Government Research Center.

Cardie, C., Farina, C.R., Bruce, T., & Wagner (2006). Better Inputs for Better Outcomes: Using the Interface to Improve e-Rulemaking. *Proceedings of the Workshop on eRulemaking at the Crossroads, 7th Annual International Conference on Digital Government Research*. San Diego, CA: Digital Government Research Center.

Appendix B: Regulation Room Comments Illustrating Situated Knowledge

Rulemaking traditionally emphasizes empirical "objective" evidence in the form of quantitative data and "premise-argument-conclusion" analytical reasoning. However, social scientists from various fields have observed that neither of these practices "comes naturally" to people (Amsterdam & Bruner, 2000; Black, 2008; Bruner, 1990; Burns, 1999; Feldman, Sköldberg, Brown, & Horner, 2004; Polletta & Lee, 2006; Rideout, 2008). The behavior of rulemaking newcomers on Regulation Room confirms these observations. What individual and small entity commenters tend to offer is highly contextualized, experiential information, often communicated in the form of personal stories. This "situated knowledge" is based on on-the-ground experiences with the kinds of problems, circumstances, or solutions involved in the proposed regulation.

On Regulation Room, we have encountered at least four categories of this experiential situated knowledge. The examples given here are actual comments from rulemakings offered on Regulation Room. Spelling and punctuation is preserved to the greatest extent possible; in some instances, multiple comments made by an individual are collapsed into a single quote for the sake of brevity. More comments in each of these categories can be found Farina, et al. (2012). All comments remain publicly viewable at regulationroom.org.

1. Accounts of Complexity

Comments of this sort draw on the situated knowledge of personal experience to reveal and explore contradictions, tensions or disagreements within what may appear to be a unitary set of interests or practices.

Disability Accessibility rule: Disability rights organizations emphatically supported DOT's approach that automated check-in kiosks be redesigned. Some commenters with disabilities, however, disagreed that the emphasis on accessible technology best served their needs. For example:

> *Alposner*:
>
> As a visually impaired person I DO NOT believe kiosks access would be beneficial. In fact, I suspect that the plan may 'backfire', making airport access more difficult. Not being able to read airport signage, and therefore requiring "meet and assist" assistance to my designated gate, I find it most convenient to fint a ticket agent who will also call for assistance to take me through security and to my gate. If kiosks become more widely used (or possibly required) in the future, it is likely tomean fewer ticket agents, thus longer wait times on line, and more difficulty and delays acquiring the assistance I need. Making keosks available to those disabled individuals who wish to use them may be a good idea in theory, but, as proven by the growth of ATMs and self service checkouts, the more automation – the less human assistance!

EOBR rule: Commenters insisted that the impact of the agency's proposal would be qualitatively different on small companies than on large carriers (many of whom already use automated fleet management devices and who, almost unanimously, supported an industry-wide mandate.) Some of these comments focused on ability to pass along new costs to customer. For example:

> *Gordon*
>
> Equipment costs for large fleets are obviously less of a concern than they are for us small fleet owners. We have eight trucks on the road. Keeping paper logs is a no brainer. What the

regulators need to appreciate is that us smaller company have less flexibility in rates we charge. We, more than any other sector are subject to wims of the free market. … Hunt, CR England, ETC can more easily hide the device expenses in the cost of doing business. We small guys can not. …

We provide income for eight familieis. These are eight familiaes that might otherwise be on the dole. It is tough enough dealing with the avalanche of regulations without being saddled without one more expense.

Others argued that inflexible automated hours-of-service rule enforcement would be disproportionately economically harmful to small companies because of the structure of the trucking business. For example:

grldbarnes

I drive for Wal Mart and use EOBR it is a wonderful tool for the type of driving I do. However I think it will put a lot of hard working drivers out of business. Unless some rules are changed and enforced, The wait time loading and unloading will kill them. Also the time waiting for dispatch to give them thier next load will be a problem. You [i.e., the agency] can not help with the latter but the loading and unloading is a major problem for drivers. I have sat a grocery store wharhouse for up to ten hours waiting to get unloaded, when I was on time and did my part. With EOBR this would kill my driving hours. Rules need to be put into force regulating the time they can hold the driver while loading and unloading. Thanks for listening to my 2cents, Gerald

Gordon

In response to your [i.e., the moderator's] question about big truck companies: Here is the nature of the business today: The biggest companies control most of the freight. They don't haul the freight, but they book the freight, and haul it with their trucks, or rake some off the top and pass the loads down to smaller companies. The reality is that there is little connection between the company paying for the hauling and the company doing the driving. What this means, then, is that smaller companies struggle to make ends meet in several ways.

