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Report to the Committee on Governmental Affairs, U.S. Senate

September 2003

ELECTRONIC RULEMAKING

Efforts to Facilitate Public Participation Can Be Improved

GAO-03-901

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GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-03-901, a report to the Committee on Governmental Affairs, U.S. Senate

Why GAO Did This Study

Information technology can greatly facilitate the public's ability to comment on proposed rules that affect them. The E-Government Act of 2002 made the Office of Management and Budget (OMB) responsible for overseeing electronic government initiatives. We examined the extent to which agency-specific Web sites and the new governmentwide Regulations.gov Web site permit the public to electronically (1) identify proposed rules that are open for comment, (2) comment on proposed rules, and (3) access regulatory supporting materials (e.g., economic analyses) and the comments of others.

What GAO Recommends

This report contains recommendations intended to improve the public's awareness of rules open for comment and the Regulations.gov system, and to improve the operation of Regulations.gov. OMB generally agreed with the report's recommendations and indicated that actions had already begun to address some of them. EPA expressed concerns about how the report characterized its Web site but expected to implement our recommendations regarding Regulations.gov.

www.gao.gov/cgi-bin/getrpt?GAO-03-901.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Victor Rezendes at (202) 512-6806 or rezendesv@gao.gov.

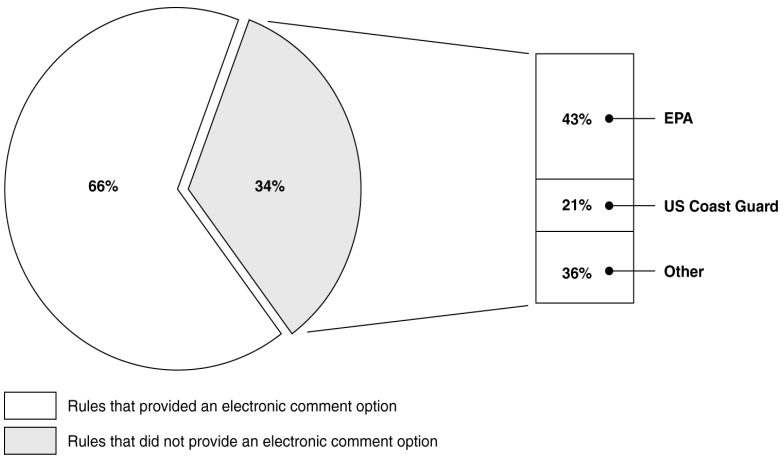
What GAO Found

The Web sites for the Environmental Protection Agency (EPA), the lead agency for the administration's electronic rulemaking initiative, and the Department of Transportation (DOT) each identified only about 20 percent of the agencies' proposed rules that were published from February 2003 through April 2003 and that were open for comment on May 1, 2003. However, a Web site for an agency within DOT identified most of the department's other rules. Neither the EPA nor the DOT systems were originally designed to include rules originating outside of the agencies' headquarters offices. The Department of Agriculture's Web site did not identify open proposed rules, but Web sites for agencies within the department collectively identified almost all of the rules. The Regulations.gov Web site identified nearly all of these agencies' open proposed rules, but its design sometimes made finding the rules difficult.

Regulations.gov allowed the public to provide electronic comments (e-comments) on about 91 percent of the 411 proposed rules that were published during this 3-month period. In contrast, the rulemaking agencies provided for e-comments in only about 66 percent of the rules. Some agencies (e.g., EPA) did not provide for e-comments in most of their proposed rules. Where agencies permitted e-comments, the methods provided varied. Only 2 of the 411 proposed rules mentioned Regulations.gov as a commenting option. Perhaps, as a result, few comments were submitted via Regulations.gov during this period.

Some agencies permitted the public to access regulatory supporting materials for some of their proposed rules. Although Regulations.gov did not permit access to these materials, EPA officials said such access would be available when the second module of the electronic rulemaking initiative is fully implemented (by the end of 2005).

About One-Third of Proposed Rules Did Not Permit E-Comments



Source: GAO.

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GAO
Accountability * Integrity * Reliability

United States General Accounting Office
Washington, D.C. 20548

September 17, 2003

The Honorable Susan M. Collins
Chairman
The Honorable Joseph I. Lieberman
Ranking Minority Member
Committee on Governmental Affairs
United States Senate

Each year, federal agencies publish thousands of regulations that can affect almost every aspect of citizens' lives—from allowing a fireworks display over the Columbia River in Vancouver, Wash., to registering food facilities in light of the potential for bioterrorism.[1] The public can play a role in the rules that affect them through the notice and comment provisions of the Administrative Procedure Act of 1946, as amended. In fact, involvement of the public in rulemaking has been described as possibly "the most complex and important form of political action in the contemporary American political system."[2] However, in order to be involved in rulemaking effectively, the public must be able to (1) know whether proposed rules are open for public comment, (2) prepare and submit comments to relevant decisionmakers, and (3) access regulatory supporting materials (e.g., agencies' economic analyses) and the comments of others so that their comments can be more informed and useful.

Information technology (IT) can greatly enhance the public's ability to accomplish each of these comment-related tasks, and can also improve federal agencies' ability to analyze and respond to those comments. In June 2000, we reported on agencies' initial efforts to use IT to facilitate public participation in rulemaking.[3] Since then, there have been several legislative and executive branch initiatives in this area. For example, Congress enacted the "E-Government Act of 2002," which contained

[1]*Safety Zone; Fort Vancouver Fireworks Display, Columbia River, Vancouver, WA* (68 Fed. Reg. 7471, Feb. 14, 2003) and *Registration of Food Facilities Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002* (68 Fed. Reg. 5378, Feb. 3, 2003).

[2]Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy, Second Edition* (Washington D.C.: CQ Press, 1999).

[3]U.S. General Accounting Office, *Federal Rulemaking: Agencies' Use of Information Technology to Facilitate Public Participation*, GAO/GGD-00-135R (Washington, D.C.: June 30, 2000).

several provisions specifically designed to encourage electronic rulemaking ("e-rulemaking"). In 2001 the administration identified e-rulemaking as one of about two dozen governmentwide electronic government ("e-government") initiatives being directed by the Office of Management and Budget (OMB). As a result of a study of existing government on-line rulemaking systems, the Environmental Protection Agency (EPA) was named the lead agency for the e-rulemaking initiative in late 2002. As the first module of the initiative, in January 2003 the administration launched a Web site at www.regulations.gov (Regulations.gov), which allows the public to find and submit comments on federal rules and other documents that are open for comment and published in the *Federal Register*. Although some agencies had previously established Web sites that identified open rules and permitted the public to comment electronically, the Regulations.gov Web site was the first to facilitate both of these functions governmentwide.[4] The second module of the e-rulemaking initiative will move beyond rule identification and commenting by establishing a governmentwide electronic docket management system into which all relevant regulatory supporting materials and public comments will be placed. The third and final module will create an electronic regulatory desktop to facilitate the rule development process.

In response to your requests and as a follow up to our previous report, we examined the public's ability to participate in the rulemaking process electronically in the wake of these efforts. Specifically, our objectives were to examine the extent to which individual agencies and the new governmentwide Regulations.gov Web site permit the public to electronically (1) identify proposed rules that are open for comment, (2) comment on proposed rules, and (3) access regulatory supporting materials and the comments of others.

[4]The National Archives and Records Administration previously developed a "Federal Register E-Docket" system to identify rules open for comment, but that system did not permit the public to submit comments directly. That system served as the foundation for Regulations.gov.

A detailed description of our methodology is provided in appendix I. Briefly, we focused most of our review on the 411 proposed rules that were published in the *Federal Register* from February 1, 2003, through April 30, 2003 (the first 3 full months that the Regulations.gov Web site was in operation).[5] Three agencies—EPA, the Department of Transportation (DOT), and the Department of Agriculture (USDA)—accounted for more than half of these proposed rules.[6] To address our first objective, we determined how many of these three agencies' proposed rules that were published during that 3-month period and open for comment as of May 1, 2003, were identified on the agencies' and the Regulations.gov Web sites as open for comment. To address our second objective, we determined how many of the 411 proposed rules provided the public with an electronic commenting option (e.g., an e-mail address to which comments could be submitted) and how many could be commented on via Regulations.gov. To address our third objective, we reviewed selected agencies' electronic docket systems and the Regulations.gov Web site to determine whether they permitted the public to identify regulatory supporting materials and the comments of others.[7] We did our work in the Washington, D.C. offices of the three selected agencies and OMB from February 2003 through June 2003 in accordance with generally accepted government auditing standards.

Results in Brief

EPA's Web site identified only about 20 percent of the agency's proposed rules that were published from February 2003 through April 2003 and that were open for comment as of May 1, 2003. DOT's Web site also identified only about 20 percent of the department's open proposed rules, but a separate, newly-created link on the Web site for an agency within the department listed most of the remaining rules. Neither the EPA system nor the DOT system was originally designed to include rules originating outside

[5]As explained more fully in appendix I, this total does not include certain items published in the proposed rules section of the *Federal Register*. For example, it does not include advance notices of proposed rulemaking, extensions of ongoing comment periods, and rules without specified comment periods and on which comments were not expected *(e.g.*, notices of data availability and notices of public meetings).

[6]Unless otherwise indicated, "agencies" in this report refers to both cabinet departments and independent agencies.

[7]As used in this report, a rulemaking "docket" is the official repository for documents or information related to an agency's rulemaking activities, and may include any public comments received and other information used by agency decision makers.

of the agencies' headquarters offices. USDA's Web site did not list any of the department's proposed rules that were open for comment, but the Web sites for the agencies within the department collectively did so for most of the open rules. In contrast to these agencies' efforts, the Regulations.gov Web site identified nearly all of the DOT, EPA, and USDA proposed rules that were open for comment. However, the design of both Regulations.gov and the agencies' Web sites sometimes posed barriers to the identification of open rules.

About 66 percent of the 411 proposed rules that were published governmentwide during the relevant 3-month period provided some type of mechanism for the public to provide comments electronically. However, the agencies varied substantially in this regard. Some agencies provided an electronic commenting option in virtually all of their proposed rules (although the method of commenting often varied). Other agencies (e.g., EPA) did not allow electronic comments on most of their proposed rules. Regulations.gov permitted the public to comment electronically on about 91 percent of the agencies' proposed rules—including many of the rules for which the agencies themselves did not provide an electronic commenting option. However, only 2 of the 411 proposed rules published during this period mentioned Regulations.gov as a commenting option. Perhaps as a result, as of May 2003 relatively few comments had been submitted through Regulations.gov.

