



## Regulations.gov and the Federal Docket Management System (FDMS)

### Committee on Regulation

#### Proposed Recommendation for Committee | October 10, 2018

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#### Legal Requirements for Maintaining Electronic Rulemaking Dockets

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The E-Government Act requires agencies, to the extent practicable, to maintain electronic rulemaking dockets (e-dockets).<sup>1</sup> An e-docket is simply a virtual folder that contains materials relevant to a particular rulemaking. It ideally includes any relevant notices (e.g., notices of proposed rulemaking (NPRMs)), supporting materials, and comments. Under the E-Government Act, e-dockets must make publicly available online, to the extent practicable, all comments received “and other materials that by agency rule or practice are included in the rulemaking docket . . . whether or not submitted electronically.”<sup>2</sup> The E-Government Act does not specify precisely which kind of materials agencies must include within their e-dockets.

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The Administrative Conference of the United States has noted that agencies should manage their public rulemaking dockets to achieve “maximum public disclosure.”<sup>3</sup> This means that, to the extent feasible, agencies should include the following within their public rulemaking dockets: (a) notices pertaining to the rulemaking; (b) comments and other materials submitted to the agency related to the rulemaking; (c) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking; (d) reports or recommendations of any relevant advisory committees; (e) other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the

~~Deleted: The purposes of the E-Government Act are to “improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency,”<sup>3</sup> and to “enhance public participation in Government by electronic means, consistent with [the Administrative Procedure Act].”<sup>4</sup> By making it easier for the public to search for and find e-dockets and access all relevant information about rulemakings, the eRulemaking Program (described below) and participating agencies can further these statutory goals.~~

<sup>1</sup> 44 U.S.C. § 3501 (note). The statute also requires agencies, to the extent practicable, to accept comments by electronic means.

<sup>2</sup> *Id.*

<sup>3</sup> See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,352, 41,360 (July 10, 2013).



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32 rulemaking; and (f) any other materials considered by the agency during the course of the rulemaking.<sup>6</sup>  
33 Because the “public rulemaking docket” is, due to the E-Government Act, the same as the “e-docket,”  
34 agencies should include all of these materials in their e-dockets.

35 **Basic Structure of FDMS/Regulations.gov**

36 Regulations.gov and FDMS are the vehicles through which all agencies, except for some  
37 independent regulatory agencies,<sup>7</sup> attempt to comply with the E-Government Act’s electronic commenting  
38 and e-docket requirements.<sup>8</sup> Regulations.gov is therefore the repository for a large part of the federal  
39 government’s rulemaking materials. Members of the public can search the site for rulemakings spanning  
40 nearly 40 years from over 180 federal agencies.<sup>9</sup>

41 Agencies that participate in Regulations.gov upload materials to Regulations.gov through a  
42 system called the Federal Docket Management System (FDMS).<sup>10</sup> Agencies create and manage e-dockets  
43 and their contents through FDMS.gov, a password-protected site that can be accessed only by authorized  
44 agency personnel.<sup>11</sup> Agency officials are responsible not only for creating e-dockets but also for  
45 appropriately indexing them by selecting relevant docket and document types and subtypes,<sup>12</sup> which will  
46 be described in greater detail below.

47 All materials that are published in the *Federal Register* automatically appear in FDMS, including  
48 materials from agencies that do not participate in Regulations.gov.<sup>13</sup> This is because there is an

<sup>6</sup> *Id.*

<sup>7</sup> The Federal Communications Commission and the Securities and Exchange Commission, for example, do not participate in FDMS/Regulations.gov. Instead, they maintain their own online rulemaking systems.

<sup>8</sup> Regulations.gov and FDMS were established by an initiative led by the Office of Management and Budget to implement President George W. Bush’s Management Agenda. *See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM NO. M-02-08, REDUNDANT INFORMATION SYSTEMS RELATED TO ON-LINE RULEMAKING INITIATIVE (May 6, 2002).*

<sup>9</sup> *See* REGULATIONS.GOV, PARTICIPATING AGENCIES, [https://www.regulations.gov/docs/Participating\\_Agencies.pdf](https://www.regulations.gov/docs/Participating_Agencies.pdf) (Mar. 2018).