Smaller companies:

– Often must accept lower rates – the cmpanies booking the freight take 25% off the top for the joy of passing paper around.

– Are often abused at shippers and recievers. Because there is little connection between trucker and shipper – truckers are often unable to demand payment for extended delays at the shipper or receiver. … Freight brokers have no incentive to pay truckers for delays – which often can amount to a day or a night – because they don't have a connection to the trucker. …. If shippers take up 25% of a driver's vailable work time – the driver must make up for it by pushing the limits of his or her endurance….

[L]arger companies sign contracts with customers that spell out such things as loading/unloading times, tarping fees and other special charges. … However, contracts between drivers and brokerages that spell out delays and other assessorial charges generally does not exist. …In our small company I have dealt with this numerous times. The standard (if there is such a thing) in the industry is to give a shipper or receiver two hours of time to load and unload. But, if at the two hour mark I call the broker and complain, I usually hear

something like: "I'll call the shipper and see about detention." This is a kiss-off. My choices are to wait or to pull the truck off the load and look for something else. If I choose the latter course, then I wast time looking for a well paying load and then fuel and time moving the truck to the new shipper and again, starting the clock. …

Although the vast majority of commenters opposed the EOBR proposal, *okiemedic_66* (who self-identified as hazardous materials driver who has used EOBRs) relied on his experience in taking a decidedly minority point of view among small operators:

I have been behind the wheel for 23 years …. [I]n this present age, I welcome EOBRs because they take the falsification argument out of trucking opponents hands. I would even welcome 24/hr serveillance cameras and a complete onbord recording set up. As long as I am in accordance with the law, it makes the job of some personal injury lawyer that much harder. Remeber, people dont just go after companies anymore. They will go after we the drivers also. I for one do not want to owe the rest of my life to some other person because I could not prove my case. If we will accept and use the new regulations as a tool for our benefit, I belive that it will eventually make the best of us more valuable in the long term.

2. Accounts of Contributory Context

Comments in this category draw on the situated knowledge of personal experience to identify contributory causes of the problem the agency aims to solve. The factors they identify are not necessarily within the agency's regulatory authority but could affect the costs or efficacy of the proposed new regulatory measures.

EOBR rule: Many commenters argued that the root causes of unsafe driving practices and exceeding "legal" driving time include: (1) the industry practice among large carriers of paying by the mile rather than hourly; and (2) the behavior of third-party shippers (over whom small companies have little control) that cause drivers to lose hours waiting at the loading dock for cargo they are contractually obligated to transport. Here is a sampling:

barney

Shippers/receivers have no respect for deadlines they have placed on drivers to move their products. Once they get the truck loaded their job is done. I've sat in a loading dock for 13hrs before and then I had to be at my delivery site in 10hrs. I couldn't sleep while in the dock because the truck would shake everytime the forklift loaded another pallet. …So many times, receivers treat inbound truckers as an extention of their assembly line or freezer… I've sad in the dock in Georgia, stuck because they were running their operations from my truck. Consequentially, I was down for a full day. … The shippers and receivers are an integral part of the problem that can't seem to be addressed by FMCSA.

smallfamilyownedtrucking

What our Gov. and Universities[37] do not understand is by imposing this it will put a majority of little companies that deliver the essentials that we americans buy everyday out of business …. If we are going to enforce this EOBR we have to change the log rules yet again to let drivers adjust their logs for this as well as many other delays. If my driver starts his clock at

[37] This is apparently a reference to Regulation Room's affiliation with Cornell University. Explanations of our independence of the agency, and our substantive neutrality, appear at several places on the site, but users still at times attribute the agency's proposals to us.

8am. sitting at a dock and doesn't get loaded till 1pm, and is supposed to be 500 miles overnight to deliver the next morning they have no time left to drive that. Causing the load to be delayed by a day and then the shipper cutting our rates for not delivering on time when it was their fault for not getting my driver out in a timely manner. without being able to adjust these times our country WILL come to a stop and as they say "then what" I can tell you but no one wants to say it.