Several federal agencies (e.g., EPA and DOT) allowed the public to have electronic access to regulatory supporting materials and the comments of others for some of their proposed rules. Other agencies provided no electronic access to these supporting materials. Regulations.gov does not provide electronic access to regulatory supporting materials or the comments of others. EPA officials noted that Regulations.gov was not designed to provide that function. They said the second module of the governmentwide e-rulemaking initiative would, when fully implemented, permit users to access supporting materials and comments of others for all proposed rules. EPA currently expects such access to begin by the end of 2005.

In general, Regulations.gov more consistently allowed the public to both identify rules open for comment and provide electronic comments than the agency systems. However, certain changes could allow Regulations.gov to work better and be more widely used, thereby potentially increasing the public's ability to participate in rulemaking. This report contains recommendations intended to improve the public's awareness of rules

open for comment and the Regulations.gov system, and improve the operation of Regulations.gov. OMB generally agreed with the report's recommendations and indicated that actions had already begun to address some of them. EPA expressed concerns about how the report characterized its docket system but expected to implement our recommendations regarding Regulations.gov.

Background

The notice and comment requirements in the Administrative Procedure Act are codified in section 553 of title 5, United States Code. The act generally requires agencies to (1) publish a notice of proposed rulemaking (NPRM) in the *Federal Register*; (2) allow interested persons an opportunity to participate in the rulemaking process by providing "written data, views, or arguments;" and (3) publish the final rule 30 days before it becomes effective. The "addresses" section in the preamble of agencies' proposed rules tells the public how they can comment on the rules.

In June 2000, we reported on five federal agencies' initial efforts to allow the public to electronically participate in the rulemaking process.[8] We determined that all five of the agencies were using IT to allow the public to participate electronically in rulemaking, but that there were variations within and among the agencies in this regard. All of the agencies had Web sites that conveyed rulemaking information to the public and/or maintained some rulemaking records in electronic form. Several of the individuals and organizations that we contacted suggested that agencies move to a more consistent organization, content, and presentation of information to allow for a more common "look and feel" to agencies' IT-based public participation mechanisms in rulemaking. However, the agency representatives that we contacted did not believe that cross-agency standardization was either necessary or appropriate.

[8]GAO/GGD-00-135R.

Legislative and Executive Branch E-Rulemaking Initiatives

In recent years, Congress has taken a number of actions to promote e-government functions in general and e-rulemaking in particular. For example, the Paperwork Reduction Act of 1995 provides that the Director of OMB should promote the use of IT "to improve the productivity, efficiency, and effectiveness of Federal programs." [9] In 1998, Congress enacted the Government Paperwork Elimination Act (GPEA), which requires that by October 21, 2003, federal agencies provide the public, when practicable, with the option of submitting, maintaining, and disclosing information electronically, instead of on paper. [10] GPEA makes OMB responsible for ensuring that federal agencies meet the act's implementation deadline.[11] Although GPEA does not specifically mention rulemaking, both OMB and rulemaking agencies have indicated that its requirements have provided an impetus for developing IT-based approaches to regulatory management.[12]

The E-Government Act of 2002[13] has been described as "the most far-reaching federal government effort to date for promoting online public involvement,"[14] and contains requirements specific to rulemaking. Section 206 of the act requires agencies, to the extent practicable, to accept public comments on proposed rules "by electronic means." That section also requires agencies (again, to the extent practicable) to ensure that a publicly accessible federal Web site contains "electronic dockets" for their proposed rules. The dockets are required to contain all comments submitted on the rules as well as "other materials that by agency rule or

[9]44 U.S.C. 3504(h)(5).

[10]44 U.S.C. 3504 note.

[11]See U.S. General Accounting Office, *Electronic Government: Better Information Needed on Agencies' Implementation of the Government Paperwork Elimination Act*, GAO-01-1100 (Washington, D.C.: Sept. 28, 2001).

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

[13]44 U.S.C.A. 3601 note.

[14]Thomas C. Beierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation*, Discussion Paper 03-22 (Washington, D.C.: Resources for the Future, 2003).

practice are included in the rulemaking docket under section 553(c) of title5, United States Code, whether or not submitted electronically." The E-Government Act also established an Office of Electronic Government within OMB, headed by an Administrator appointed by the President.[15] The act requires the Administrator of that office to work with the Administrator of OMB's Office of Information and Regulatory Affairs in establishing the strategic direction of the e-government program, and to oversee its implementation. We have previously reported that OMB leadership of these efforts is extremely important to their success.[16]

The President has also demonstrated an interest in greater use of IT in a range of government functions, including rulemaking. For example, in July 2001 the President identified the expansion of e-government as one of the five priorities of his management agenda. To support this priority, OMB developed an implementation strategy that identified 24 e-government initiatives, one of which was e-rulemaking.[17] This initiative is intended to provide a single portal for businesses and citizens to access the federal rulemaking process and comment on proposed rules. In late 2002, EPA was named lead agency of the initiative.

As a first step in the e-rulemaking initiative, in January 2003 the administration launched the Regulations.gov Web site, which is intended to allow users to find, review, and submit comments on agencies' rules and other documents. According to its April 2003 e-government strategy, one of the administration's goals is to receive 200,000 electronic comments via Regulations.gov. The second module of the initiative involves consolidation of existing electronic docket systems into a governmentwide version of EPA's docket system. The administration said e-rulemaking would "democratize an often closed process," and estimated that the initiative would save nearly $100 million by creating a single docket system to access and comment on all federal agencies' rules and eliminating duplicative agency-specific docket systems.

[15]44 U.S.C.A. 3602.

[16]U.S. General Accounting Office, *Information Technology: OMB Leadership Critical to Making Needed Enterprise Architecture and E-government Progress*, GAO-02-389T (Washington, D.C.: Mar. 21, 2002).

[17]For a description of the other initiatives, see U.S. General Accounting Office, *Electronic Government: Selection and Implementation of the Office of Management and Budget's 24 Initiatives*, GAO-03-229 (Washington, D.C.: Nov. 22, 2002).

In May 2002 the Director of OMB sent a memorandum to the heads of executive departments and agencies advising them of "our intention to consolidate redundant IT systems relating to the President's on-line rulemaking initiative." Citing OMB's authority under the Clinger-Cohen Act of 1996, the Director said OMB had identified "several potentially redundant systems across the federal government that relate to the rulemaking process," and indicated that consolidation of those systems could save millions of dollars.

Regulations.gov Identified More Rules Open for Comment Than Major Rulemaking Agencies' Web Sites

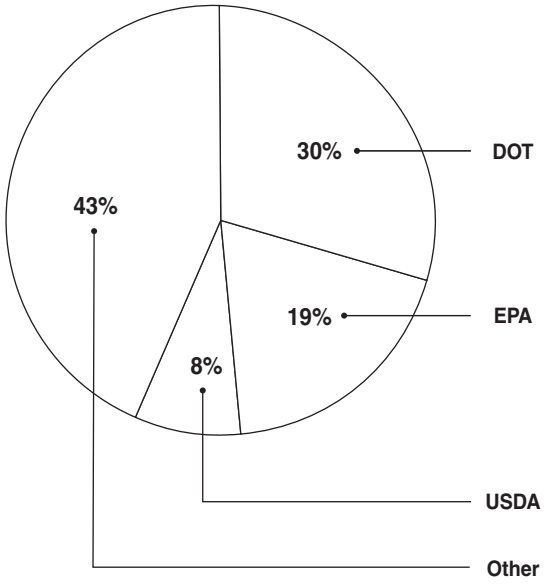
EPA's Web site identified only about 20 percent of the agency's proposed rules that were published from February 2003 through April 2003 and that were open for comment as of May 1, 2003. DOT's Web site also identified about 20 percent of the department's open proposed rules, but a separate, newly created link on a Web site for an agency within the department listed those rules. Neither the EPA system nor the DOT system was originally designed to include rules originating outside of the agencies' headquarters offices. USDA did not have a Web site that listed the department's proposed rules that were open for comment, but various Web sites for the agencies within the department collectively did so for most of the open rules. Regulations.gov identified nearly all of the DOT, EPA, and USDA proposed rules that were open for comment. However, the design of both Regulations.gov and the agencies' Web sites sometimes posed barriers to the identification of open rules.

Some Agency Web Sites Did Not Identify All Proposed Rules Open for Comment

From February 1, 2003, through April 30, 2003, federal agencies published 411 proposed rules in the *Federal Register*. As figure 1 shows, three agencies—DOT, EPA, and USDA—published more than half of these proposed rules (122, 78, and 34 rules, respectively).[18]

[18]See appendix II for a list of the other agencies that published proposed rules during this period.

Figure 1: Three Federal Agencies Accounted for More Than Half of the 411 Proposed Rules Published from February 2003 through April 2003



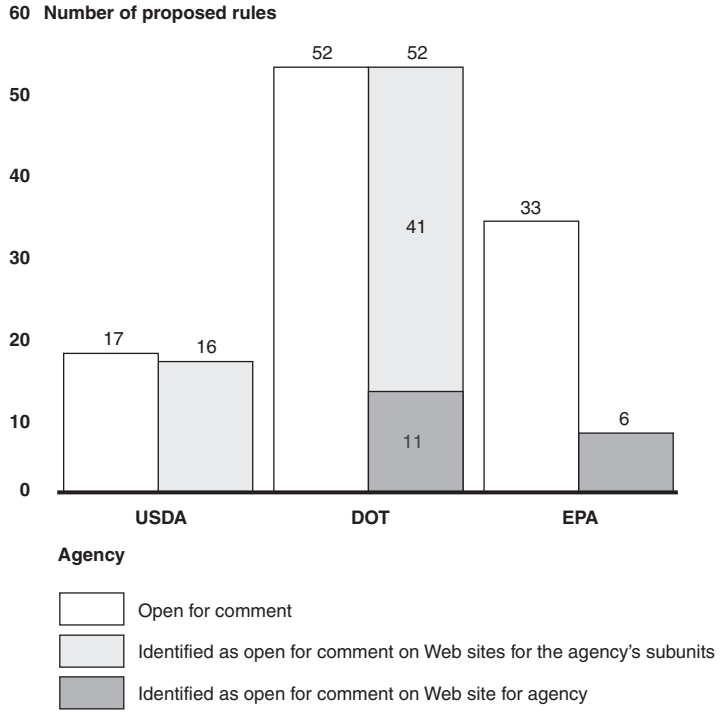
Source: GAO.