<sup>10</sup> *See* FEDERAL DOCKET MANAGEMENT SYSTEM, *Welcome to the e-Rulemaking Initiative*, <https://www.fdms.gov/fdms/public/aboutus>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See* U.S. DEPARTMENT OF STATE, FEDERAL DOCKET MANAGEMENT SYSTEM (FDMS), <https://www.state.gov/m/a/dir/rulemaking/fdms/>.

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52 automated, “behind the scenes” link between the *Federal Register* and FDMS whereby each day, the  
53 entirety of the *Federal Register’s* contents is sent to FDMS.<sup>14</sup>

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54 The Regulatory Information Services Center (RISC) within the General Services Administration  
55 also regularly interacts with FDMS/Regulations.gov. RISC, along with the Office of Information and  
56 Regulatory Affairs (OIRA), maintains the Unified Agenda, a semi-annual publication of significant  
57 regulatory actions that agencies plan to take in the short and long term. The Unified Agenda indicates  
58 whether a rule has federalism implications, creates unfunded mandates, or affects small entities, and it  
59 contains other pieces of information about the rule.<sup>15</sup> When an agency official enters a key identifier  
60 assigned by RISC, which is referred to as the “Regulatory Identification Number,” (RIN) into the e-  
61 docket in FDMS, the Unified Agenda information publicly appears on Regulations.gov.<sup>16</sup>

### 62 Governance and Funding of FDMS/Regulations.gov

63 FDMS/Regulations.gov is governed by an Executive Steering Committee (Committee) that  
64 consists of officials from dozens of federal agencies.<sup>17</sup> The Committee is co-chaired by the Deputy  
65 Administrator of OIRA and the Chief Information Officer of the Environmental Protection Agency  
66 (EPA). It makes decisions about the design, operations, maintenance, and budgeting of  
67 FDMS/Regulations.gov upon advice from several smaller, lower-tiered bodies. These bodies include a  
68 Change Control Board, an Advisory Board, and a Budget Working Group.<sup>18</sup>

69 EPA is considered the “managing partner” of FDMS/Regulations.gov. As such, it is responsible  
70 for implementing changes to the system that have been approved by the Committee. To facilitate this  
71 responsibility, the EPA created a Project Management Office (PMO), which consists of a small staff of  
72 experts in online docket management technology.<sup>19</sup> This staff is responsible for implementing the policy

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<sup>14</sup> *Id.*

<sup>15</sup> Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 Fed. Reg. 36,757, 36,757 (June 26, 2015).

<sup>16</sup> See, e.g., *Alaska: Hunting and Trapping in National Preserves*, available at <https://www.regulations.gov/document?D=NPS-2018-0005-0001> (last accessed Oct. 2, 2018).

<sup>17</sup> See REGULATIONS.GOV, *The eRulemaking Initiative*, <https://test.regulations.gov/aboutProgram>.

<sup>18</sup> CURTIS COPELAND, CONG. RESEARCH SERV., RL34210, ELECTRONIC RULEMAKING IN THE FEDERAL GOVERNMENT 6 (2008).

<sup>19</sup> *Id.*

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76 decisions of the Committee. Although some commenters use the term “eRulemaking Program” to refer to  
77 the PMO specifically, the term as used in this preamble and recommendation refers to the  
78 FDMS/Regulations.gov governance structure as a whole, not solely to the PMO.