Consumer Mortgage Protection rule: The proposed rule would have required mortgage servicers to give borrowers in trouble information about all possibly available loan modification options (LMOs). Although consumer commenters favored this proposal, some argued strenuously that it didn't go far enough. They recounted experiences of being denied payment restructuring only to discover, after it was too late, that the denial was based on erroneous calculations of their home's net present value (NPV):

alpha squirrel

This [i.e., the proposed rule] addresses nothing in my example. They notified me of LMO's but then hid the fact they applied extra risk percentage of 2.5%, meaning the NPV caluculated by my using the HAMP [federal Home Affordable Modification Program] site did not match the NPV value they came up with, since Wells Fargo was adding unbeknown to consumers 2.5% risk to the prime. Telling them all the LMO's means nothing if they do not have full disclosures on the numbers used in the NPV model their calculations, and their deteminations. They should not be able to disqualify anyone from a LMO unless they fully disclose all the calculations used to determine that disqualification

The rule as finalized now requires this disclosure.

3. Accounts of Unintended Consequences

Comments in this category draw on the situated knowledge of personal experience to identify possible outcomes and effects of the proposal other than those the agency is seeking to achieve.

Disability Accessibility rule: Comment of *Alposner* predicting that automated kiosks would, on balance, hurt travelers with disabilities by reducing personal assistance (quoted above as an Account of Complexity) fits in this category as well.

EOBR rule: Commenters argued that inflexible enforcement of hours-of-service rules through automated monitoring could result in absurd and even unsafe results. Here is a sampling:

virgil tatro

I had this happen running elogs in bad weather i had to shut down 16 miles from home because my time was up.. i had to park in reed point montana i only live 16 miles from there, but due to weather conditions and the elog i could not drive home.

trucking

A driver is going to be giving an ETA to the receiver that is going to be mathematically possible time wise with out much extra to spare, forcing a driver to be more aggressive in order to even have a chance of making it, and will constantly be [distracted] by stressing over time. …[W]hat is going to happen when a driver can not find a parking spot after searching for an hour for a spot and his eobr says you are now driving in violation what are you going todo park on a get on ramp and get a ticket.

alcanman

i believe eobr's would be a disaster for the small business trucker.case in point,i had an 18:00 appt., my 14 hrs were up at 21:30,i thought that would be plenty of time to unload, at 21:30 they were done and told me i could not stay on the property, the nearest safe haven was 1hr. away. i would like to know how i would put that into an eobr? thank you for listening,alcanman

Others described instances when dispatchers used electronically transmitted information to pressure drivers to be on the road for the maximum possible number of hours, even though this increased fatigue by disrupting normal sleeping patterns. For example"

virgil tatro

using a qualcomm system i have in the past been awakened at night only to have my dispacher tell me my 10 hours is up and i need to get going. he has no idea how long i had been asleep or resting just that i had been sitting for 10 hours and woke me up at 2;30 am sayin i had to go ive sat my 10 hours.. now how will an eobr make this better.. as an owner operator using no qualcomm and paper logs i slept as long as i wanted and they didnt know the difference..

Several commenters, who recounted their years of experience in the industry, warned that the increased expense and stress they associated with EOBRs would shift the composition of the workforce from seasoned small operators to inexperienced drivers for large companies. For example:

Gearjammer

I have been an owner operator for over 12 years now and have seen my bottom line drop to almost nothing. the high costs of over regulation along with the facts that freight rates today are where they were 10 years ago add the fact that maintenance costs are outrageous is pretty much unbearable for the little guy to even come close to making a living. … [N]ot only do I resent being punished because of the few bad apples in this industry, I cannot bear the weekly cost of the monitoring but the cost of buying this monstrosity will take the money I have saved for a vacation for me and my wife,the fist we have been able to plan in over 5 years because of the slim profits that have been able to generate.

I have about decided that the government could care less about the small business owner in trucking and have teamed up with the driver mill companies that hire new students that have no idea on how to be compliant and even worse are not safety first oriented so if they want to force me to come up with another 2 to 5 thousand a year to prove that I am following the rules then I will take the loss on my equipment and find some work that is less stressful more profitable in the process and watch the carnage that will surely happen as the proven safe drivers give up in frustration and the new breed of inexperienced super truckers take over from the proven safe old hands

Impact on the economy from increased operating costs was a predictable argument; less predictable was argument that literal compliance with hours of service rules would mean more trucks on the highways:

Okcarhauler

the only way a driver makes any money is when the truck is moving. If the shipper or reciever holds you up, your not making a dime. So you either fix the logs, or go broke, Its that simple. The Federal goverment knows this, they just look the other way. If everyone had to log legal because of the eobr's, there would be a need for more trucks on the road, more drivers, improved freeways to handle the trucks just to keep up with whats being shipped now.