To determine the extent to which the three agencies' Web sites and Regulations.gov identified rules that were open for comment, we examined both types of lists on the day after the 3-month period ended—May 1, 2003. However, because the comment periods for some of the proposed rules published during this period were as short as 30 days, only about 44 percent of the rules for these three agencies were open for comment on that date. Specifically, 52 of the 122 DOT proposed rules were open for comment, 33 of the 78 EPA proposed rules were open, and 17 of the 34 USDA proposed rules were open.

The results of this portion of our review are depicted in figure 2. As discussed in detail in the following sections, DOT and EPA had links from their Web sites' home pages that ultimately allowed users to identify some of the proposed rules that were open for comment. USDA's Web site did not contain a link that identified rules that were open for comment throughout the department. However, the Web sites for most of the individual agencies within USDA provided links to lists that, in combination, identified 16 of the department's 17 proposed rules that had been published during the 3-month period and that were open for comment on May 1, 2003. DOT's departmentwide list only identified 11 of the 52

proposed rules that were open for comment, but a separate Web site for an agency within the department identified the 41 remaining open DOT proposed rules. EPA's Web site only identified 6 of the agency's 33 proposed rules that were open for comment and that had been published during the 3-month period. The Web sites for the individual offices within EPA did not identify additional proposed rules that were open for comment.

Figure 2: Three Agencies' Web Sites Varied in Ability to Identify Proposed Rules Published from February 2003 through April 2003 That Were Open for Comment on May 1, 2003



Source: GAO.

In some cases, the design of agencies' Web sites made it difficult to find proposed rules that were open for comment. Specifically, the Web sites sometimes (1) lacked a clear, direct link to proposed rules open for comment, (2) used terminology that did not clearly identify rules that were open for comment, and/or (3) required the public to know which agency within a department issued the proposed rule.

USDA

USDA did not have a link from its home page that allowed the public to identify proposed rules open for comment throughout the department. However, all but 2 of the 19 agencies within USDA had such links on their home pages. Using those links we were able to identify 16 of the 17 USDA proposed rules that were published from February 2003 through April 2003 and that were open for comment on May 1, 2003. Some of the USDA agencies directly provided a list of their open rules, but others (e.g., the Farm Service Agency and the Animal and Plant Health Inspection Service) simply provided a link to the lists available on Regulations.gov. Only one USDA agency did not have any type of link or list of open rules—the Cooperative State Research, Education, and Extension Service (CSREES). CSREES had one proposed rule published during the 3-month period that was open for comment on our target date.

Because USDA does not provide the public with a list of all proposed rules open for comment on its Web site, a member of the public would have to examine each USDA agency's list to know which rules within the department were open for comment. Also, if a member of the public wanted to find a particular USDA rule, the user would have to either know which agency within the department issued the rule or examine each agency's list within the department. In addition, the Web sites for some of the USDA agencies used terminology that could make it difficult to identify proposed rules open for comment. For example, the department's Food Safety and Inspection Service (FSIS) link to proposed rules open for comment was located within a link entitled "FSIS Notices or Directives." A member of the public may not know that a list of open proposed rules could be found under a "Notices or Directives" link.

DOT

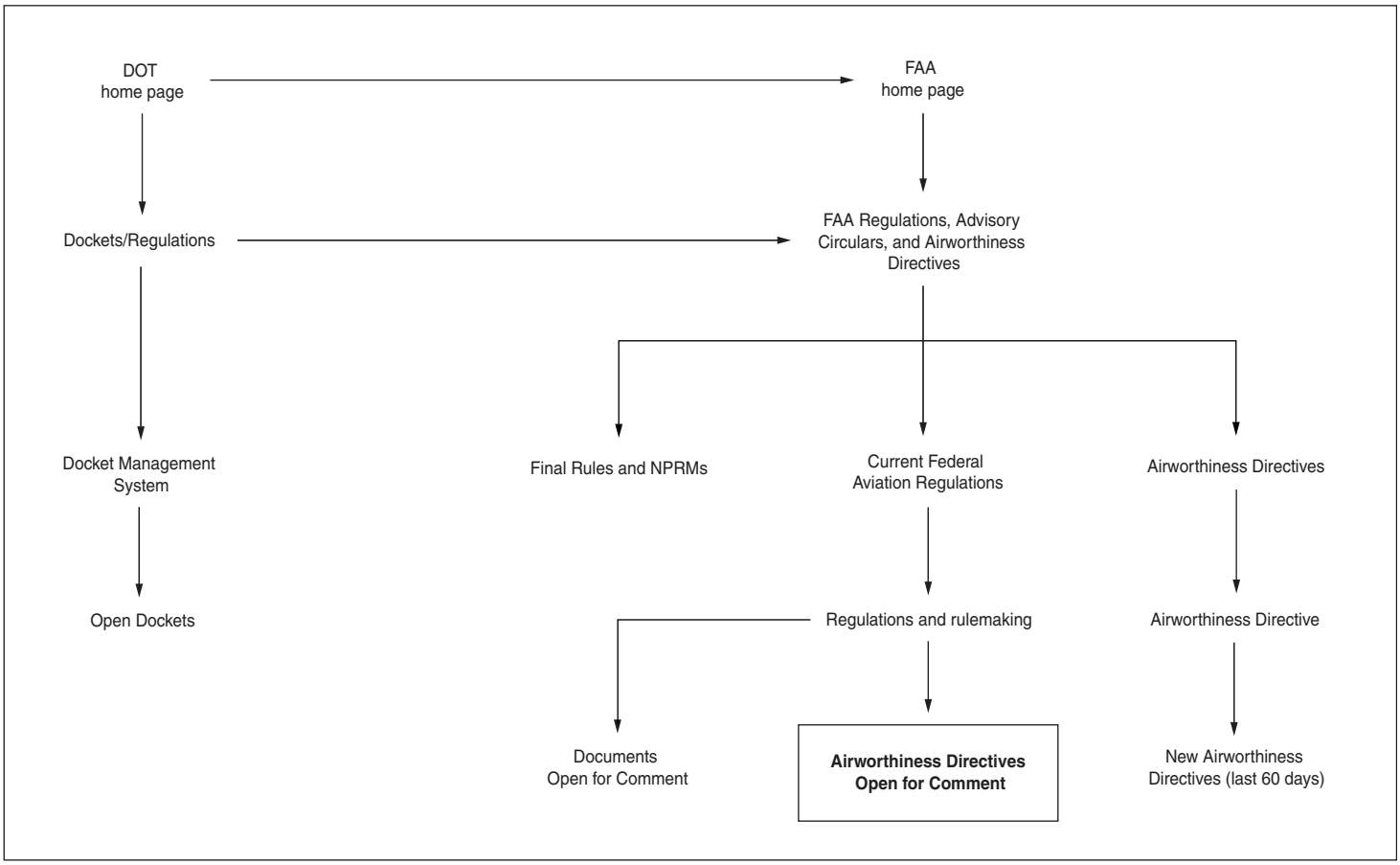
DOT's home page contained a link that ultimately led to a table of *Federal Register* items from various parts of the department for which public comments were being sought. However, using that table on May 1, 2003, we were able to identify only 11 of the 52 proposed rules that were published during the 3-month period covered by our review and that were open for comment as of that date. All of the 41 proposed rules that were not listed in the open dockets table were proposed airworthiness directives published by regional offices within the Federal Aviation Administration (FAA).[19] According to an FAA official, airworthiness directives were

[19]These directives originate in FAA's regional offices and are intended to correct an unsafe condition in a product, such as an aircraft or its engine or propeller, when this condition is likely to exist or develop in other products of the same design.

excluded from the department's docket management system primarily because manufacturers were concerned that if the directives were listed the public would have free access to proprietary information that was normally sold to them. However, the official said FAA had recently decided that the public's right to the information outweighed the manufacturers' concerns. As a result, FAA plans to put airworthiness directives in the department's document management system, so the directives would also appear in the open dockets table. Meanwhile, FAA added a page, "Airworthiness Directives Open for Comment," to its own Web site in April 2003.

Figure 3 illustrates the steps that the public must follow to find DOT's proposed rules open for comment through both the DOT and FAA Web sites. As the figure illustrates, finding DOT proposed rules that are not airworthiness directives is relatively easy. However, the list of open dockets provided through the DOT Web site created the impression that it contains all of the department's proposed rules, when in fact it excluded about 80 percent of them. Also, to locate the proposed rules that are missing from the list, a member of the public would first have to know to use the FAA Web site. Then, after accessing the FAA Web site, a user could take any of three paths—only one of which can be used to find a list of open airworthiness directives. The link on the FAA Web site for "Final Rules & NPRMs" lists agency rules that are not airworthiness directives (and that are also listed on the departmentwide system). The "Airworthiness Directives" link provides a list of new directives that have become final in the last 60 days, not proposed directives that are open for comment. Only the "Current Federal Aviation Regulations" link ultimately provides a list of airworthiness directives that are open for comment, but only after going through a "Regulation and Rulemaking" link and avoiding a "Documents Open for Comment" link.

Figure 3: Different Steps Required to Identify Airworthiness Directives and Other DOT Rules That Were Open for Comment



Source: DOT and FAA sites.

Also, although the departmentwide system is relatively straightforward, it requires the public to know that the term "docket" refers to (among other things) proposed rules. The DOT home page contained a link entitled "Dockets & Regulations," which contained a link to the department's docket management system."[20] That system, in turn, contained a link to "Open Dockets" that listed DOT *Federal Register* items open for comment (other than airworthiness directives). When we pointed out to DOT

[20]The DOT docket management system is an electronic, image-based database that stores on-line information about proposed and final regulations, copies of public comments on proposed rules, and related information for easy research and retrieval.

officials that a member of the public may not know that "Open Dockets" contains a list of proposed rules open for comment, they said the term "dockets" is used because the department's system includes more than just rules (e.g., adjudicatory proceedings).

