ELECTRONIC RULEMAKING IN THE NEW AGE OF OPENNESS: PROPOSING A VOLUNTARY TWO-TIER REGISTRATION SYSTEM FOR REGULATIONS.GOV

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TABLE OF CONTENTS

Introduction 1262
I. Development of the Current E-Rulemaking Model 1269
A. A Brief History of E-Rulemaking 1269
B. Problems with the Current System 1271
II. Exploring the Two-Tier Model 1274
A. Point of Comparison: The European Commission's Public Consultations System 1275
B. European Imports: Defining the Scope of the "Your Voice" Model Stateside 1278
1. A Registry for Participating Interest Groups 1279
2. A Common Code of Conduct and Enforcement Mechanisms 1280
3. Consultative Processes to Engage Interest Groups 1281
4. Optimum Customization Options for Regulations.gov ... 1282
III. Practical Implications of the Two-Tier Model 1282
A. Looking on the Bright Side: Benefits of the System 1282
B. Nothing Is Perfect: Costs of the System 1284
Conclusion 1285

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INTRODUCTION

On his first day in office, President Barack Obama issued a document that promised to usher in a new age of openness by fundamentally transforming the way government operates.[1] Dubbed the "Open Government Memorandum," this document outlined the Obama Administration's plans to enhance government transparency, increase public participation, and spur collaboration between citizens and lawmakers[2] by cultivating advances in Internet technology.[3] Focusing on federal executive agencies, the Office of Management and Budget (OMB) implemented the Open Government Initiative, a plan of action requiring the agencies to meet specific openness-related goals within preset deadlines and establishing a "presumption of openness" that governs agencies' dissemination of government information.[4] The ensuing flurry of agency activity spawned numerous Web sites,[5] blogs,[6] and Web-based innovations

1. *See* Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009) [hereinafter Open Government Memorandum] ("Openness will strengthen our democracy and promote efficiency and effectiveness in Government.").

2. The Administration believes these goals are intrinsically valuable, but some scholars treat them merely as a means to enhance the legitimacy of the rulemaking process and produce better regulations. *See* Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 927–28 (2009) (arguing that public participation promotes fairness in the rulemaking process and allows agencies to understand the consequences of their actions, while transparency enables the public to monitor agency activity and hold agencies accountable for their actions).

3. *See* Open Government Memorandum, *supra* note 1, at 4685 (ordering federal agencies to utilize the Internet and other "innovative tools, methods, and systems" to achieve transparency, public participation, and collaboration); Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget to the Heads of Executive Departments and Agencies, Open Government Directive 2, 10 (2009) [hereinafter Open Government Directive], *available at* http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf (requiring agencies to "proactively use modern technology" when making information available online and to create "[f]lagship [i]nitiative[s]" designed to achieve one of the three openness goals).

4. *See id.* at 2–6 (directing agencies to post data online in open formats, enhance the quality of these data, and forge "a [c]ulture of [o]pen [g]overnment" based on collaboration across various professions within each agency).

5. *See id.* at 2–3 (directing each agency to construct an "Open Government Webpage" to facilitate easy access to current information on that agency's efforts to serve as the gateway[s] for agency activities related to the Open Government Directive, and to solicit public feedback on how to best achieve the Directive's goals). Most federal agencies have already complied with this requirement: the web pages are now visible on each agency's homepage. *See, e.g.*, *Open Government*, EPA.GOV, http://www.epa.gov/open (last visited Nov. 3, 2010) (highlighting the Environmental Protection Agency's (EPA's) featured innovation, called "MyEnvironment," which allows the public to view current environmental conditions

such as Data.gov[7] and the IT Dashboard,[8] among others.[9]

The Administration's government-wide push toward openness includes soliciting public feedback to improve electronic rulemaking (e-rulemaking),[10] an initiative that augments the traditional notice-and-comment procedures[11] by allowing federal agencies to post proposed regulations and other policy documents online.[12] The eRulemaking Program is a group of over thirty departments and agencies responsible for implementing e-rulemaking policies[13] that selected Regulations.gov as the

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within individual communities).

6. The White House and Office of Management and Budget (OMB) now maintain blogs with regular postings by numerous high-ranking agency officials on salient public policy issues. *See* THE WHITE HOUSE BLOG, http://www.whitehouse.gov/blog (last visited Nov. 3, 2010); OMB BLOG, http://www.whitehouse.gov/omb/blog/ (last visited Nov. 3, 2010).

7. Created by a presidential initiative, Data.gov is a Web site that collects information from every federal agency and disseminates it online in an open, searchable format. *See* EXEC. OFFICE OF THE PRESIDENT, OPEN GOVERNMENT: A PROGRESS REPORT TO THE AMERICAN PEOPLE 3 (2009) [hereinafter OPEN GOVERNMENT REPORT], *available at* http://www.whitehouse.gov/sites/default/files/microsites/ogi-progress-report-american-people.pdf (claiming that numerous administrative and economic benefits will be realized by making data readily and easily available online); *Data.gov Catalogs*, DATA.GOV, http://www.data.gov/catalog/tools (last visited Nov. 3, 2010) (describing the three methods that the public may use the site to search online "data catalogs" made available by federal agencies).

8. Another presidential initiative, the IT Dashboard, is a Web site that visualizes statistics and spending information from the various agencies' information technology (IT) budgets. *See* OPEN GOVERNMENT REPORT, *supra* note 7, at 3 (identifying IT Dashboard, Recovery.gov, and usaspending.gov as three such "dashboards" created by the Administration); FEDERAL IT DASHBOARD, http://itdashboard.gov/ (last visited Nov. 3, 2010).

9. *See* OPEN GOVERNMENT REPORT, *supra* note 7, at 13–22 (providing a lengthy listing of agency innovations and efforts regarding openness); *Open Government Featured Innovations*, THE WHITE HOUSE, http://www.whitehouse.gov/open/innovations (last visited Nov. 3, 2010) (offering a visual catalog of the Administration's most important innovations to date).

10. For a thorough analysis of the current e-rulemaking regime, see generally CYNTHIA R. FARINA ET AL., ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 22–29 (2008), *available at* http://www.abanet.org/adminlaw/E-Rulemaking%20Report%20Web%20Version.pdf (delineating the circuitous path of the Government Initiative through the end of the second Bush Administration).

11. *See generally* Administrative Procedure Act, 5 U.S.C. § 553 (2006) (outlining the procedures for informal agency rulemaking, also known as notice-and-comment rulemaking).

12. *See* FARINA ET AL., *supra* note 10, at 3 ("E-rulemaking has transformative potential to increase the comprehensibility, transparency and accountability of the regulatory process.").

13. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34210, ELECTRONIC RULEMAKING IN THE FEDERAL GOVERNMENT 10 (2008), *available at*

target for change.[14] Regulations.gov is the federal government's one-stop portal Web site that allows the public to view and comment on proposed rules electronically.[15] From May 21 through July 21, 2009, the Web site included a feature called the Regulations.gov Exchange (the Exchange),[16] an online forum that encouraged the public to recommend changes to the Web site that would foster transparency and openness.[17] The feedback received from the Exchange ultimately led to the adoption of numerous changes to Regulations.gov,[18] and the initiative proved successful enough for the eRulemaking Program to relaunch the Exchange in January 2010.[19]

One proposal considered on the Exchange was the creation of a customizable homepage called MyRegulations.gov that would allow users to register with the system and create personalized online profiles.[20] This

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http://www.fas.org/sgp/crs/misc/RL34210.pdf; *see also* John Moses, *Improving Online Public Participation in Agency Rulemaking*, THE WHITE HOUSE: OPEN GOVERNMENT INITIATIVE BLOG (June 12, 2009, 5:03 pm), http://www.whitehouse.gov/blog/Improving-Online-Public-Participation-in-Agency-Rulemaking (stating that the eRulemaking Program's mission "is to increase public access to, participation in, and understanding of federal rulemaking and improve agencies' efficiency and effectiveness in developing rules").