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79 There is no direct appropriated funding stream for FDMS/Regulations.gov.<sup>20</sup> Rather, the system is  
80 funded through what eRulemaking Program officials term a “cost allocation model.” Agencies that  
81 participate in FDMS/Regulations.gov fund the system through contributions, decided by a formula. The  
82 formula for contributions, established by the EPA in its Capital Asset Plan and Business Case, is based  
83 primarily on: 1) the size of a participating agency’s budget; 2) the average annual number of rules and  
84 non-rule items the agency publishes; and 3) the average annual number of comments the agency receives  
85 in its rulemakings.<sup>21</sup>

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86 **Interaction Among FDMS/Regulations.gov, Other Online e-Rulemaking Systems, and**  
87 **Commercial Search Engines**

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88 In addition to the eRulemaking Program, there are federal offices that house rulemaking materials  
89 and information. These include the Office of the Federal Register (OFR) and RISC. RISC houses Unified  
90 Agenda information, such as whether a rule imposes unfunded mandates and whether it has federalism  
91 implications, on Reginfo.gov. OFR’s Federalregister.gov provides access to the officially published  
92 document. Combined, information housed by all three of these bodies and others provides the user with  
93 important context about rulemakings.

94 The concept of connecting data housed by different entities is called “data interoperability.”<sup>22</sup>  
95 Data interoperability among Regulations.gov, RISC, and OFR is realized when agencies enter certain  
96 identifying numbers about a rule into e-dockets. The three key identifiers are: 1) the Federal Register  
97 Document Number; 2) the RIN (described above); and 3) the Regulations.gov Docket Number. The  
98 Federal Register Document Number is assigned by OFR when an agency sends a document to it for  
99 publication in the Federal Register. Because e-dockets often contain more than one document that has  
100 been published in the Federal Register, there are often two or more Federal Register Document Numbers  
101 associated with any given rulemaking. The Regulations.gov Docket Number is generated by FDMS when

<sup>20</sup> Cynthia R. Farina, Reporter, *Achieving the Potential: The Future of Federal E-Rulemaking, Report of the Committee on the Status and Future of Federal E-Rulemaking*, 62 ADMIN. L. REV. 279, 282 (2010).

<sup>21</sup> See Copeland, *supra* note 16, at 17.

<sup>22</sup> See ENVTL. PROT. AGENCY, OPEN GOVERNMENT PLAN 4.0 9–10 (Sept. 2016).

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106 an agency user creates an e-docket. The RIN is generated when an agency submits rulemaking materials  
107 to OIRA for review. When all three key identifiers are entered, users can understand the relationships  
108 among related e-dockets and can have access to the entire lifecycle of a rulemaking. If any of these  
109 identifiers are missing, or are incorrectly entered, the user will have difficulty discerning key context  
110 about the rulemaking.

111 In addition to these other offices, FDMS/Regulations.gov interacts, to a limited extent, with  
112 commercial search engines. However, for technical reasons that are beyond the scope of this  
113 recommendation, search engines currently do not capture the vast majority of materials on  
114 Regulations.gov.<sup>23</sup> Currently, they only capture materials that have appeared on the “front page” of  
115 Regulations.gov (e.g., “What’s Trending” notices). Most materials in FDMS never make it to the front  
116 page. By allowing search engines to capture all of FDMS’s publicly available underlying data, the  
117 eRulemaking Program would harness the technological expertise of the private sector to make it easier for  
118 people to find rulemaking materials.

119 **Problems with FDMS/Regulations.gov**

120 Many users of Regulations.gov have found that the system does not allow people to consistently  
121 and reliably: a) search for and find particular e-dockets and b) access supporting materials and other  
122 relevant information about rulemakings.<sup>24</sup>

123 One reason it is difficult to search for and find particular e-dockets is because agencies sometimes  
124 create multiple e-dockets for the same rulemaking.<sup>25</sup> For example, if an agency moves its rulemaking  
125 action from an NPRM to a final rule, the agency sometimes creates a separate e-docket for the final rule,  
126 instead of maintaining a single e-docket to which all documents related to the rulemaking are assigned. A  
127 user who tries to find this proposed rule might come across the first e-docket the agency created and  
128 conclude incorrectly that there has been no final rule issued. Sometimes this “multiple e-docket” problem  
129 happens because a sub-agency (e.g., the Occupational Safety and Health Administration) issued the  
130 NPRM and created the initial e-docket, and the parent agency (e.g., Department of Labor) issued the final

<sup>23</sup> See Cary Coglianese, *A Truly “Top Task”: Rulemaking and Its Accessibility on Agency Websites*, 44 *Env’tl. L. Rep.* 10660, 10661–63 (2014).