EPA

EPA's home page contained a link that ultimately led to a list of certain EPA proposed rules and other documents that were open for comment. On May 1, 2003, that list included only 6 of the 33 proposed rules that were published from February 2003 through April 2003 and that were open for comment. The list did not include 6 rules issued by EPA headquarters offices and 21 state- and/or region-specific proposed rules that were issued by EPA regional offices—primarily state implementation plans (SIP) under the Clean Air Act.[21] EPA officials said these state- and/or region-specific rules were not on the agency's list of rules that were open for comment because the system was originally designed to include only rules that originated in EPA's headquarters, not those that originated in its regional offices. However, EPA officials said that efforts are currently under way to add regional office rules and other material to the system. They said the agency was conducting a pilot test in its Boston and Atlanta regional offices that is designed to add proposed SIPs to the agencywide list.

Like DOT, EPA uses the term "dockets" to guide users to rules open for comment. Specifically, EPA's home page contained a link entitled "Laws, Regulations, & Dockets," which leads to a link called "EPA Dockets." This link then leads users to another link called "View Open Dockets," which reveals a list of "Dockets Open for Comment." As we indicated previously, the public may not know that "dockets" includes a list of proposed rules. Also, at the time of our review the titles of these links suggested that they contained all EPA rules open for comment (when, as our work indicated, they did not).[22] Recently, EPA added a section to the top of its "EPA Dockets" page indicating that the system "currently contains only docket materials for EPA's major Headquarters programs. For a list of other EPA rules and proposed rules currently open for comment, visit

[21]EPA has set national air quality standards for six common air pollutants—ground level ozone (smog), carbon monoxide, lead, nitrogen dioxide, sulfur dioxide, and particulate matter. A SIP can be revised by a state when necessary to address the specific air pollution situation in the state.

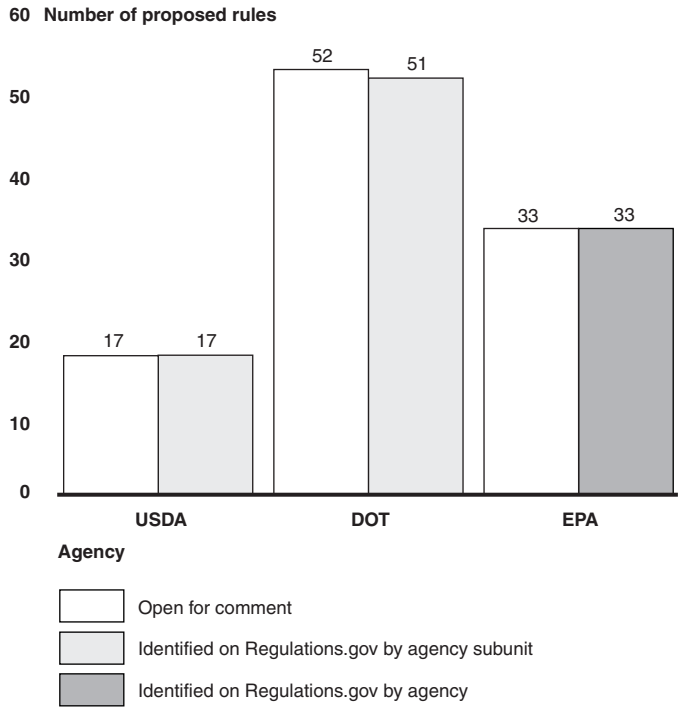
[22]EPA representative said another link on the agency's Web site ("About EDOCKET") indicated that the system contained only headquarters rules, and said the system was being phased in across EPA.

www.regulations.gov." EPA also recently noted on its "About EDOCKET" Web page that it "contains Headquarters regulatory and non-regulatory dockets and documents," suggesting (although not specifically stating) that it does not contain regional office material.

Regulations.gov Identified More Proposed Rules Open for Comment Than Major Rulemaking Agencies' Web Sites

As figure 4 shows, Regulations.gov listed 101 of the 102 USDA, DOT, and EPA proposed rules that were published between February 2003 and April 2003 and that were open for comment as of May 1, 2003. Although Regulations.gov was, in general, more comprehensive than the three major rulemaking agencies' Web sites, we concluded that users could face difficulty finding these open rules on the governmentwide site because of limitations related to its design and operation.

Figure 4: Regulations.gov Identified Almost All of the USDA, DOT, and EPA Proposed Rules Published from February 2003 through April 2003 That Were Open for Comment on May 1, 2003



Source: GAO.

One such limitation was that Regulations.gov did not allow users to obtain a list of all rules open for comment within a cabinet department, only by agency within departments. For example, clicking on "Agriculture Department" within Regulations.gov produced a list of links to 10 different agencies within USDA (e.g., the Agricultural Marketing Service and the Farm Service Agency). A user wanting to obtain a list of all USDA rules open for comment would have to search through each of the 10 links. Similarly, a user wanting to find a particular USDA rule but who did not know which agency within the department issued the rule would have to search through each of the agencies' lists.

Another limitation was that the titles of the rules in Regulations.gov were not always the same as the titles as they appeared in the *Federal Register*, making it difficult to determine whether a particular rule was listed, as the following examples illustrate.

- The *Federal Register* title for one of the EPA rules in our review was "Florida: Revision to Jacksonville, Florida Ozone Air Quality Maintenance Plan." However, the title used in Regulations.gov was "Air quality implementation plans; approval and promulgation; various States: Florida." It was not clear that a rule about an air quality maintenance plan in Jacksonville was the same as a rule about air quality implementation plans for the entire state of Florida.

- The *Federal Register* titles for the FAA airworthiness directives in our review were very specific, such as "Airworthiness Directives; Boeing Model 767-200, -300, -300F, -400, and –400ER Series Airplanes." However, the titles for the directives in Regulations.gov were much more general, such as "Airworthiness directives: Boeing" or "Airworthiness directives: McDonnell Douglas." Because FAA issues a number of directives involving these manufacturers' aircraft, it was unclear whether the rules listed in Regulations.gov were the same rules that were listed in the *Federal Register*.

Changes to Regulations.gov

At the start of our review Regulations.gov permitted users to search for rules by keyword or by agency, but the two search functions could not be used simultaneously. As a result, the searches yielded results that were not as specific as might be needed. For example, a user attempting to locate an open rule about animal drugs within the Animal and Plant Health Inspection Service could (1) do a keyword search on the words "animal drugs," yielding a list of all open rules about animal drugs governmentwide (not just those within that agency); or (2) do an agency search on "Animal

and Plant Health Inspection Service," yielding a list of all open rules from that agency (not just those about animal drugs). However, in June 2003, the Regulations.gov search functions were changed, and users were permitted to search for rules by keyword within particular agencies (although still not within entire departments).

The search function in Regulations.gov has changed since it was initially established in other ways as well. For example, users can now use recently added links to identify "Regulations Published for Comment Today" and rules with "Comments Due Today." However, these links cannot be combined with other search functions (e.g., to identify regulations published for comment today by a particular agency).

Proactive Rule Identification Systems

Both Regulations.gov and the agency-specific rule identification systems discussed above are "passive" systems, requiring users to take the initiative and find out about recently proposed rules. As we reported in our June 2000 report, some agencies have begun using more proactive mechanisms for alerting the interested public about impending or recently issued rules and opportunities for participation.

For example, DOT has established a "list serve" that permits members of the public to receive e-mail notifications when government documents are entered into the department's docket management system.[23] Subscribers are instructed to create a "profile" that identifies the user by e-mail address and to create "agents" (automatic document hunters) to send search results to the subscribers' e-mail addresses. Subscribers tell the agents what to look for and every 24 hours it will retrieve a list of documents matching the criteria entered. If a particular DOT agency is selected (e.g., FAA), the subscriber will receive notifications for all of that agency's dockets. Notifications can be limited in several other ways as well (e.g., only dockets with federalism implications, tribal implications, or small entity implications). EPA also allows the public to subscribe to any of several list serves and receive notifications about a variety of issues, including *Federal Register* documents concerning the agency's air program, water program, and pesticide programs.[24]

[23]DOT's list serve can be accessed at http://dms.dot.gov/emailNotification/index.cfm.

[24]EPA's list serves can be accessed at http://www.epa.gov/epahome/listserv.htm.

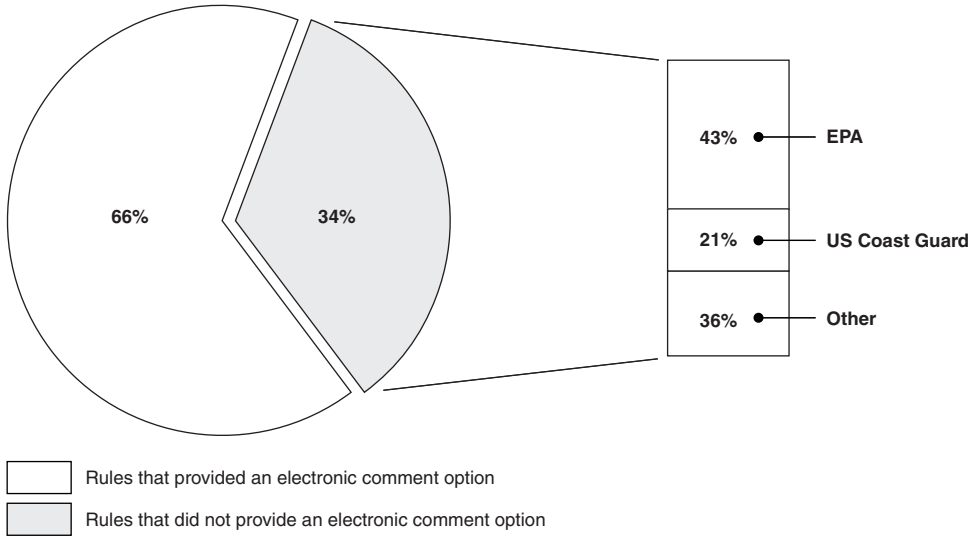
Regulations.gov Permitted Electronic Comments on More Proposed Rules Than Agencies' Systems

About 66 percent of the 411 proposed rules that were published governmentwide during the relevant 3-month period provided some method by which the public could provide comments electronically. However, the agencies varied substantially in this regard. Some agencies provided an electronic commenting option in virtually all of their proposed rules, although the method of commenting often varied. Other agencies (e.g., EPA) did not allow electronic comments on most of their rules. In contrast, Regulations.gov permitted the public to comment electronically on about 91 percent of the agencies' proposed rules—including many of the rules for which the agencies themselves did not provide an electronic commenting option. However, the agencies mentioned Regulations.gov as a commenting option in only 2 of the 411 proposed rules. Perhaps as a result, as of May 2003 relatively few comments had been submitted on proposed rules through Regulations.gov.