14. *See* Moses, *supra* note 13 (identifying upgrading of Regulations.gov as the "next step" toward realizing the goals of the Open Government Initiative).

15. Regulation.gov's "User Notice" describes the site as "a public service [provided] to increase participation in the government's regulatory activities by offering a central point for submitting comments on regulations." *About Us: User Notice*, REGULATIONS.GOV, http://www.regulations.gov/search/Regs/home.html#privacyNotice (last visited Nov. 3, 2010).

16. Available at http://www.regulations.gov/exchange/ (last visited Nov. 3, 2010), the Regulations.gov Exchange includes current and closed topic discussions.

17. *See* Moses, *supra* note 13 (listing six general areas where the eRulemaking Program solicited public feedback, including educating private citizens on the intricacies of agency rulemaking, explaining proposed rulemakings in plain English to help the public understand them, and using online social networking tools to enhance public participation in agency rulemaking). Moses notes the tools considered, which include user-based ranking and affiliation systems, and allowing users to share links and bookmark to various rules. *Id.*

18. *See Regulations.gov: Constantly Evolving to Meet Users [sic] Needs*, REGULATIONS.GOV, http://www.regulations.gov/search/Regs/FactSheet_Whats_New_at_Regulations_gov.pdf (last visited Nov. 3, 2010) (detailing the changes made to the Web site's homepage and search page).

19. *About Us: Enhancements & Fixes*, REGULATIONS.GOV, http://www.regulations.gov/search/Regs/home.html#aboutEnhancements (follow "January 2010" hyperlink under "Former Release Notices") (last visited Nov. 3, 2010). The relaunched Regulations.gov Exchange Web site requires users to register before posting comments or ranking proposals. REGULATIONS.GOV EXCHANGE, http://www.regulations.gov/exchange (last visited Nov. 3, 2010).

20. This idea was previously recommended during the first release of the Exchange and received a lot of favorable feedback. *MyRegulations.gov*, REGULATIONS.GOV EXCHANGE, http://www.regulations.gov/exchange/page/myregulationsgov-0 (last visited Nov. 3, 2010). Perhaps not coincidentally, the current Deputy Chief Technology Officer for Open

innovation would allow registered users to save personal information on the Web site to pre-fill comment forms, store search parameters for later reuse, track proposed rules and uploaded comments, and possibly even exchange messages with other users or participate in online message boards.[21] E-rulemaking already dramatically lowers the cost of participation in the regulatory process,[22] increasing the number of comments that agencies receive.[23] Proponents of e-rulemaking have long argued that a registration system would increase that effect,[24] resulting in better rules.[25] However, a registration system for Regulations.gov could also be configured to achieve the Administration's openness goals by including specialized features for interest groups, such as lobbyists or policy analysts, as opposed to individual citizens.

Government, Beth Simone Noveck, is a long-time advocate of such measures. *See generally* Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 J.L. & POL'Y FOR INFO. SOC'Y 1, 11 (2005) (arguing that creation of a "MyRulemaking homepage" would enable people to feel like "part of a rulemaking community"); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 474–75 (2004) [hereinafter Noveck, *Electronic Revolution*] (asserting that a MyRulemaking homepage would enable communities to exert some control over the rulemaking process). Ms. Noveck is a major player in the Administration's Open Government Initiative. *See, e.g.*, Beth Noveck, Deputy Chief Technology Officer for Open Government, *Transparency Governance*, THE WHITE HOUSE: OPEN GOVERNMENT INITIATIVE BLOG (June 4, 2009, 9:04 PM), http://www.whitehouse.gov/blog/Transparency-Governance (requesting public feedback on methods to promote open government).

21. *MyRegulations.gov*, REGULATIONS.GOV EXCHANGE, *supra* note 20.

22. Beth Simone Noveck, *Public Participation in Electronic Rulemaking: Electronic Democracy or Notice-and-Spam?*, ADMIN. & REG. L. NEWS, Fall 2004, at 7, 7 [hereinafter Noveck, *Public Participants*].

23. In 2008, Regulations.gov received around 40,000 comments and 12.5 million hits per month; in contrast, the Web site received only 1,000 comments per month in 2002. *Program Impact and Achievements*, REGULATIONS.GOV, http://www.regulations.gov/search/Regs/FactSheet_Program_Impact.pdf (last visited Nov. 3, 2010). *But see* COPELAND, *supra* note 13, at 42 ("[R]elatively few comments have been coming to the agencies via Regulations.gov compared to other methods of commenting.").

24. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 475 (arguing that customization would improve public participation in the system by offering incentives for private citizens to become involved in rulemaking). *But see* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 902 (2006) ("[S]o far, the Internet has not significantly increased individual participation in the rulemaking process."); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 943 (2006) (arguing that public participation in rulemaking has not significantly increased since the advent of electronic rulemaking; on the contrary, "empirical research shows that e-rulemaking makes little difference").

25. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 439–40 (suggesting that a series of recommended changes to e-rulemaking could "enable group collaboration," leading to "informed, relevant, and responsive" comments).

Interest groups have played an important role in American politics since the nation's founding.[26] There are no specialized rules governing lobbyist conduct in rulemaking, and the impact of interest groups over the rulemaking system is not always clear.[27] Nevertheless, interest groups possess clear-cut advantages over ordinary citizens.[28] Organized interest groups understand the complexities of the rulemaking process and possess the time and resources to draft and submit detailed comments, which often allow them to command a disproportionate influence over agency officials.[29] Although their contributions are often seen as a benefit, interest groups also try to manipulate the system to promote self-serving agendas.[30] But interest groups have a stake in the regulatory process and will participate in rulemaking, whether agencies want them to or not. Thus, the challenge for agencies is to collaborate with interest groups to take advantage of their expertise but ensure that the process is transparent to protect the integrity of the system. The e-rulemaking system may be up to this challenge.

One source for a potential solution is the European Commission's (the Commission's) *Your Voice in Europe* (Your Voice) Web site, which solicits public feedback for proposed policies and legislation.[31] Your Voice is essentially the European equivalent to Regulations.gov: it is a government

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26. *See generally* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31–35 (1985) (exploring the problems created by factionalism through the lens of the civic republican and pluralist conceptions of government, and proposing several solutions to these problems).

27. However, the Obama Administration has recently toughened its stance against lobbyists in other regulatory contexts. *See* Exec. Order No. 13,490, 74 Fed. Reg. 4673, 4673 (Jan. 26, 2009) (preventing lobbyists registered with the federal government from serving on a specific board or agency if they had lobbied in that agency's area of expertise or for that specific agency in the past two years); Memorandum from President Barack Obama on Ensuring Responsible Spending of Recovery Act Funds to the Heads of Executive Departments and Agencies, 74 Fed. Reg. 12,531, 12,531, 12,533 (Mar. 25, 2009) (ordering agency heads to ensure that disbursement of Recovery Act funds is merit-based and to disclose lobbyists' written communications regarding those funds).

28. Private citizens do not typically possess subject-matter expertise or procedural knowledge and lack the necessary incentives to acquire them. But while their comments may not be complex or detailed, they may still offer important insights or anecdotal knowledge. *See* WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 35–36 (1992) (arguing that lobbyists, lawyers, and think tanks in Washington, D.C., possess the financial motivations to understand and influence rulemaking).