<sup>24</sup> See Farina, *supra* note 18, at 285–86.

<sup>25</sup> See *ERULEMAKING PROGRAM, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES* 8 (Nov. 30, 2010).

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131 rule and created the second e-docket. In any case, there are often at least two e-dockets, each containing  
132 documents that are part of a single rulemaking. At best, this is confusing. At worst, it misleads the user as  
133 to the status of the rulemaking if her search does not locate both e-dockets and enable her to recognize the  
134 relationship between them.

135 Another reason it is difficult to search for and find particular e-dockets is because the “Advanced  
136 Search” feature on Regulations.gov often does not helpfully narrow down the number of results that come  
137 up in a search. The purpose of an “advanced search” is to allow a user to search by different filters (e.g.,  
138 date range, type of source, and author), reduce the number of search results, and therefore increase the  
139 likelihood of finding what she is looking for. An advanced search function is especially important on  
140 Regulations.gov, given the millions of materials, many with similar titles, that are in the system.

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141 However, many of the filters that appear within Regulations.gov’s “Advanced Search” feature do  
142 not helpfully narrow down the relevant results. A user can search by “Document Type,” with the options  
143 listed as “Notice,” “Proposed Rule,” “Rule,” “Public Submission,” and “Other.” These options do not  
144 capture the vast array of rulemaking materials, such as advanced and supplemental notices of proposed  
145 rulemaking, that are stored within the FDMS database. Agencies also use these labels inconsistently,  
146 which further hinders the public’s ability to use the “Document Type” advanced search filter to  
147 successfully locate materials.<sup>26</sup> Some agencies, for example, label an Advanced Notice of Proposed  
148 Rulemaking as a “Notice,” and others label it as a “Proposed Rule.”<sup>27</sup> Additionally, there are “Document  
149 Subtypes” and “Docket Subtypes,” which offer a more comprehensive list of options that some agencies  
150 use and others do not. The existence of these subtypes exacerbates the problem of inconsistent use and  
151 generates more confusion for the user of Regulations.gov who is trying to locate relevant results.<sup>28</sup>

152 An additional problem with advanced searching is that selecting a parent agency as the  
153 “Agency” does not include results for sub-agencies. For example, a rule listed by a specific sub-agency

<sup>26</sup> Additionally, because of inconsistent use of these labels, users cannot easily address broad questions about agency rulemaking practices, such as: how often agencies use pre-proposal public information gathering processes like notices of inquiry and advanced notices of proposed rulemaking, and how often agencies use direct final, interim final, and other final-before-comment processes.

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<sup>27</sup> See Todd Rubin, *Regulations.gov and the Federal Docket Management System 9* (Aug. 31, 2018) (report to the Admin. Conf. of the U.S.), [www.acus.gov/report/fdms-and-regulationsgov-draft-report-8-31-2018](http://www.acus.gov/report/fdms-and-regulationsgov-draft-report-8-31-2018).

<sup>28</sup> See *id.*

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155 (e.g., the Bureau of the Census) may not be available when one searches for rules issued by the parent  
156 agency (e.g., the Department of Commerce). Visitors who use the “Agency” filter and select a parent  
157 agency may erroneously conclude that a particular document has not been published.<sup>29</sup>

158 When users do find relevant e-dockets, they may discover that they do not always contain  
159 supporting materials and Unified Agenda information that are visible to the public.<sup>30</sup> There are good,  
160 practical reasons for agencies to include supporting materials within their e-dockets. Doing so helps boost  
161 the quality of public comments. Furthermore, if no Unified Agenda information appears within the e-  
162 docket, members of the public cannot easily determine, among other things, whether a rule is considered a  
163 “major rule,” whether it has “federalism implications,” and whether it affects small entities. The absence  
164 of this information may diminish the public’s ability to comment adequately, and therefore undermines the  
165 statutory goals of informed public participation and transparency in rulemaking.<sup>31</sup>