Agencies Allowed for Electronic Commenting on About Two-Thirds of Proposed Rules

As figure 5 shows, about 66 percent of the 411 proposed rules published from February 2003 through April 2003 provided the public with some type of electronic commenting option (e.g., an e-mail address to which comments could be sent). However, there were significant differences among the agencies in the extent to which they permitted electronic comments. Some agencies (e.g., the Federal Communications Commission) provided for electronic comments in all or virtually all of their proposed rules. Other agencies provided an electronic commenting option in few if any of their rules. (See app. II for a list showing the extent to which each department or agency that published proposed rules during this period provided for electronic comments.) Figure 5 also shows that most of the proposed rules that did not provide for electronic comments were published by two agencies—EPA and the U.S. Coast Guard.

Figure 5: About Two-Thirds of the 411 Proposed Rules Published from February 2003 through April 2003 Provided for Some Type of Electronic Comments



Source: GAO.

EPA accounted for 43 percent of the proposed rules published during the relevant 3-month period without an electronic commenting option. In fact, 61 of the 78 EPA proposed rules published during this period (about 80 percent) did not provide for electronic comments. Most of these EPA proposed rules were state- or region-specific rules that originated in the agency's regional offices—the same type of rules that EPA did not identify on its Web site as open for comment. EPA representatives said the regional offices were using an outdated template that reflected the agency's historical method of soliciting comments, and noted that electronic comments were allowed on most of the agencies' significant rules.

In most cases, EPA did not mention an electronic commenting option in the preamble to its proposed rules, and in some cases EPA specifically prohibited electronic comments. For example, in a number of proposed SIPs published by EPA's Philadelphia regional office, the rule included the following statement: "Please note that while questions may be posed via telephone and e-mail, formal comments must be submitted in writing, as indicated in the ADDRESSES section of this document." The addresses section of the rules only provided a mailing address to which paper

comments could be sent.[25] EPA officials said that a review of this issue by the agency's Office of the General Counsel concluded that the statement included in these rules was probably caused by the inadvertent use of an outdated *Federal Register* notice template.

Methods of Submitting Electronic Comments to Agencies Varied

The 270 proposed rules that provided for electronic comments instructed the public to submit these comments either through an e-mail address, an agency's Web-based electronic docket system, or both. In more than 80 percent of these proposed rules (224 of the 270 rules), the agencies provided an e-mail address to which comments could be submitted. However, the addressees of the comments varied by agency and, in some cases, by rule within agencies. For example, in some cases the public was instructed to send the e-mail comments to an individual (e.g., secretary@cftc.gov). In other cases the address provided was an agency rulemaking docket (e.g., OW-docket@epamail.epa.gov or air-and-r-docket@epa.gov). In still other cases the public was directed to a designated mailbox for the rule or a group of related rules (e.g., farcase.2002-018@gsa.gov, cottoncomments@usda.gov or 9-asw-adcomments@faa.gov**.** In about 29 percent of the proposed rules (77 of the 270 rules), the agencies instructed the public to submit comments via their Web-based electronic docket systems. For example, in DOT rules (other than airworthiness directives), users were permitted to submit comments to http://dms.dot.gov. That link took users to the department's docket management system page on the DOT Web site, which contained a link entitled "Comments/Submissions." For airworthiness directives, users were instructed that they could submit comments to the e-mail address for the FAA regional office responsible for the rule.

The agencies permitting electronic comments also varied in other respects. For example, EPA and the Department of Health and Human Services permitted the public to attach documents to their electronic comments (e.g., studies supporting their point of view), while the General Services Administration did not allow attachments. Also, EPA and the Patent and Trademark Office permitted the public to submit comments anonymously, but other agencies, such as the Department of the Interior, the Department

[25]By July 2003, EPA began providing an e-mail address for these SIPs. Specifically, the rules state that comments can be provided either by mail or electronically, and that electronic comments should be sent either to an e-mail address within EPA "or to http://www.regulations.gov, which is an alternative method for submitting electronic comments to EPA."

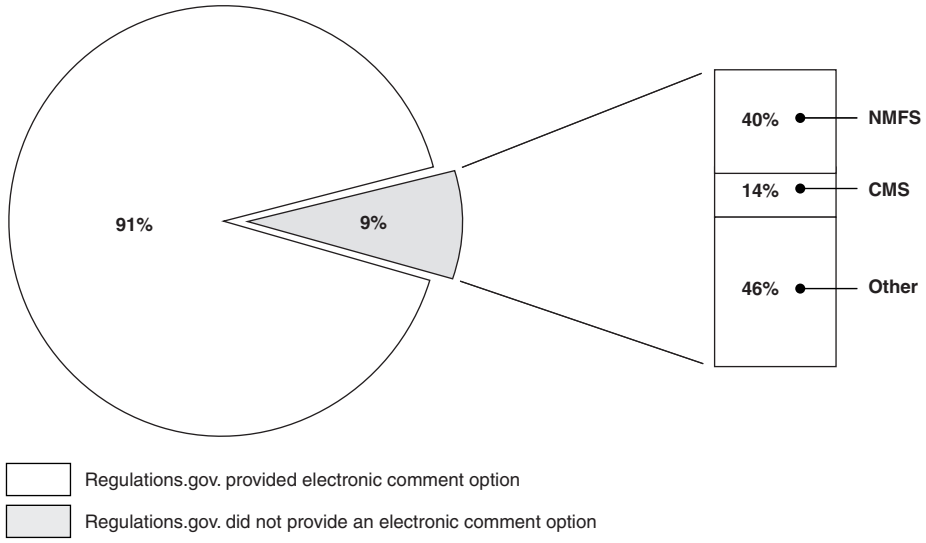
of the Treasury, and the Federal Communications Commission, required commenters to provide some type of identifying information (e.g., name, address, and/or organizational affiliation).

Regulations.gov Allowed Electronic Commenting on Virtually All Proposed Rules

In Regulations.gov, users wanting to submit comments through the system simply type their comments in a "Comments" box, complete any other required or optional identifying information, review the comment upon completion and (where permitted) attach related documents, and then click on the "Submit Comments" button provided. At that point the electronic comment is sent to EPA's National Computing Center. From there, comments are batched and sent each night to a designated address for the rulemaking agency.

As figure 6 shows, Regulations.gov allowed the public to comment electronically on about 91 percent of the 411 proposed rules that were published from February 2003 through April 2003. As noted previously, the rulemaking agencies themselves only provided for electronic comments in about 66 percent of these rules. Therefore, Regulations.gov provided the *only* electronic commenting option for more than one-quarter of the proposed rules published during this period. This was the case for 61 of EPA's 78 proposed rules (about 78 percent).

Figure 6: Regulations.gov Permitted Electronic Comments on Nearly All of the 411 Proposed Rules Published from February 2003 through April 2003



Source: GAO.

Figure 6 also shows that two agencies accounted for more than half of the proposed rules on which electronic comments were not allowed through Regulations.gov—the National Marine Fisheries Service (NMFS) with the Department of Commerce and the Centers for Medicare & Medicaid Services (CMS) within the Department of Health and Human Services. Selecting the "Submit a Comment" link for one of these rules yielded the following statement:

"This Agency does NOT accept electronic comments for this Federal Register document. You must print out this comment and submit it to the agency by any method identified in the Federal Register document for the rule you are commenting on. The agency's contact information will also appear on the printed comment form. Your comment will not be considered until this agency receives it. For further information, follow directions in the specific Federal Register document or contact the specific agency directly."

A Department of Commerce official told us that NMFS has had a written policy since October 1999 of not accepting public comments on its proposed rules via e-mail or the Web. However, he said that NMFS is in the process of repealing that policy and that the agency anticipates accepting electronic comments later this year. He also said that NMFS had developed a pilot program that would not only permit the acceptance of electronic comments, but would also facilitate their analysis. According to the "How

to Comment" section for the CMS rules listed on Regulations.gov, the agency does not accept comments by facsimile or e-mail "because of staff and resource limitations."

An EPA official involved in the e-rulemaking initiative said that Regulations.gov follows whatever commenting procedure the agencies tell EPA to use. If an agency does not want to receive electronic comments, he said Regulations.gov would instruct users to print out and mail their comments.

Required Information in Regulations.gov Varied

The information that the public was required to provide when submitting a comment using Regulations.gov varied. Most commonly (e.g., for many of the rules from DOT, EPA, and the Department of Veterans Affairs), the only required information was the comment itself, with space provided in which other information (e.g., name, address, and organization) could (but was not required to) be submitted. However, for other rules (such as those rules published by the Forest Service and the Food and Drug Administration), commenters were required to provide additional information such as their names, mailing addresses, or other identifying information. In still other cases, Regulations.gov only provided users with a comment box; users were not even given the option of providing identifying information.

An EPA official involved in the e-rulemaking initiative told us that each agency is responsible for determining whether that agency's comment page on Regulations.gov includes fields identifying the commenter, and whether those fields were mandatory or optional. He said the e-rulemaking initiative had not considered how certain fields might affect the public's willingness or ability to comment (e.g., whether certain members of the public would feel comfortable identifying themselves as a requirement to comment on a proposed rule).

Relatively Few Comments Received through Regulations.gov

In May 2003, an EPA official involved in the e-rulemaking initiative told us that about 400 comments had been filed on rules governmentwide through Regulations.gov. However, the official said this total included "test comments" that had been submitted from within the federal government, and estimated (because no data were readily available) that only about 200 of the 400 comments that federal agencies had received through Regulations.gov by that date were from the general public. He also said that of all the public comments that EPA had received on its various rules—including the more than 300,000 comments received through the agency's own e-rulemaking Web site and traditional methods for the proposed

changes to the new source review program—EPA received only 8 public comments through Regulations.gov. Similarly, DOT officials told us that from February 2003 through April 2003, the department had received only 21 comments through the Regulations.gov Web site. During the same period, DOT said it had received nearly 18,000 comments through its document management system, of which nearly 16,000 were electronic.