29. *See* Coglianese et al., *supra* note 2, at 932 (arguing that the failure to consider the viewpoints of all interested parties is one problem with the current rulemaking system).

30. *See* GREIDER, *supra* note 28, at 35–36.

31. *Your Voice in Europe*, EUROPEAN COMM'N, http://ec.europa.eu/yourvoice/index_en.htm (last visited Nov. 3, 2010).

Web portal that provides online access to various reports, studies, and regulations issued by the Commission and requests "contributions" from interested parties outside of the government.[32] However, Your Voice treats interest groups categorically differently from individual citizens. The Web site features a voluntary registration system that "encourages" interested parties—both organizations and individuals—to provide personal information to the Commission[33] but requests greater disclosure from organizations. Your Voice also includes a feature called the Register of Interest Representatives (Register), an online list of all registered interest groups that contains links to the profiles of each group.[34] This list does not include private citizens, and the information gathered from them is much more detailed than the information gathered from interest groups.[35] But despite these vast differences between the two systems of governance,[36] some of the features from Your Voice could be brought stateside with only modest costs to agencies.[37]

The eRulemaking Program should follow the European model and

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32. Similar to comments, contributions are submissions from nongovernmental entities intended to provide feedback on contemplated policy measures. *See Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue—General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, at 4, COM (2002) 704 final (Dec. 11, 2002) [hereinafter *Consultation and Dialogue Report*], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:en:PDF (listing the various entities that regularly consult with the Commission). To view the Commission's consultations page, see *Open Consultations*, EUROPEAN COMM'N, http://ec.europa.eu/yourvoice/consultations/index_en.htm (last visited Nov. 3, 2010).

33. *European Transparency Initiative (ETI)–Frequently Asked Questions (FAQ) on the Commission's Register for Internet Representatives*, EUROPEAN COMM'N, 1, http://ec.europa.eu/transparency/docs/reg/FAQ_en.pdf (last visited Nov. 3, 2010) ("All entities engaged in activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions are expected to register." (internal quotations and emphasis omitted)). However, registration is not required, and anyone can contribute without first registering with the Your Voice Web site. *Id.* at 2.

34. *See Commission Green Paper: European Transparency Initiative*, at 8, COM (2006) 194 final (May 3, 2006) [hereinafter *Commission Green Paper*], *available at* http://ec.europa.eu/transparency/eti/docs/gp_en.pdf (declaring that the Register is meant to provide a "general overview" of lobbyist activities to the public); *Register of Interest Representatives*, EUROPEAN COMM'N, https://webgate.ec.europa.eu/transparency/regrin/welcome.do?locale=en (last visited Nov. 3, 2010) (stating that the goals of the register are to increase public awareness of the special interest groups and lobbyists that affect European Union (E.U.) policy, including the resources employed by those groups).

35. *Register of Interest Representatives*, *supra* note 34.

36. *See generally* PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW OF THE EUROPEAN UNION: RULEMAKING 71–81 (George A. Bermann et al. eds., 2008) (outlining the differences between U.S. rulemaking and E.U. lawmaking).

37. *See infra* Part III.B.

design a two-tiered registration system for the new MyRegulations.gov. The first tier should register private individuals, collecting minimal information to protect privacy while offering the unique customization options discussed above to maximize public participation.[38] The second tier should register interest groups and organizations, collecting detailed information and disseminating it online to promote transparency. In addition, agencies should maximize collaboration by offering additional opportunities for interest groups to contribute to the policymaking process through the new registration system. Registration should be voluntary on both levels, and anyone should be able to access Regulations.gov and comment on proposed rules without first registering with the system. Finally, the system should also import several other design features from Your Voice, such as a user Code of Conduct and a corresponding enforcement mechanism.

This Comment argues that a voluntary two-tiered registration system that acknowledges the role of interest groups in rulemaking is best suited to meet the Administration's goals for open government. Part I briefly reviews the history of e-rulemaking in the United States, including the recent policies by the Obama Administration. It also considers how the role played by interest groups in rulemaking offers both advantages and disadvantages to agencies, and briefly considers several technical challenges posed by the current e-rulemaking model. Part II describes the European model in more detail and explores the degree to which that model should be modified and imported to the United States. Part III considers the practical implications of importing the European model, focusing on the pros and cons of the proposed system. This Part weighs the perceived benefits of the system against its apparent costs, concluding that the import is worthwhile. In closing, this Comment recommends that the eRulemaking Program conduct an in-depth study and public consultation to further evaluate the costs of a voluntary two-tiered registration system.

38. Privacy is an important consideration when providing personal information over the Internet. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, E-GOVERNMENT STRATEGY 13 (2002), http://www.usa.gov/Topics/Includes/Reference/egov_strategy.pdf (noting that placing personal information online poses inherent risks, and that government must take measures to ensure that privacy is guaranteed in online interactions); *see also About Us: User Notice*, *supra* note 15.

I. DEVELOPMENT OF THE CURRENT E-RULEMAKING MODEL

A. A Brief History of E-Rulemaking[39]

Early development of federal e-rulemaking was an ad hoc process. Individual agencies designed systems to meet their own specific needs that were serviced by separate servers and hosted by each agency's own Web sites.[40] But the "revolution"[41] toward the current e-rulemaking system did not begin until the second Bush Administration included e-rulemaking as part of its E-Government Strategy in 2002.[42] Later that year, Congress passed the E-Government Act of 2002,[43] and OMB selected the Environmental Protection Agency (EPA) as the lead agency for the Bush Administration's e-rulemaking initiative.[44] At that point, system development progressed quickly: Regulations.gov was unveiled in January 2003,[45] and OMB required all federal executive agencies to upload proposed rulemakings and related documents onto the Federal Docket Management System (FDMS) shortly thereafter.[46] OMB also required

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39. For a more thorough history of electronic rulemaking, see FARINA ET AL., *supra* note 10 at 21–32. *See also* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 217–21 (4th ed., 2006).

40. *See* Letter from Michael Brostek, Assoc. Dir., Fed. Mgmt. & Workforce Issues, U.S. Gen. Accounting Office, to Rep. Henry A. Waxman, Ranking Minority Member, Comm. On Gov't Reform & Sen. Joseph Lieberman, Ranking Minority Member, Comm. On Gov't Affairs, on Federal Rulemaking: Agencies; Use of Information & Technology to Facilitate Public Participation 2 (June 30, 2000), http://www.gao.gov/new.items/gg00135r.pdf (noting that all five agencies that were studied used their own rulemaking Web sites to post proposed rules and accept electronic comments on some of those rules but that "the specific features and uses of [information technology] differed significantly between and sometimes within the agencies").

41. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 434 (arguing that e-rulemaking would precipitate the end of paper-based notice-and-comment rulemaking and replace it with an electronic equivalent).

42. *See* OFFICE OF MGMT. & BUDGET, *supra* note 38, at 2, 16 (listing development of an online rulemaking management system designed to integrate the disparate agency docketing systems as one of twenty-three high-pay-off, government-wide initiatives).

43. Pub. L. No. 107-347, 116 Stat. 2899 (codified in scattered titles of U.S.C.).

44. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-777, ELECTRONIC RULEMAKING: PROGRESS MADE IN DEVELOPING CENTRALIZED E-RULEMAKING SYSTEM 7–8 (2005), *available at* http://www.gao.gov/new.items/d05777.pdf (explaining that OMB shifted management responsibilities for the e-rulemaking initiative from the Department of Transportation (DOT) to EPA because it selected EPA's electronic docket (EDOCKET) system as the platform for Regulations.gov); *see also* COPELAND, *supra* note 13, at 12 (postulating that an underlying reason for the change in leadership was DOT's reluctance to accept OMB's plans for creation of a centralized e-rulemaking system).