Consumer Mortgage Protection rule: Although consumer commenters approved of CFPB's proposal to require lenders to respond to borrowers' oral (not just written) claims of error, several criticized the part of the proposal that would have allowed oral responses from the lender. They argued that borrowers could not safely rely on mere oral assurances. Here is a sample:

britt

To rely on oral communication would be disastrous for homeowners. If I had not have everything in writing, I would not have the ability to take them to court.

Every single rule is catering to the servicer, not the consumer. If these rules are implemented you don't even need to worry about writing a QWR [qualified written request for error correction]. Might as well reverse Respa law. If they can give answers orally they can lie. And they do lie, believe me. I have these lies in writing and it is the only way I can hold them accountable.

steve smith

Unless borrowers are required to tape record every conversation, I fear oral communications only adds miscommunication and could lead to possible deceptive practices.

For example, prior to my foreclosure calling the title co. only four original loan pages could be retrieved to my loan. Both the local and corporate offices couldn't find documents to my loan. It wasn't until after foreclosure did I learn to contact the department of insurance to file a complaint. It was then did I receive some specific loan documents requested. I later thought to ask how pages related to the loan application are transferred between the broker, loan originator, and title. I called title and was told that the only pages kept on file are per the lenders instructions and that they do not keep copies of loan applications on file. This was unfortunate to hear since that was not my question and title had already previously sent me copies of those pages.

The example may not be directly related to servicers but it was meant to demonstrate how a simple inquiring question could raise new questions as to whether the oral experience was a miscommunication or a deceptive practice. Unfortunately, I do not recommend this.

The rule finally adopted retains the written response requirement.

4. Reframing Accounts

Comments in this category draw on the situated knowledge of personal experience to reframe the regulatory issues, including the competing values at stake.

EOBR rule: The discussion revealed that, for many small operators, concerns about expense, counterproductive inflexibility, and invasion of privacy were only part of the reason for strongly opposing the proposed rule. Equally important were: the perception that the government was

unfairly treating them as lawbreakers, a feeling heightened by a recently finalized rule that required flagrant HOS violators to install EORBs; a related perception that their professional competence was being impugned; and the conviction that EOBRs would add pressure to what was already a high-stress occupation.

Chele

I feel that there is a place for EOBR's. You are already using them where I feel they make the best sense! On drivers & company's that have a very bad habit of disregarding the HOS & Safety Rules. To mandate them on Every truck is punishing (financially, morally,& ethically) those who have already proven that we obey the laws the FMCSA have on the books ….

Being a Owner-Operator I know trucking is NO 9 to 5 job! We have to be flexible in so many ways the average person could not believe. This is no dreamy job, no great adventure. We work long hours, do hard outdoor labor (I run a Step Deck trailer) in every kind of weather, we have loads of paperwork to keep up to date. We also need to eat, sleep, shower, house keep, maintain our equipment, & relax, for we have a high stress job.

trucking

I guess the best thing to compare this to is somebody that breaks the law and gets put under house arrest and gets the ankle bracelet to make sure they do what they are told What is the difference. I broke no crimes but they want to watch to make sure I am being a good boy, and if their little black box tells them you did something wrong you have troubles, and this they say will make the roads safer. How I ask? by putting more stress on an already stressful job and making it more stressful having everything you do recorded. … [H]ow would you like having government sitting in your office with you making sure that everything you are doing is legal,or make sure you are using the right garbage can for the right garbage or having Irs there watching every trans action…

virgil tatro

I have been on the road all of my 37 years and have seen every scenario.. …I am also a professional i do not need an ELECTRONIC RECORDER telling me when to stop driving.. or to keep me in compliance, as I am also a grown man and have been on my own for many many years making responsible decisions! … i do not need an EOBR to keep track of me!! I would never put a life in jeopardy by driving tired, not mine or any one elses!

Toolman

I used to love this job/way of life. Not anymore. The government regs,fuel costs and greedy brokers have done a great job of destroying the american truck driver. We sacrifice so much for this job, IE. Family,hometime,health. We used to be compensated for it. … Let us do are jobs. Most of [us] are professionals,we know are limitations…. Over regulating this industry is causing more and more good drivers to seek employment outside of the trucking business, myself included.