EPA officials responsible for the e-rulemaking initiative suggested that the relatively infrequent use of Regulations.gov in its first 3 full months of operation could be because commenters have become used to filing comments in a particular way, and are not comfortable using the new system. However, another possible explanation is that major rulemaking agencies have not mentioned Regulations.gov as a commenting option in their proposed rules. Specifically, of the 411 proposed rules published from April through May 2003, only 2 mentioned Regulations.gov in their preambles as a way for the public to provide comments. [26]

Some Agencies Provided Electronic Access to Supporting Materials, but Regulations.gov Does Not Currently Do So

Several federal agencies (e.g., EPA and DOT) allowed the public to have electronic access to regulatory supporting materials and the comments of others for some of their proposed rules. Other agencies provided no electronic access to these materials. Regulations.gov does not provide electronic access to regulatory supporting materials or the comments of others. However, EPA officials noted that Regulations.gov was not designed to provide that function, and said that the second module of the governmentwide e-rulemaking initiative would, when fully implemented, permit users to access supporting materials and the comments of others for all proposed rules. EPA currently expects such access to begin by the end of 2005.

Some Agencies Provided Electronic Access to Supporting Materials and Comments

Regulatory agencies are required to prepare supporting materials for many of their proposed and final rules. Those supporting materials can include the agency's economic analysis (describing, for example, the alternatives the agency considered and the costs and benefits of the alternative selected) and descriptions of how the agencies have complied with various

[26] *NARA Facilities; Public Use* (68 Fed. Reg. 19168, Apr. 18, 2003) and *Size for Purposes of the Multiple Award Schedule and Other Multiple Award Contracts; Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations* (68 Fed. Reg. 20350, Apr. 25, 2003).

rulemaking requirements (e.g., the Regulatory Flexibility Act, the Paperwork Reduction Act of 1995, and Executive Order 12866). These materials, as well as the comments filed by the public in response to a notice of proposed rulemaking, have traditionally been housed in agencies' rulemaking dockets. Access to these materials during the period in which proposed rules are open for comment can permit those comments to be more informed and targeted to particular issues.

Several of the major rulemaking agencies had electronic docket systems in which the pubic could obtain access to regulatory supporting materials and the comments of others during the public comment period for some (but not all) of their proposed rules. As the following examples illustrate, the features of those systems varied.

- As noted previously, DOT's document management system did not include airworthiness directives published by FAA's regional offices. However, the system provided electronic access to supporting materials and the comments of others for some of the department's other proposed rules. Docket materials available through the system included the text of the proposed rules, any related *Federal Register* notices (e.g., advanced notices of proposed rulemaking, notices, and corrections), environmental assessments, environmental impact statements, regulatory flexibility analyses, and some of the comments received on the rules. The identities of the commenters were provided when available (e.g., "John Doe" or "XYZ Organization").

- As noted previously, EPA's electronic docket system did not include proposed rules that originated in the agency's regional offices. For proposed rules in the system that were issued by EPA headquarters offices, the system permits users to obtain such items as the agency's economic analyses for the rules, paperwork estimates, e-mails between EPA and OMB, and the comments already provided (with the identities of the commenters provided). In those cases where the documents may have copyrighted information and are not available electronically, the electronic docket system provided a reference to where hard copies of the documents may be reviewed.

Some agencies provided electronic access to only certain types of supporting materials, or for certain rules, as the following illustrates.

- USDA did not have a link from its home page providing electronic access to supporting materials or the comments for all of its proposed

rules. However, a "Federal Rulemaking" link from the Agricultural Marketing Service's home page ultimately provided electronic access to "public comments received on rules and notices." However, the link did not provide access to any regulatory supporting materials. The rules and related comments were categorized under the commodity related to the proposed rule (e.g., cotton, dairy, or poultry).

- Similarly, the Department of Health and Human Services did not have a link to public comments or supporting materials from its home page, but a "Dockets" link was available from the Food and Drug Administration's Web site. The agency's docket system provided a great deal of supporting materials and comments of others filed regarding the agency's rules and other publications, but we found the system somewhat difficult to navigate. In particular, although the Web site contained a link (updated monthly) entitled "Dockets – Closing with comment period ending within the next two months," the agency did not clearly identify *proposed rules* that were open for comment. Also, the list provided did not appear to contain all proposed rules.

Other agencies that made at least some supporting documents available to the public included the Occupational Safety and Health Administration, the Federal Communications Commission, and the Social Security Administration. These agency-specific Web sites allowed the public access to, among other things, the comments that had already been received, the agencies' regulatory impact analyses, and related notices.

Regulations.gov Did Not Permit Access to Comments or Supporting Materials

Regulations.gov provided electronic access to copies of the proposed rules as they appeared in the *Federal Register*. However, the Web site did not permit the public to access the comments of others or regulatory supporting materials.[27] EPA officials noted that Regulations.gov is the first module of the administration's e-rulemaking initiative, and is currently limited to a "pointer or communication" focus that allows the public to electronically identify and comment on rules. They said that when the second module of the e-rulemaking initiative is complete, all agencies' rules and docket materials would be in a single electronic docket. At that point,

[27]Although Regulations.gov did not provide these materials directly, in some cases, the electronic copies of the rules provided on Regulations.gov contained links to agencies' docket systems where public comments and supporting materials could be obtained.

the public would be able to access supporting materials and public comments for all rules electronically.

The governmentwide docket system was originally scheduled to be completed by July 2003, with full implementation by the end of September 2004. However, EPA officials told us during this review that the implementation of the second module is currently scheduled to be completed by the end of 2005. They also said a number of legal and policy issues still must be resolved as part of the development and implementation of this module (e.g., whether the electronic docket will be the official record and what types of supporting materials would be included in this governmentwide docket). EPA officials pointed out that the implementation of this module does not depend upon the resolution of the legal issues. However, unless the electronic docket is recognized as the official record, duplicative agency-specific dockets will not be eliminated and the expected $100 million in savings will not be realized.

Conclusions

Our study indicated that Regulations.gov more directly and more comprehensively allowed the public to identify proposed rules that were open for comment than the three major rulemaking agencies' electronic systems that we examined. Other agencies that publish fewer proposed rules may be even less likely to have clear, complete, and up-to-date electronic systems to identify rules that are open for comment. Rather than create new agency-specific rule identification systems or invest significant resources to improve agencies' existing systems, the agencies could do what EPA and some of the agencies within USDA are already doing—simply provide a link to Regulations.gov on their Web sites and tell users that Regulations.gov identifies all of their rules that are open for comment.

Our study also indicated that Regulations.gov more consistently permitted the public to comment on proposed rules electronically than the agencies' systems. However, almost none of the proposed rules published in Regulations.gov's first 3 months of existence mentioned the Web site as a commenting option—including nearly 100 rules for which Regulations.gov was the public's *only* electronic commenting option. We recognize that *Federal Register* notices are not the only way that the public learns how to comment on proposed rules. We also recognize that Regulations.gov is an interim system, in place only until the second module of the administration's e-rulemaking initiative is fully operational. Until that occurs (currently scheduled for the end of 2005), we believe that

improvements to both the visibility and the operation of Regulations.gov should be made. If Regulations.gov is to be a success as a commenting option, the public needs to know that the option exists. One way to improve its visibility (although clearly not the only way) is to mention Regulations.gov in agencies' proposed rules as a commenting option.

Although we believe that Regulations.gov is superior to the agencies' notice and comment systems in some respects, users currently are unable to identify all proposed rules open for comment within a cabinet department, and must search through a dozen or more links to obtain a complete list or to locate a particular rule within the department. Also, Regulations.gov currently does not always identify rules using their titles as they appear in the *Federal Register*, thereby making it difficult for users to locate particular rules. Perhaps the biggest advantage that the agency-specific commenting systems have when compared to Regulations.gov is the public's ability to access electronically regulatory supporting materials and the comments of others. However, as EPA officials pointed out, Regulations.gov was not designed for that function, and the next module of the administration's e-rulemaking initiative will hopefully provide that capability. Until that capability is provided and proven, we do not believe that agencies should be required to abandon docket systems that already permit the public to review regulatory supporting materials and the comments of others.

The E-Government Act of 2002 established an Office of Electronic Government within OMB, and requires the Administrator of that office to work with the Administrator of OMB's Office of Information and Regulatory Affairs in establishing the strategic direction of the e-government program and to oversee its implementation. In light of our findings, OMB could issue guidance to rulemaking agencies that could improve the public's ability to comment on the rules that affect their lives.

Recommendations for Executive Action

We recommend that the Director of OMB issue guidance to the rulemaking agencies on ways to improve the electronic commenting process for proposed rules. Specifically, the guidance should instruct the agencies to (1) provide a link to Regulations.gov on their Web sites to allow users to identify proposed rules open for comment, and (2) note in the preambles of their proposed rules the availability of Regulations.gov as an electronic commenting option.

We also recommend that the Director make changes to Regulations.gov to improve its capabilities. Specifically, Regulations.gov should allow users to identify all proposed rules open for comment within a cabinet department, and should list rules using the titles as they appear in the *Federal Register*.

Agency Comments and Our Evaluation

On August 8, 2003, we provided a draft of this report to OMB and to EPA for review and comment. We also provided a draft for technical review to USDA and DOT. DOT provided us with a few technical suggestions, which we incorporated as appropriate. USDA indicated that it agreed with the report and would take action regarding its findings.

On August 22, 2003, we met with EPA officials and received informal comments on the draft report. As a result of those comments, we clarified several issues in the report. For example, EPA officials pointed out that the different parts of the e-rulemaking initiative should be referred to as "modules" instead of "phases," and said the implementation of the second module began in 2003 and would be completed by the end of 2005. They also said that the implementation of the second module did not depend on the resolution of outstanding legal issues.

On August 28, 2003, the EPA Program Manager and Deputy Assistant Administrator for the e-rulemaking initiative provided written comments on the draft report. (Comments are reprinted in app. III.) In general, the Program Manager said that the report required "substantial revision to accurately and fairly characterize existing federal electronic docket systems." He also said that the report's findings were "presented in a manner that could easily cause an objective reader to reach unsupportable conclusions." For example, he said that "EPA's EDOCKET system had been recently launched" when we conducted our review, and that "this snapshot of a point in time…cannot accurately or fairly present the functional capabilities and status" of the system. However, EPA's Web site indicated that the EDOCKET system had been in operation since at least September 2001. Also, the Program Manager's letter indicated that a 2002 study concluded that the EDOCKET system was "the closest to ideal of the existing [federal docket management] systems," and quoted the study as saying that the EPA system "contains no significant weaknesses or omissions, functional or otherwise." Therefore, it is not clear how EPA can claim that at the time of our review (May 2003) the EDOCKET system had been "recently launched," or how the agency can suggest that the system identified as the best in the government should not have been part of our review. We believe that the information in our report about the contents of

EDOCKET as of May 2003 (that it identified only 6 of 33 EPA proposed rules that were open for comment) is an accurate characterization of the system at that point in time.