45. LUBBERS, *supra* note 39, at 220.

46. The Federal Docket Management System (FDMS) is a database designed to store

these agencies to abandon their individual Web sites to consolidate e-rulemaking efforts on the centralized process site.[47]

Regulations.gov was the centerpiece of these efforts. The Web site allows users to locate proposed rules, policy documents, and related documents online through a simple keyword search feature. Users may view these documents in their entirety and submit comments through a linked text box. After the agencies review each comment, they can elect to post them on the Web site.[48] Before submitting their comments, users are often asked to provide personal information by the agency proposing the rule. The information requested varies from agency to agency, and some agencies do not require any information at all.[49]

Despite the success of this system,[50] many observers believed that e-rulemaking could be improved and recommended changes to the system.[51]

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the various documents comprising each rulemaking record in separate online dockets that are distinguished by different docket numbers. FARINA ET AL., *supra* note 10, at 12. Regulations.gov is the public interface for the FDMS system, while FDMS.gov is the password-protected government interface. *Id.* Independent agencies are not required to use FDMS; however, many voluntarily choose to use the system, such as the Federal Trade Commission and the Nuclear Regulatory Commission. *See id.* at 12, 12 nn.9–10 (noting that the independent agencies that actively promulgate rules, such as the Federal Communications Commission, tend to use their own unique e-rulemaking systems).

47. Memorandum from Mitchell E. Daniels, Jr., Dir., Office of Mgmt. & Budget, Exec. Office of the President to the Heads of Exec. Dep'ts & Agencies on Redundant Information Systems Relating to On-Line Rulemaking Initiative 1–2 (May 6, 2002), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/m02-08.pdf (asserting that the second Bush Administration's decision to "consolidate redundant IT systems" would reduce system maintenance costs and better enable users to locate and comment on proposed rules); *see also* FARINA ET AL., *supra* note 10, at 23 (arguing that the choice of a centralized system over numerous individual models created future problems by stifling innovation).

48. *See* FARINA ET AL., *supra* note 10, at 13, 18 (postulating that agencies choose not to publish myriad comments due to copyright issues and concerns over obscene or business proprietary material).

49. *See id.* at 25 (offering "anonymous comments" as an example of the absence of data harmonization within the e-rulemaking system).

50. *See Program Impact and Achievements*, *supra* note 23 (noting increased public participation, cost savings from agency collaboration, and technological evolution in e-rulemaking). Regulations.gov notes, that maintaining a single portal for e-rulemaking efforts (as opposed to separate systems for each agency) has saved an estimated $129 million over the last five years. *Id.* The American Bar Association (ABA) also had positive feedback for the government's efforts to date. *See* FARINA ET AL., *supra* note 10, at 17 (praising EPA's efforts to incorporate over 170 "rulemaking entities" in the new system despite "political complexities and resource limitations").

51. *See generally* Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 INT'L J. POL'Y, ADMIN. & INSTITUTIONS 529, 532 (2009) (listing numerous organizations that recommended changes to the Obama Administration on e-

Some observers disagreed over the scale of the required changes,[52] but most generally agreed that the eRulemaking Program should improve the search feature on Regulations.gov and make the site more user-friendly. Once the Obama Administration unveiled the Open Government Initiative in 2009,[53] it was ready to respond to these recommendations. After soliciting public feedback on proposed changes to the system through the Regulations.gov Exchange[54] and brainstorming ways to improve e-rulemaking,[55] the eRulemaking Program released an upgraded version of Regulations.gov that included the following innovations: advanced search options that allow users to apply filters or search within results; labels for documents on the system (called "topics") designed to make searches easier; and various visual upgrades, such as a list of proposed rules that are expiring soon and visual graphics with Web site statistics.[56]

B. Problems with the Current System

Despite the recent movement toward openness, the current system still has numerous problems. One major issue is that e-rulemaking does not properly recognize the important role that interest groups play in the rulemaking process, despite the prevalence of interest groups in American political theory since the days of the founding fathers. James Madison spoke of the problem of factions in *The Federalist* and argued that the United States' structure of government was designed in part to avert that problem.[57] According to Madison, factions will always pose problems in a democratic society; however, a federalist government partially mitigates

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rulemaking and transparency).

52. *Compare* FARINA ET AL., *supra* note 10, at 5 (recommending system-wide changes that require broad congressional and administrative action, such as creation of a new agency to head the e-rulemaking initiative and direct congressional funding), *with* Noveck, *Electronic Revolution*, *supra* note 20, at 480–91 (discussing small-scale evolutionary technological innovations that could improve the e-rulemaking system, such as "[t]hreaded [c]omments" and "[v]isualization [t]ools").

53. *See supra* notes 4–9 and accompanying text.

54. *See supra* notes 16–19 and accompanying text.

55. As part of the Open Government Initiative, the Administration conducted a three-stage "[u]nprecedented [c]onsultation [p]rocess" with the public to uncover ways to realize the goals of the Initiative. OPEN GOVERNMENT REPORT, *supra* note 7, at 12 (describing the process of brainstorming for ideas, discussing those ideas, and drafting proposed actions). The final phase involved 375 participants and over 2,200 votes on the submitted drafts. *Id.*

56. *See Regulations.gov: Constantly Evolving to Meet Users [sic] Needs*, *supra* note 18.

57. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison) (arguing that a representative democracy is the best system of government to mitigate the problem of factions because elected leaders are unlikely to place the interests of a specific faction over the general welfare of their constituents).

factionalism's negative effects by amalgamating a large variety of interests that offset one another and ensure that no single interest becomes powerful enough to oppress minority rights.[58] Of course, the founding fathers never imagined that interest groups could eventually organize themselves nationally at the push of a button through electronic social networking tools like Twitter or Facebook.

Modern laws also recognize the influence that interest groups can have on governmental decisionmaking through their contacts with the Executive Branch,[59] the Legislative Branch,[60] and administrative agencies.[61] Some scholars have even argued that reviewing courts developed the "hard look" doctrine of judicial review to prevent undue influence from interest groups in agency decisionmaking.[62] Furthermore, the Administrative Procedure

58. *See* THE FEDERALIST NO. 51, at 120 (James Madison) ("[S]ociety itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority.").

59. *See* Federal Advisory Committee Act, 5 U.S.C. app. § 2(a), (b)(5) (2006) (announcing the benefits that advisory committees provide to executive agencies and requiring that the public be informed of "the number, purpose, membership, activities, and cost of advisory committees"); Wash. Legal Found. v. Am. Bar Ass'n Standing Comm. on the Fed. Judiciary, 648 F. Supp. 1353, 1358–59 (D.D.C. 1986) ("The central purpose of the Act is to 'control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups.'" (quoting HLI Lordship Indus., Inc. v. Comm. for Purchase from the Blind, 615 F. Supp. 970, 978 (E.D. Va. 1985))).

60. Federal lobbyists are currently required to register before representing clients in legislative affairs. *See* Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601(3), 1603(a) (2006) (requiring registration of federal lobbyists to ensure public awareness of the role such groups play in influencing legislation).