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166 Yet another problem with FDMS/Regulations.gov is that it is not completely interoperable with  
167 the other two main rulemaking sites: Federalregister.gov and Reginfo.gov. For example, if an agency user  
168 of FDMS neglects to enter the RIN for an e-docket, or enters an incorrect RIN, Unified Agenda  
169 information will not be displayed on Regulations.gov. An even more fundamental problem is that there is  
170 no common “look and feel” across the three websites. A user of Federalregister.gov, for example, can  
171 search by whether a rule is “economically significant,” but no such search option is available on  
172 Regulations.gov. Complete interoperability among these three sites would allow users to seamlessly  
173 locate essential context about rulemakings.

174 FDMS and Regulations.gov are remarkable achievements, made possible by the diligent work of  
175 many government officials over many years. However, they can be improved to allow the public, agency  
176 officials, and members of Congress to find rulemaking materials easily and understand how rulemakings  
177 were developed.

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<sup>29</sup> See *id.* at 7.

<sup>30</sup> See Farina, *supra* note 18, at 287.

<sup>31</sup> See 44 U.S.C. § 3501 (note).

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RECOMMENDATION

- 181 1. The Office of the Chairman of the Administrative Conference of the United States should
- 182 work with the eRulemaking Program to provide, on an ongoing basis, resources to help
- 183 identify and meet user needs in navigating and finding materials on Regulations.gov, both
- 184 in its current form and as it continues to evolve.
- 185 2. The default should be for agencies to use one e-docket for each rulemaking proceeding to
- 186 the maximum extent possible. In instances in which agencies must use more than one e-
- 187 docket for a single rulemaking, they should link the related e-dockets by using relevant
- 188 identifiers and making clear to users in each of the related e-dockets that the e-dockets
- 189 are linked. The eRulemaking Program should offer tools both on Regulations.gov to help
- 190 users identify instances of related e-dockets, and on FDMS to help agency administrators,
- 191 docket managers and other agency officials implement the concept of one e-docket and
- 192 highlight any related e-dockets.
- 193 3. The eRulemaking Program should work with the Office of the Federal Register, other
- 194 federal officials, and other experts as needed to analyze the current list of Document and
- 195 Docket Types and Subtypes and make any changes to these labels that will facilitate
- 196 consistent use within and across agencies.
- 197 4. The e-Rulemaking Program, the Office of the Federal Register, the Regulatory
- 198 Information Services Center, and offices that have statutory responsibilities related to
- 199 rulemaking such as the National Institute of Standards and Technology, should work to
- 200 achieve data interoperability so that information in e-dockets could be connected to other
- 201 relevant information, reflecting the entire lifecycle of a rulemaking proceeding.
- 202 5. The eRulemaking Program should ensure that agencies receive prompts that alert them to
- 203 any e-dockets that do not have supporting and related materials. The prompt should
- 204 remind agencies of their legal obligation to include, to the extent practicable, all materials
- 205 that by agency rule or practice are included in the rulemaking docket, whether or not
- 206 submitted electronically.

**Commented [TR1]:** Given that the Office of the Chairman is a separate entity from the Assembly, and that this is ultimately a recommendation from the Assembly, "should" is more appropriate than "will." Furthermore, this accords with our precedent. See, e.g., Recommendation 2014-7, Best Practices for Using Video Teleconferencing for Hearings, 79 Fed. Reg. 75,114, 75,119 (Dec. 17, 2014).

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218 6. The eRulemaking Program should make its underlying publicly available data as open,  
219 accessible, and searchable as possible, so that interested third parties such as commercial  
220 search engines can allow people to search for rulemaking content.

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