The Program Manager also indicated that the draft report did not reflect EDOCKET's original design or intended use—that is, that it was designed to include "EPA's highest priority regulatory actions" and that regional office actions (which were described in his letter as "administrative in nature or are of limited geographic scope") would be included in a subsequent expansion of EDOCKET. However, the draft report that we provided to EPA noted that EDOCKET was originally designed to include only headquarters regulations and that regional office rules would eventually be added to the system. Also, EDOCKETS contained only half of the headquarters proposed rules that were open for comment. Finally, most of the items open for comment in EPA's EDOCKET system are general docket notices and are not part of the rulemaking docket. It is not clear why EPA considers proposed rules emanating from the agency's regional offices (e.g., rules implementing the Clean Air Act within a region) less important than these notices.

Finally, the Program Manager indicated that Regulations.gov was intended to be an interim comment system and had been in operation for only a short period at the time of our review. Therefore, he said the e-rulemaking team was not surprised by many of the shortcomings that we identified and said the team would review the recommendations and expected to implement many of those not already included in the initiative's second module. He also said that expanding the functional capabilities of Regulations.gov to include a "wider range of public services" would have delayed its launch. However, we did not suggest that Regulations.gov's functional capabilities be expanded, and noted in the draft report provided to EPA that certain functions not currently part of Regulations.gov (e.g., access to regulatory supporting material) would be added in the second module of the e-rulemaking initiative.

On August 29, 2003, the Administrator of Office of Information and Regulatory Affairs provided written comments on the draft report. (Comments are reprinted in app. IV.) In general, the Administrator agreed with the draft report's recommendations and indicated that actions had already begun to address some of the recommendations. However, he suggested clarifications to a few of the points made in the report. For example, the draft report provided to OMB stated that it was not clear when the second module of the e-rulemaking initiative would be

implemented. The Administrator pointed out that some aspects of the second module had already begun and the module would be completed by October 2005. As noted previously, in response to informal comments that we had received from EPA after the draft report had been provided to OMB, we changed the report to reflect that implementation of the second module began in 2003 and would be completed by the end of 2005.

Also, in reference to our recommendation that OMB issue guidance to the rulemaking agencies on how to improve electronic commenting, the Administrator noted that on August 1, 2003, OMB had issued implementation guidance on the E-Government Act of 2002. Although that guidance addresses certain aspects of the e-rulemaking initiative, it does not address the issues in our recommendation (and that the Administrator agreed should be implemented).

Finally, noting that our draft report recommended that OMB make changes to Regulations.gov to improve its capabilities, the Administrator indicated that the functionality of Regulations.gov would be enhanced with the completion of the second module. However, the draft report provided to OMB already indicated that certain functions not currently included in Regulations.gov (e.g., access to supporting material) would be added with the completion of the second module, and we did not recommend the addition of those functions.

As agreed with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its date. At that time, we will send copies to the Director of OMB, the Secretary of Agriculture, the Secretary of Transportation, and the Administrator of EPA. It will also be available at no charge on GAO's Web site at http://www.gao.gov. If you have any questions concerning this report, please call Curtis Copeland or me at (202) 512-6806.

Major contributors to this report include Joe Santiago, Mary Martin, and John Ripper.

Victor S. Rezendes
Managing Director
Strategic Issues

Objectives, Scope, and Methodology

The objectives of our review were to determine the extent to which individual agencies and the new governmentwide Regulations.gov Web site permitted the public to electronically (1) identify proposed rules that are open for comment, (2) comment on proposed rules, and (3) access the comments of others and regulatory supporting materials.

To address these objectives, we focused on the period from February 1, 2003, through April 1, 2003—the first 3 full months that Regulations.gov was in operation. Some items published in the "proposed rule" section of the *Federal* Register did not appear to be proposed rules in the traditional sense of the word and/or did not request public comments. Therefore, we developed criteria for what constituted a "proposed rule" for purposes of our study: (1) the item must be a "rule" as defined under the Administrative Procedure Act [5 U.S.C. sec. 551(4)];[1] (2) the "action" line in the preamble to the proposed rule must either say "proposed rule," "notice of proposed rulemaking," or "supplemental notice of proposed rulemaking;" and (3) the rule must specify a defined comment period. Applying these criteria, we determined that 411 proposed rules had been published in the *Federal Register* by 38 agencies during the targeted 3-month period. Three agencies published more than half of these 411 proposed rules. The Department of Transportation (DOT) issued 122 of the rules (30 percent), the Environmental Protection Agency (EPA) issued 78 rules (19 percent), and the Department of Agriculture (USDA) issued 34 of the rules (8 percent).

Because reviewing all federal agencies' Web sites for open proposed rules would have taken an unreasonable amount of time, we decided to focus our efforts in relation to the first objective on the above three. We then developed a list of proposed rules that were open for comment as of the day after our target period ended (May 1, 2003). Of the 122 DOT proposed rules published from February 2003 through April 2003, 52 were open for comment as of May 1, 2003. Thirty-three of the 78 EPA rules were open as of that date, as were 17 of the 34 USDA rules. We then compared our list of open proposed rules for these three agencies with lists of proposed rules that were identified as open for comment on the three agencies' Web sites and the Regulations.gov Web site on that date. We also examined the Web

[1]The Administrative Procedure Act defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."

sites for the three agencies and Regulations.gov to determine how easy it would be for users to identify proposed rules open for comment.

To address our second objective, we examined each of the 411 rules to determine whether the issuing agency had provided some type of electronic commenting option (e.g., an E-mail or a Web site to which comments could be sent). We also examined Regulations.gov to determine whether that Web site permitted electronic comments for the rules. In doing so, we noted differences in how comments were required or permitted to be submitted in both the agencies' and the Regulation.gov systems.

To address the third objective, we examined the Regulations.gov Web site and the Web sites for agencies that published 10 or more proposed rules during the time period covered by our review. Among those agencies were DOT, EPA, and USDA as well as the Federal Communications Commission, the Department of Health and Human Services, the Department of Labor, the Department of the Interior, and the Department of Commerce. We attempted to assess whether the agencies permitted users to access the comments of others and/or regulatory supporting materials such as agencies' economic analyses.

During the course of this review we interviewed agency officials responsible for regulatory matters within DOT, EPA, and USDA, including EPA officials who were responsible for the electronic rulemaking initiative. We also interviewed officials at the Office of Management and Budget who were responsible for the governmentwide e-rulemaking initiative. At the end of our review we provided a draft of this report to the Director of the Office of Management and Budget and the Acting Administrator of EPA for their review and comment. We also provided drafts to the Secretary of Agriculture and the Secretary of Transportation for technical review. Because our review focused on proposed rules published during a 3-month period, the results cannot be extrapolated to rules published during other time frames. Also, both the agencies' electronic rulemaking systems and the new Regulations.gov Web site are constantly changing, thereby making any description of those systems time sensitive. We conducted this review from February 2003 through June 2003 in accordance with generally accepted government auditing standards.

Agencies Varied in Extent to Which They Provided for Electronic Comments on Proposed Rules

Department/agency	Number of proposed rules published from February 2003 through April 2003	Number of rules in which agency provided for electronic comments	Number of rules in which agency did not provide for electronic comments
Departments			
Department of Agriculture	34	29	5
Department of Commerce	18	3	15
Department of Defense	13	7	6
Department of Education	1	1	0
Department of Energy	4	4	0
Department of Health and Human Services	19	14	5
Department of Homeland Security	18	1	17
Department of Housing and Urban Development	3	0	3
Department of the Interior	22	20	2
Department of Justice	3	0	3
Department of Labor	6	6	0
Department of Transportation	122	107	15
Department of the Treasury	17	15	2
Department of Veterans Affairs	3	3	0
Agencies			
Commodity Futures Trading Commission	3	3	0
Court Services and Offenders Supervision Agency	2	0	2
Environmental Protection Agency	78	17	61
Farm Credit Administration	2	2	0
Federal Communications Commission	11	11	0
Federal Election Commission	1	1	0
Federal Emergency Management Agency	1	1	0
Federal Housing Finance Board	1	1	0
Federal Maritime Commission	1	1	0
Federal Reserve System	2	2	0
Federal Trade Commission	2	2	0

(Continued From Previous Page)

Department/agency	Number of proposed rules published from February 2003 through April 2003	Number of rules in which agency provided for electronic comments	Number of rules in which agency did not provide for electronic comments
General Services Administration	1	1	0
Library of Congress	1	0	1
National Archives and Records Administration	1	1	0
National Credit Union Administration	2	2	0
Nuclear Regulatory Commission	6	6	0
Office of Government Ethics	1	1	0
Office of Personnel Management	3	1	2
Peace Corps	1	0	1
Pension Benefit Guaranty Corporation	1	1	0
Small Business Administration	2	2	0
Securities and Exchange Commission	3	3	0
Social Security Administration	1	1	0
Thrift Savings Plan	1	0	1
Total	**411**	**270**	**141**

Source: GAO.

Note: Eight of the 411 rules were joint rules between two or more federal agencies. These rules were included under the first agency listed in the *Federal Register* notice.

Comments from the Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 2 8 2003

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. Victor S. Rezendes
Managing Director, Strategic Issues
General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Rezendes:

Thank you for the opportunity to comment on the draft report titled "Electronic Rulemaking Efforts to Facilitate Public Participation Can Be Improved (GAO-03-901)." On behalf of the eRulemaking team, I welcome the General Accounting Office's (GAO) long standing and continued interest in efforts to improve the federal rulemaking process – particularly improvements that will enhance the public's ability to participate effectively and fully in the federal regulatory process. We look forward to working with you in achieving the goals of the eRulemaking Initiative.