61. The U.S. Court of Appeals for the D.C. Circuit has struggled with the dilemma caused by ex parte contacts between agency officials and outside parties. The court initially took a strong position toward disclosing such contacts, but later changed its stance. *Compare* Home Box Office, Inc. v. FCC, 567 F.2d 9, 56–57 (D.C. Cir. 1977) (holding that "fundamental notions of fairness" require agencies to publicly disclose ex parte communications made between regulators and interested parties during the crucial period from the end of the comment period to the time the final rule is adopted), *with* Sierra Club v. Costle, 657 F.2d 298, 401–02, 408–09 (D.C. Cir. 1981) (rejecting a per se ban on ex parte contacts during the post-comment period and generally accepting such contacts between agency officials and executive branch officials or members of Congress). In addition, the agency capture theory asserts that agencies can become "dominat[ed] by the industry they were charged with regulating." *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (arguing that the courts established various judicial doctrines, including the "hard look" doctrine, in response to concerns over agency capture).

62. *See, e.g.*, Sunstein, *supra* note 26, at 63 ("Reviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy."). However, political pressure is now an acceptable reason for an agency to

Act (APA) requires agencies to provide "interested persons" with the opportunity to influence final rules[63] and "to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule."[64] As will be explored below, the potential exists for e-rulemaking to provide even greater transparency as to the influence of interest groups on the rulemaking process. This is especially pertinent in light of the current movement toward open government.

In addition, there are several technical issues with the current e-rulemaking system that reduce its overall effectiveness. Submitting electronic responses via Regulations.gov is quicker and less costly than submitting comments via mail.[65] However, this increases the incentive for spam commenting. Opening up the agency rulemaking process to the Internet allows anyone with an Internet connection to submit a comment online, thereby paving the way for an influx of "spam" comments, which are defined as "bulk uploads of thousands of repetitive comments from servers of private organizations."[66] Not only are agencies forced to expend scarce resources to filter through the myriad of uniform comments, but there is a risk that genuinely helpful comments could be lost in a sea of spam.[67] While increasing the number of comments arguably enhances public participation in rulemaking, the quality of agencies' rules will not increase accordingly if the comments are overly duplicative.[68] The Web

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reverse a longstanding policy. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810–11 (2009) (holding that an agency's rationale for changing its policy position need not be more detailed than its original rationale, but must make clear that the new position is statutorily permissible, supported by good reasons, and viewed by the agency as better).

63. 5 U.S.C. § 553(c) (2006).

64. Rodway v. Dep't of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975). This requirement has arisen from the APA's requirement that agencies "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

65. *See* Noveck, *Public Participation*, *supra* note 22, at 7.

66. FARINA ET AL., *supra* note 10, at 29; Noveck, *Public Participation*, *supra* note 22, at 7.

67. *See* Benjamin, *supra* note 24, at 904 (noting that organized efforts by interest groups to alter form comments to evade agencies' countermeasures create additional work for agency officials); Noveck, *Electronic Revolution*, *supra* note 20, at 442–43 (claiming that such a loss of "quality input" would "frustrate the goals of citizen participation" and lead agencies to avoid rulemaking altogether).

68. Regulations.gov allows anyone to instantly access a wealth of information that was previously only available in forlorn agency reading rooms and to submit comments without even leaving the house. But as the cost of participation is lowered and more duplicative comments are submitted, the marginal cost of reviewing those additional comments will eventually exceed the marginal benefit received from them. *See* Coglianese, *supra* note 2, at 929–30 (arguing that quality matters more than quantity in rulemaking, especially when a

site's current design does nothing to deter this phenomenon, thus forcing agency officials to sort through thousands of these "spam" comments and increasing the chances that they will overlook useful comments. In short, both quality and quantity matter.

There are several ways that spam comments can be submitted on Regulations.gov. Computer-savvy users can create software programs that manipulate stored e-mail addresses to quickly submit thousands of form comments.[69] While agency officials could devise counteracting software to locate and isolate form messages,[70] they would expend valuable time and money to do so. Interest groups could also mobilize their supporters to submit similar comments that are worded differently enough to evade the agency's counteracting software.[71] Attacks of this type are more costly and could require significant resources to sort through the comments.[72]

A related problem is the lack of uniform standards for requesting personally identifiable information from commenters.[73] Generally, when interested parties wish to comment on proposed rulemakings, they must provide some basic information, such as their name and e-mail address, to the agency proposing the rule.[74] However, the amount and specific types of information requested varies from agency to agency.[75] Some agencies allow for completely anonymous commenting by not requiring any personal information from commenters.[76] Although the privacy protection efforts by some agencies provide incentives to use the system, they also diminish the accountability of users who violate the terms of the user agreement. The two-tier model proposed in this Comment could provide the framework for eventually resolving these issues with the current e-rulemaking system.

II. EXPLORING THE TWO-TIER MODEL

Before the current Administration took office, the EPA[77] and several

large variety of perspectives are represented).

69. Noveck, *Electronic Revolution*, *supra* note 20, at 442.

70. *See* Benjamin, *supra* note 24, at 904.

71. *Id.*

72. *Id.* at 904–05.

73. *See* FARINA ET AL., *supra* note 10, at 24 (addressing the disagreements resulting from the lack of a hierarchical decisionmaking within the e-rulemaking initiative).

74. *See About Us: User Notice*, *supra* note 15 (advising users to view the *Federal Register* notice for additional information regarding individual agency submission requirements).

75. *Id.*

76. *See* FARINA ET AL., *supra* note 10, at 25 (noting that agencies have "emphatically different views" on whether to allow comments).

77. The EPA at one time considered registration as a means to resolve issues surrounding submission of Confidential Business Information (CBI). The EPA's pre-

outside observers had already suggested the implementation of some type of registration system.[78] However, few looked to the European Union for suggestions on improving rulemaking in the United States.[79] Nevertheless, Europe has had considerable success enticing interest groups to voluntarily register with its portal Web site, Your Voice in Europe. The eRulemaking Program should seriously consider implementing a two-tiered system based in part on the European Commission's system of conducting stakeholder consultations.

A. Point of Comparison: The European Commission's Public Consultations System

The European Commission's Your Voice Web site works much like its U.S. counterpart[80] and was designed with similar policy goals in mind.[81] The Web site's main page provides a list of recent regulatory proposals (called "consultations") that are open for public comment; a separate page on the Web site sorts these proposals by policy area to make searching easier.[82] After clicking on a specific consultation, the user is then taken to a separate page that provides basic information about the proposed action and includes links and instructions on how to submit comments (called

registration system would have allowed registered users to fill out a "CBI comment form" indicating that the comment should not appear on Regulations.gov. *See* FARINA ET AL., *supra* note 10, at 13 n.17. Noveck recommends a similar system, whereby users could label comments or attachments as CBI. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 487. The public would be unable to view these attachments but could see that they were submitted and labeled as CBI, thereby preserving transparency. *Id.* However, the current practice is to not treat any submission to Regulations.gov as CBI; rather, agencies lay out any special procedures for submitting CBI in the *Federal Register* notices accompanying the proposed rules. *See About Us: User Notice*, *supra* note 15.

78. Noveck suggests creating a dual-authentication system as a means to address privacy concerns. The system would register users' e-mail addresses with the agencies but hide them from the general public, enabling authentication of comments while protecting commenters from spammers and other malicious individuals. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 488–89.

79. One group that conducts research on this topic is the European Union Administrative Law Project, a group within the American Bar Association (ABA) Section of Administrative Law and Regulatory Practice. *See* Section of Administrative Law & Regulatory Practice, *European Union Administrative Law Project*, AM. BAR ASSOC., http://www.abanet.org/adminlaw/eu/home.html (last visited Nov. 3, 2010).

80. *See supra* note 34 and accompanying text.

81. "Openness and [a]ccountability" are two of the stated goals in the White Paper on European Governance, which requires the European Commission to disclose "who is being consulted and why" and "what has influenced decisions in the formulation of policy." *Consultation and Dialogue Report*, *supra* note 32, at 17.

82. *Your Voice in Europe, Open Consultations*, EUROPEAN COMM'N, http://ec.europa.eu/yourvoice/consultations/index_en.htm (last visited Nov. 3, 2010).

"contributions").[83] The Commission's consultations process is varied: some consultations request contributions through e-mail, allowing for completely user-generated comments, while other consultations direct users to complete detailed questionnaires.[84] These questionnaires provide background information on certain aspects of the proposed regulation and then ask a series of questions on each aspect.[85]

A unique feature of Your Voice is how it differentiates between individuals contributing in a private capacity and organizations representing special interests. Private individuals cannot register with the system but may still provide personal information when contributing to the Web site. However, before lobbyists and other organizations[86] are allowed to contribute, they are first brought to a registration screen where they are strongly encouraged to register their organizations with the Register of Interest Representatives.[87] Registrants must designate their organization as one of four categories: (1) "professional consultancies [or] law firms"; (2) "corporate lobby units ('in-house representatives') or trade associations"; (3) "NGOs and think-tanks"; or (4) a generic "other" category.[88] Registration requires submission of highly detailed information about the organization, and organizations must provide slightly different information depending on the category selected.[89] The procedure is completely voluntary,[90] and

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83. *Id.*

84. The Commission uses a web-based software program known as "Interactive Policy Making," which enables users to access and complete the questionnaires online using a common Web browser. *See Interactive Policy Making Online Consultation: How Does It Work?*, EUROPEAN COMM'N, http://ec.europa.eu/yourvoice/ipm/ipm_en.htm (last visited Nov. 3, 2010) (describing the "life-cycle" phases of the software).

85. *Compare Regional Policy – Inforegio: Consultation*, EUROPEAN COMM'N, http://ec.europa.eu/regional_policy/consultation/danube/consultation_en.htm (last visited Nov. 3, 2010) (requesting contributions via e-mail), *with Mobility & Transport: Passenger Rights*, EUROPEAN COMM'N, http://ec.europa.eu/transport/passengers/consultations/2010_03_01_apr_legislation_en.htm (last visited Nov. 3, 2010) (containing a link to a detailed online questionnaire).

86. The Commission defines "lobbying" as "all activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions." *Commission Green Paper*, *supra* note 34, at 5. The Commission defines "lobbyists" as "persons carrying out such activities." *Id.*

87. Interested parties submitting contributions to the system should also follow these guidelines and disclose "which interests they represent" and "how inclusive that representation is," but ultimately need not do so. *Consultation and Dialogue Report*, *supra* note 32, at 17.

88. *European Transparency Initiative (ETI)—Frequently Asked Questions (FAQ) on the Commission's Register for Internet Representatives*, EUROPEAN COMM'N, 3, http://ec.europa.eu/transparency/docs/reg/FAQ_en.pdf (last visited Nov. 3, 2010).

89. For examples of the various registration forms, see *Register of Interest Representatives*, EUROPEAN COMM'N, https://webgate.ec.europa.eu/transparency/regrin/infos/

anyone who chooses not to register may still contribute as a private citizen.[91]

The Register has three additional noteworthy features. First, anyone who chooses to register must accept the Commission's Code of Conduct, which requires that registrants "identify themselves by name" and "declare [their] interests," provide accurate information, abstain from dishonest attempts to collect information, and adhere to other specified standards of conduct.[92] Second, the Commission provides for enforcement of the provisions in the Code of Conduct and investigations of alleged violations of the Code.[93] Sanctions include "suspension or exclusion from the Register."[94] Anyone registered in the system can file complaints against other registrants for alleged misconduct.[95] Although the exact procedures for the complaint process are not yet finalized,[96] the Commission reviewed ten allegations of Code of Conduct violations that led to four hearings on possible violations in one year of the Web site's operation.[97] None of these cases resulted in formal sanctions, but one registrant agreed to briefly suspend its activities on the system.[98] Third, the Commission often requests feedback from interest groups that it recognizes as integral to the subject matter on which the proposal is based, thereby making those groups a more important component to the policymaking process and enhancing

howtoregister.do (last visited Nov. 3, 2010).

90. *See Communication from the Commission: Follow-up to the Green Paper "European Transparency Initiative,"* at 4, COM (2007) 127 final (Mar. 21, 2007), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0127:FIN:EN:PDF (accepting a voluntary approach to registration rather than a compulsory one).

91. *See id.* ("[I]f [the requested] information is not provided, submissions will be considered as individual contributions.") (citation omitted).

92. *High-Level Working Group on a Common Register and Code of Conduct for Lobbyists: Joint Statement Regarding the Progress Achieved to Date,* EUROPEAN COMM'N, 3–4 (Apr. 22, 2009), http://ec.europa.eu/commission_2010-2014/sefcovic/documents/transparency/code_of_conduct_lobby_en.pdf.

93. *Id.* at 4.

94. *Id.*

95. *Id.*

96. The Commission restated its goal to further clarify the enforcement mechanisms for the Code of Conduct in a May 6, 2010 press release. Press Release, European Comm'n, Commission and Parliament Relaunch Work Towards a Common Register and Code of Conduct for Lobbyists (May 6, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/544&format=HTML&aged=0&language=EN&guiLanguage=en.

97. *Communication from the Commission to the European Parliament and the Council, European Transparency Initiative: The Register of Interest Representatives, One Year After,* at 8, COM (2009) 612 final (Oct. 28, 2009) [hereinafter *European Transparency Initiative: One Year After*], *available at* http://ec.europa.eu/transparency/docs/communication_2009_en.pdf.

98. *Id.*

collaboration.[99]

So far, the Register has had considerable success. Around 3,063 organizations have already registered,[100] and that number will continue to grow as the Register's coverage nears its full potential.[101] Two years after the Register's creation, the Commission and the European Parliament (Parliament) have recommenced their plans to establish a "common register" for both governing bodies,[102] which would likely lead to a sharp increase in registration. The Commission views this growth as an indication that the voluntary registration method is successful and should continue.[103] This success has resulted from public acceptance of the Register as "a normal step" for contributing to European Union policymaking, efforts by staff members to promote its use, and self-regulation on the part of professional associations and lobbyist groups.[104]

B. European Imports: Defining the Scope of the "Your Voice" Model Stateside

Considering the success of the Commission's Your Voice Web site, the eRulemaking Program should consider adopting certain design features

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99. *See* STRAUSS ET AL., *supra* note 36, at 79–80 (listing, by way of example, proposals regarding "Employment and Social Affairs" that were conducted with "employers' organizations and trade unions").

100. *Register of Interest Representatives*, *supra* note 34. *But see Transparency Still Out of Sight on Lobby's Second Anniversary*, ALLIANCE FOR LOBBYING TRANSPARENCY & ETHICS REGULATION (June 23, 2010), http://www.alter-eu.org/press-releases/2010/06/23/eu-lobby-register-at-2-year-anniversary (claiming that less than 50% of lobbyists based in Brussels signed up for the Register).

101. *European Transparency Initiative: One Year After*, *supra* note 97, at 2.

102. Press Release, European Comm'n, *supra* note 96. If this were to occur, the Commission's Register would likely merge with the Parliament's list of accredited lobbyists. Parliament requires lobbyists to publicly register their names and the names of their lobbying firms. European Parliament Rules of Procedure r. 9(4), July 2010. In addition, they must adhere to a code of conduct that requires them to provide "the interests they represent" and abstain from dishonest conduct, among others. *Id.* at app. X, art. 3(1). Parliament can deny renewal of access passes to any lobbyist who violates these rules. *Id.* at art. 1(2).