Increasing and simplifying public access to government services and strengthening participatory democracy through a more citizen-centric government are major goals of the President's Management Agenda. The Administration launched the interagency eRulemaking initiative to overcome barriers to public participation in the federal regulatory process. We will accomplish this by improving the public's ability to find, view, understand, and comment on federal regulatory actions. In addition, the initiative will enhance rulemaking practices within federal agencies through the use of electronic tools and services. Ultimately, this initiative will improve agency processes, save taxpayer resources, enhance public participation, and yield more timely regulatory decisions.

Because the public's ability to participate in the notice and comment part of the regulatory development process is a major aspect of the initiative, the interagency team conducted an independent validation and verification analysis of seven federal agency electronic docket management systems, including the Environmental Protection Agency's (EPA) recently launched EDOCKET system. This independent evaluation, conducted in 2002, concluded that EDOCKET was, "...the closest to ideal of the existing [federal docket management] systems," based on its management of content, processing of public comment, and search functions. EPA, as one 140 federal rulemaking agencies, was asked to lead the interagency initiative because of this conclusion.

The report also stated that EDOCKET's "commenting capabilities are well integrated with the regulation/dockets information, and the search facility is robust, containing full-text search, wildcard-searching and Boolean arguments, and allows the user to sort results easily. These solid facilities combined with the fact that EPA's platform contains no significant weaknesses or omissions, functional or otherwise, accounts for its [top rating among federal systems]." Based on the public's use of the EPA's EDOCKET system (averaging more than 300,000 hits per month) and the numerous public awards it has received, EDOCKET has been a tremendous success.

In reviewing the draft GAO report, we have concluded it requires careful, but substantial revision to accurately and fairly characterize existing federal electronic docket systems. As written, it will not provide the candid, useful, and insightful information about the performance and capabilities of electronic docket systems the public, Congress, and Executive agencies need to enhance the public's ability to use such systems. In particular, GAO's findings, while sometimes accurate on their face, are presented in a manner that could easily cause an objective reader to reach unsupportable conclusions.

For example, EPA's EDOCKET system had been recently launched and was actively being rolled out across the agency (and continues to be so) when the GAO acquired the data upon which its report is based. This snap shot of a point in time during the roll out of an information technology system, by definition, cannot accurately or fairly present the functional capabilities and status of a system – regardless of any caveats GAO may include at our request in the body of its report. Nor can it provide a reader the ability to compare such a system to other mature, long established systems. As a result, the draft report will not provide the public and Congress the useful information they need to evaluate, critique, and otherwise perform their appropriate and necessary functions.

As a result of this snap shot, the draft report does not accurately reflect EDOCKET'S original design or intended use. The EDOCKET system was designed to provide initial public access to EPA's highest priority regulatory actions and supporting materials (e.g., scientific and economic analyses, public comments, etc.). These regulations have national applicability, often generate the greatest amount of public interest and comment, and have the greatest potential for improving human health and the environment. Regional actions, while large in number, are typically administrative in nature or are of limited geographic scope (e.g., Clean Air Act State Implementation Plan revisions). This latter category is part of a second phase expansion of EDOCKET that will add docket materials from EPA's regional offices and field operations.

The draft GAO report also addresses the recently launched Regulations.gov web site, the first module of the eRulemaking Initiative. The Regulations.gov system currently supplements existing paper-based and electronic docket operations. It provides the public with its first ever, one-stop shopping ability to electronically find, view, and submit comments on regulatory actions. The interagency members of the eRulemaking Initiative and EPA as the managing partner are very proud of Regulations.gov's accomplishments. It has received widespread attention and use since its launch in January, 2003 (the system receives over 180,000 hits per month, on average). Public

awards include the 2003 SecurE-Biz Leadership Award, 2003 E-Gov Pioneer Award, and the 2003 Colborn Award for Innovation in rulemaking. It was also a finalist for the 2003 FOSE Showcase in Excellence Award.

Regulations.gov was intended to be an interim, quick solution for providing enhanced public participation in the notice and comment process. Due to the creativity, dedication, and ingenuity of the federal agency employees involved, it was deployed in less than three months at a very modest expense. It had been in operation less than two weeks when GAO started collecting data on the system for its report. The eRulemaking team is not surprised by many of GAO's findings that identify shortcomings associated with its intentionally limited scope and short life span. Expanding the functional capability of Regulations.gov to include a wider range of public services would have substantially delayed its launch and precluded the public from being able to take advantage of any benefits associated with such an electronic government service.

The second module of the eRulemaking Initiative will replace Regulations.gov. It will take longer to develop, have far greater functional capabilities, and provide the public with a far greater ability to participate in the regulatory process. The system will allow hundreds of federal rulemaking entities to deposit rulemakings and supporting materials into a central repository enabling the public to search, view, and submit comments on virtually all rules and Federal Register Notices. EPA and its fellow team members welcome GAO's recommended enhancements to Regulations.gov. The team is reviewing these recommendations and expects to implement many of those not already included in the Initiative's second module.

Thank you again for the opportunity to review and comment on the draft report. We look forward to working with you in the future as we both strive to improve the federal regulatory system. If you have any further questions, please feel free to contact me at (202) 564-6665, or Oscar Morales, Director of the eRulemaking Initiative, at (202) 632-0331 (morales.oscar@epa.gov).

Sincerely,

Richard D. Otis, Jr.
eRulemaking Initiative, Program Manager and
Deputy Assistant Administrator

Enclosure

cc: Mark Luttner
Oscar Morales
Steve Tiber
eRulemaking Initiative members

Comments from the Office of Management and Budget

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

AUG 29 2003

Mr. Victor Rezendes
Managing Director
Strategic Issues Team
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Rezendes:

Thank you for the opportunity to comment on the draft report titled, Electronic Rulemaking Efforts to Facilitate Public Participation Can Be Improved (GAO-03-901). As you know, the Administration's vision for Government reform is guided by three principles -- Government should be citizen-centered, results-oriented, and market-based. These principles have been woven into the five government-wide reform goals outlined in the President's Management Agenda. The effective implementation of E-Government is important in making Government more responsive and cost-effective. The success of E-Government depends on agencies working as a team across traditional boundaries to better serve the American people, focusing on citizens rather than individual agency needs.

The goal of the Administration's E-Rulemaking initiative is to create a government-wide docket system that will provide citizens and businesses with a single Internet access point to all Federal regulatory material. The first module of this initiative was to create a cross-agency portal that would allow citizens to find, review, and comment on proposed federal rules. This was accomplished with the creation of Regulations.gov. The Office of Management and Budget (OMB) is pleased with the progress of Regulations.gov which allows the public to comment on more than 90 percent of proposed rules -- a 38 percent increase over individual agency sites. We are pleased that your draft report highlights this fact.[1]

The second module of the initiative -- to create a government-wide e-docket system -- is currently underway. The cross-agency team has been working on business process reengineering (BPR) analysis of individual agency requirements, the statement of work (SOW) is on the street and a draft migration plan has been submitted to OMB. The draft plan calls for 51 rulemaking entities to be migrated/converted to the government-wide system by October of 2004. This represents approximately 50 percent of rules and proposed rules. The remaining 71 entities will be migrated/converted by October of 2005.

[1]"Regulations.gov allowed the public to provide electronic comments (e-comments) on more than 90 percent of the 411 proposed rules that were published this 3-month period." (Highlights page, GAO draft report, Electronic Rulemaking Efforts to Facilitate Public Participation Can Be Improved (GAO-03-901)).

While we are pleased with the progress of Regulations.gov and the E-Rulemaking initiative, there is always room to improve. We have already begun exploring GAO's recommendations to improve Regulations.gov that were made in the report. However, we would also like to clarify a few of your comments and/or key points made in the report.

Specific comments and recommendations on Regulations.gov

The draft report states "...it is not clear when that second phase (of the e-rulemaking initiative) will be implemented" while other portions of the report cite another, now outdated timetable. The initiative is organized into three Modules: Module 1 (deployment of Regulations.gov), Module 2 (deployment of a federal-wide docket management system), Module 3 (deployment of a rulemaking virtual workspace based on best practices and expert tools). Module 2 is organized into a 6-phase schedule, with agencies migrating into the federal-wide docket management system during a given phase. For instance, as currently planned Phase 1 will conclude at the end of September 2004 while Phase 6 concluding at the end of September 2005. The necessary work to be successful in Module 2 is already underway.

Your report recommends "that the Director of OMB issue guidance to the rulemaking agencies on ways to improve the electronic commenting process for proposed rules." We are pleased to say that this work has already begun. On August 1st, OMB issued general guidance to the rulemaking agencies in its Implementation Guidance for the E-Government Act of 2002. In it OMB states that all agencies were expected to make their public regulatory dockets electronically accessible and searchable using Regulations.gov and that they had to accept electronic submissions to their online dockets.

The report recommends "that the Director of OMB make changes to Regulations.gov to improve its capabilities." It is important to note that the current Regulations.gov site represents the completion of Module 1 of the E-Rulemaking initiative and was only intended to provide citizens with the ability to easily find, review and comment on proposed rules. The enhanced functionality sited in the report will be achieved with completion of Module 2 – a government wide electronic docket management system, which will provide the public online access to the comments of others as well as supporting materials.

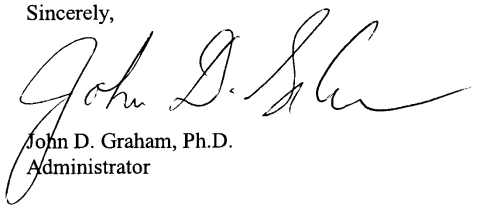
The report recommends, specifically, that "Regulations.gov should allow users to identify all proposed open rules for comment within a cabinet department, and should list rules using the titles as they appear in the Federal Register." We agree with this recommendation and have begun working with the Rulemaking team to take the necessary steps to comply.

Finally, your report recommends specifically that the "guidance (from the Director of OMB) should instruct agencies to (1) provide a link to Regulations.gov on their Web sites to allow users to identify proposed rules open for comment, and (2) note in the preambles of their proposed rules the availability of Regulations.gov as an electronic commenting option." We also

agree that these two specific recommendations will make it easier for citizens to comment and it is our understanding that the Office of Federal Register has already requested it of all the agencies. We will work with the Office of Federal Register and the E-Rulemaking team to follow through with these recommendations.

Thank you again for providing us with a draft copy of the report to review and provide our comments.

Sincerely,



John D. Graham, Ph.D.
Administrator

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