103. *European Transparency Initiative: One Year After*, *supra* note 97, at 2. Trade associations and "in-house" lobbyist groups posted the highest registration numbers, whereas law firms and think tanks posted markedly lower numbers. *Id.* at 2–3. Law firms tend to view registration as conflicting with their client confidentiality obligations; however, the Commission believes that lawyers can disclose clients that they represent in lobbying capacities while maintaining confidentiality for clients they represent in court proceedings. *Id.* at 3. On the other hand, think tanks do not want to be associated with for-profit enterprises, a claim that the Commission expresses no sympathy toward. *Id.* Although interesting, both of these topics are outside the scope of this Comment and will not be covered in any more detail.

104. *Id.* at 3–4.

from that system to help it achieve the Obama Administration's goals of public participation, transparency, and collaboration,[105] while also addressing the problems raised in the previous section. The eRulemaking Program should adapt each of the three features discussed above for the new MyRegulations.gov homepage.[106] To encourage registration, these features should be designed to maximize the incentives for registration, particularly for interest groups.

1. A Registry for Participating Interest Groups

The primary feature of MyRegulations.gov should be an online registry for interest groups similar to the registry used in the European model. As described above, the registration system should contain two tiers, one for private individuals and one for interest groups. The system should be voluntary, meaning that anyone can still use Regulations.gov without registering.[107] The system also should standardize what information agencies request from registrants on each tier and make publicly available online, while granting agencies the discretion to request additional information on a voluntary basis. The type and amount of information requested from second-tier registrants should be greater than that requested from first-tier registrants.

The eRulemaking Program should solicit minimal information from all first-tier registrants to preserve their privacy[108] and ensure that the system does not create disincentives to participation.[109] These registrants should be required to submit their names, e-mail addresses, and city and state of residence, but only their names and locations (city and state only) should be disclosed to the public and only when they submit comments. Registrants

105. *See Consultation and Dialogue Report*, *supra* note 32, at 3–4 (establishing governing principles for the Commission's consultation process that incorporate its goals of enhancing public participation and transparency).

106. *See supra* notes 20–21 and accompanying text.

107. The European model has successfully registered users on a voluntary basis. As illustrated above, the number of lobbying organizations in the EU that have registered is already over the 3,000 mark after only one year of operation. *See supra* note 100 and accompanying text.

108. Information such as Social Security numbers, credit card or bank account numbers, or other sensitive information should not be requested.

109. For example, a proposed rule on Regulations.gov does not require any personal information, but only suggests commenters submit their name and the name of their organization. *See Submit a Comment*, REGULATIONS.GOV, http://www.regulations.gov/search/Regs/home.html#home (last visited Nov. 3, 2010) (select the "Submit a Comment" hyperlink; then from the "Select a Document Type" menu, choose "Proposed Rule"; select "Search"; from the results column, choose any "Submit a Comment" hyperlink to view the comment submission form).

on this tier could also elect to disclose additional demographical information—such as age, sex, education, and income level—on any comment they submit, or elect to keep that information confidential. Registrants on this level should also have the option to create unique user names to preserve their anonymity, if desired,[110] which is similar to the current registration system for the Regulations.gov Exchange.[111]

In contrast, the eRulemaking Program should solicit ample information from second-tier registrants to maximize the transparency of their impact on the rulemaking process. These registrants should be required to submit the name of the individual applying, the name of the organization, the organization's business address, the name of the head of the organization, and possibly even relevant financial information of their company.[112] The eRulemaking Program should create online profiles for each organization containing this information and link a registrant's profile to any comments submitted by that registrant. In addition, a complete record of all second-tier registrants containing links to each registrant's profile should be assembled and placed on Regulations.gov. Lastly, profiles should include full records of past comments submitted by each registrant, complete with hyperlinks to those comments, to provide full transparency of the agendas for each organization.

2. *A Common Code of Conduct and Enforcement Mechanisms*

The eRulemaking Program should lead the way in developing a code of conduct for all registered users of Regulations.gov, following the Commission's code as a model.[113] Creating a code of conduct would increase public accountability by informing the public of the proper way to use the system.[114] The code should specifically define spam commenting and strongly discourage such conduct. It should also explicitly mention

110. By allowing creation of user names, agencies could enable users to comment anonymously by displaying the user name rather than the commenter's actual name. But the agency would still have access to the commenter's identity, thereby preserving accountability in the event that the comment violates the code of conduct. *See also* FARINA ET AL., *supra* note 10, at 25 (stating that agencies' views toward anonymous commenting vary considerably).

111. *See Registration*, REGULATIONS.GOV, http://www.regulations.gov/exchange/user/register (last visited Nov. 3, 2010).

112. *See European Transparency Initiative: One Year After*, *supra* note 97, at 5–6 (explaining the benefits of improved registration disclosure guidelines that promote greater transparency between the Commission and the registrants).

113. *See supra* note 92 and accompanying text.

114. This feature could supplement the current User and Privacy Notices. *See About Us: User Notice*, *supra* note 15.

other potential legal challenges to e-rulemaking, such as privacy concerns and copyright issues. The code should be created using public feedback, similar to OMB's solicitation of feedback during the Open Government Initiative to ensure maximum collaboration and compliance by users.[115]

To enforce the code of conduct, the eRulemaking Program should take responsibility for overseeing the comment system. It should implement a system that will warn individuals and organizations caught violating the code that continued action could result in banning them from Regulations.gov, and create procedures for implementing such a ban.[116] For less severe violations, the Program could decline to post the comment on the Web site and, instead, post a notice that states the nature of the violation and identifies the violator. Each registrant's profile could include a tally of violations and links to these descriptions to serve as a disincentive to violate the rules. In addition, agencies should actively encourage registered groups to self-regulate their participation in e-rulemaking. Registrants should be allowed to flag comments that violate the code of conduct and report offenders to the Program.[117] In this way, interest groups and other organizations will have a stake in the process, increasing accountability and collaboration.

3. *Consultative Processes to Engage Interest Groups*

The eRulemaking Program should actively solicit detailed feedback from registrants through various methods to provide incentives to registration and promote collaboration. First, agencies could post lengthy questionnaires on proposed rulemakings on Regulations.gov and allow registered users to complete these questionnaires. This feature would serve a dual purpose: it would allow agencies to focus public feedback on certain areas of their proposals and provide registrants more opportunities to make their voices heard. The eRulemaking Program should also implement other innovative online tools not found in the Commission's Web site, such

115. *See supra* notes 16–19 and accompanying text.

116. One potential problem with this method of enforcement is that enforcement measures could raise due process concerns. As a result, OMB could be required to provide hearings for registrants whose rights to use the system have been taken away. Thus, banning users should not be the primary enforcement method used by the eRulemaking Program, but a last resort to be used only in instances involving extreme abuse of the system.

117. This proposal is similar to the idea of "signing onto a comment," whereby a commenter can express approval for a comment without associating himself with the author of that comment. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 484 (suggesting that participants should be allowed to comment on a rule in whole or in part so as to allow more specified and direct commenting).

as message boards and "wikis" on proposed rules.[118] Online tools would be even more useful if agencies used them to collect feedback before initiating a rulemaking. These efforts could even replace advanced notices of proposed rulemaking that are published in the *Federal Register*.[119]

4. *Optimum Customization Options for Regulations.gov*

Lastly, agencies should provide additional incentives to promote registration, particularly by interest groups. Registered groups should be allowed to provide feedback on other comments and commenters directly to the agency. Threaded comments—a form of commenter feedback in which users may comment on preceding comments—have been proposed as a method that would permit such feedback; this method is commonly seen on online message boards.[120] Registrants could also submit positive or negative feedback about other commenters, creating a user feedback rating that would be visible to the public.[121] Such a system would have the added benefit of providing agencies with a general idea as to which commenters submit "helpful" comments and which do not. While feedback ratings would not be taken as gospel, they could be another tool to help agencies sort through the thousands of comments submitted for each rulemaking.

III. PRACTICAL IMPLICATIONS OF THE TWO-TIER MODEL

A. *Looking on the Bright Side: Benefits of the System*

The two-tiered registration system provides a number of practical benefits to federal agencies, interest groups, private citizens, and society as a

118. The government is increasingly turning to online tools such as wikis to solicit information from stakeholders. For example, the "Wikified Field Manual" is a collaborative Web environment used by the U.S. Army, modeled after Wikipedia.com, that enables various military members to post "instructions for soldiers on all aspects of military life" online. OPEN GOVERNMENT REPORT, *supra* note 7, at 4–5.

119. *See* Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 317–18 (1998) (describing the process of providing notice of legislative changes and the measures taken to solicit public input).

120. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 489 (arguing that threaded comments would allow for "greater deliberation and responsiveness" and also lower the total number of comments submitted).

121. *See* Benjamin, *supra* note 24, at 899–900 (recommending creation of a system to allow commenters to endorse other comments by rating them on a scale of one to ten). This type of rating system is seen on eBay to rate buyers and sellers, making users accountable for their interactions on the site and providing other users with insight on the potential trading partners. *See Help: How Feedback Works*, EBAY.COM, http://pages.ebay.com/help/feedback/howitworks.html (last visited Nov. 3, 2010).

whole. Agencies benefit because these innovations are designed to increase public participation and collaboration, which boost the quantity and quality of comments, respectively.[122] With more and better quality comments, agencies would be able to promulgate more efficiently rules that consider a wider variety of viewpoints. Similarly, these rules conceivably have broader public support and are less likely to be challenged in court. Finally, registration would discourage submission of spam comments by raising the cost of submission, helping to reduce inefficiency in the process.[123]

Likewise, interest groups and private citizens also have much to gain with this system. Registration for tier-one registrants would be quick, likely taking up no more time than registration for any other common Web site.[124] While registration for interest groups would take significantly more time to complete, each group would only have to register once. Moreover, once registered, each of these groups could take advantage of the system's unique customization options and have additional opportunities to submit meaningful feedback to the agencies, as proposed above.

Finally, society as a whole would be served by the increased transparency regarding the role that interest groups play in the rulemaking process and the heightened quality of regulations that agencies would promulgate. The public would have new tools to better understand biases that interest groups may possess. Also, additional legal issues such as privacy concerns,[125] violations of copyright laws,[126] and disclosure of confidential business information[127] could more easily be addressed.

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122. *See supra* notes 21–25 and accompanying text.

123. This benefit is necessarily diminished in a voluntary registry, but the benefits of registration would likely encourage most users to register, regardless.

124. For example, registration for the Regulations.gov Exchange is quick and simple, requiring only a few pieces of user information. *See* REGULATIONS.GOV EXCHANGE, *supra* note 19.

125. Malicious software programs might be capable of locating names and e-mail addresses attached to comments posted online. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 488–89 (discussing the abuse of open access by "spambots" and other data harvesting programs).

126. *See generally* Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1472–74 (2002) (explaining that copyright issues come in two forms: when commenters submit their own copyrighted material and when commenters submit material to which others own the copyright without the permission of the copyright holders).

127. *See* Noveck, *Electronic Revolution*, *supra* note 20, at 487 ("[A]ccidental distribution of nonpublic materials over the Internet . . . could create a disincentive to participation in the process and delegitimize online rulemaking . . . .").

B. *Nothing Is Perfect: Costs of the System*

As with any system, there are bound to be some costs and shortfalls to it. The primary costs that a two-tier registration system would incur are the time and resources spent creating the system, encouraging entities to register, maintaining the collected information, and monitoring activity occurring on the site. Creation of the software for such a system should not be too much more costly than what has already been spent. The eRulemaking Program has already created a registration system for the Regulations.gov Exchange, and that system will likely serve as the basis for the MyRegulations.gov system. Most of the remaining features of the system would likely require creating moderately simple software programs. Agencies would likely have to increase electronic data storage capacities, however, to accommodate the large influx of registrants, which would probably require dedicating and maintaining new servers. Also, agency officials would likely spend significant amounts of their time managing these new processes.

Some measures could be taken to minimize these costs. Agencies could focus initial registration efforts on organizations, which are far fewer in number than private citizens. Agencies already expend some resources to combat spam commenting and to process information provided during rulemakings. However, if the registration system succeeded in reducing spam comments, it would free up some of these resources. Also, by gathering and storing information about entities that repeatedly use the system to submit comments, these efforts might be reduced over time.

Another possible drawback is that interest groups would simply ignore the call to register, or else register their organizations but then submit comments through shadow entities to obscure their use of the e-rulemaking system. For example, a lobbying firm could register with the site but then submit comments through an unregistered sister organization or affiliated group. In this way, the transparency benefits of the system would be undermined.

Agencies might not be able to take any direct action against such efforts; however, the Administration is attempting to create a culture where openness and transparency are the norms. Agencies could follow suit by explaining that registration is a normal procedure that does not harm registered entities. Alternatively, it could be seen as a publicized list of accomplishments for each interest group, as they are lending their expertise for the betterment of the rulemaking process. In addition, many groups, particularly nonprofits, already make much of the information that would be registered with the system available. Thus, the process of centralizing this data does not reveal anything more about these entities but simply

makes this information more accessible.

Finally, it seems likely that the loss of privacy to registrants inherent in this system would create widespread distrust of the system. Technology can minimize these privacy concerns, however, while maximizing the incentives to participate in the new system. For example, by encrypting and restricting access to sensitive information, agencies can authenticate comments and increase the accountability of commenters while still protecting their privacy. Although the current system pays little heed to privacy interests,[128] technology can be better tailored toward making users aware of the existing policies.[129] Such awareness could actually yield a net increase in users' privacy interests by alerting users of the potential consequences of participation.

CONCLUSION

Electronic rulemaking has opened the door of possibility for numerous technological innovations designed to increase public participation, transparency, and collaboration in agency policymaking. Although the Obama Administration has taken significant steps to harness these innovations, they fall short of recognizing the crucial role that interest groups play in rulemaking. Redesigning MyRegulations.gov as a voluntary two-tiered registration system—modeled to some extent after the European Commission's Register of Interest Representatives—would address this primary concern, while creating numerous incentives for interest groups and private individuals to register with the system and participate in the process. The system would focus on increasing the quality of comments, thereby increasing participation, as well as promoting transparency in the process. Additional measures could be put in place to promote collaboration and deter misuse. The major downside to the system is the cost it imposes on agencies. But the benefits outweigh the costs, and over time, the cost of implementing the system could pay for itself. In light of these benefits, the eRulemaking Program should seriously consider implementing a two-tier registration system.

128. Regulations.gov only has one generic privacy notice for all rulemakings conducted on the site. *See About Us: User Notice*, *supra* note 15.

129. For example, Your Voice in Europe includes a detailed "Personal Data Protection" notice and requires issuance of specific privacy statements for each consultation. *Legal Notice*, EUROPEAN COMM'N, http://ec.europa.eu/geninfo/legal_notices_en.htm#personaldata (last visited Nov. 3, 2010). Through these measures, the Commission has undertaken a more comprehensive effort to protect privacy than Regulations.gov.

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