



Memorandum

To: Committee on Rulemaking
From: Emily Schleicher Bremer (Staff Counsel)
Date: ~~August 17~~October 3, 2011
Re: Draft Recommendation

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The following draft recommendation is based on Professor Coglianesi’s report and ~~represents what the Committee might produce if it chose to adopt the recommendations suggested by the report. However, the Committee is not required to do so.~~the Committee’s discussion at its August 24, 2011 meeting. This draft is intended to facilitate the Committee’s discussion at its ~~August 24~~October 6, 2011 ~~public~~ meeting and not to preempt the Committee’s discussion and consideration of the proposed recommendations. In keeping with the Conference’s practice, a draft preamble has been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should also feel free to revise it as appropriate.

Agency Innovations in e-Rulemaking

Draft Preamble

The rulemaking function of federal regulatory agencies is typically accomplished today through “e-rulemaking”: that is, through ~~the use of digital technology. The website www.regulations.gov~~“the use of digital technologies in the development and implementation of regulations,” before or during the informal rulemaking process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA).”¹ The website www.regulations.gov centralizes much e-rulemaking activity throughout the executive branch. This recommendation concerns ~~additional activities by individual agencies, beyond the use of regulations.gov, that~~their own websites to promote e-rulemaking and other agency initiatives and activities.

~~Individual agencies have promoted e-rulemaking in innovative ways. For example, agencies have developed portions of their own websites to support their~~The proliferation of competing demands for communication makes rulemaking only one—perhaps even to some, a relatively minor one—of the many priorities under consideration when agency officials make decisions about the design and functionality of their websites. As a result, there is a risk agencies will make website design decisions without giving due consideration to the values

¹ Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking 1* (quoting Cary Coglianesi, *E-Rulemaking: Information Technology and the Regulatory Process 2* (2004) (working paper), http://lsr.nellco.org/upenn_wps/108).



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of public participation reflected in the various laws and executive orders that have called upon agencies to use electronic media to enhance the public's understanding of and role in rulemaking. Indeed, an emerging approach to government website design focuses on giving prominence to "top tasks" sought by members of the public. Such an approach certainly has much to be said for it. But an exclusive focus on current website use or demand will probably push information about rulemaking, and online opportunities for public commenting on rulemaking, far into the background—simply because the volume of website traffic generated by online government services performed by many agencies dwarfs the traffic related to rulemaking. Rulemaking may perhaps never be a "top task" in terms of the numbers of web users, but in a democracy, few tasks compare in significance with the ability of government agencies to create binding law backed up with the threat of civil, and even criminal, penalties.

The Conference studied the websites and e-rulemaking initiatives of 90 agencies, each of which had reported completing an average of two or more rulemakings during each six-month period covered by the semiannual regulatory agenda. The study reveals that individual agencies have used websites in innovative ways to promote e-rulemaking. For example, agencies have developed portions of their own websites to support rulemaking efforts. Some agencies have specialized webpages that allow users to submit and view comments on all of the agency's open rulemakings, or to view information on the status of their priority rulemakings. Links from some agency home pages make rulemaking information easy to locate. Other agencies have innovated by using social media to get the public involved in the rulemaking processes from the earliest stages. These social media tools include blogs, Facebook, Twitter, IdeaScale, and other online discussion platforms.

The Conference's study of agency websites and e rulemaking initiatives reveals that agency use of innovative features such as these to encourage and facilitate public engagement in rulemaking is not uniform. Agency innovations can improve the availability of information and engage the public in rulemaking activities at no great cost to the government. A cost-effective technique to improve the availability of rulemaking information on individual agency websites leverages available centralized data sources. An example of this approach is found on the websites of many members of Congress, who provide a link on their home page to a page listing all the legislation the member sponsors. The list is not drawn from the Member's own database, but rather extracts information from a THOMAS database of all legislation currently pending in Congress. Regulations.gov makes a similar tool available to agencies, thus enabling them to provide easy access to complete and up-to-date rulemaking information without the necessity of maintaining the underlying database.

Agencies can also use online discussion facilitators, who can be designated agency employees or independent contractors, to encourage public engagement in agency rulemakings. The purpose is to conduct an online conversation about rulemaking. The facilitator would not



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speaking on behalf of the agency, and a disclaimer that would need to be stipulated clearly and prominently.

Agency innovations can also further well-established policies in favor of broadening access by groups that have historically faced barriers to participating effectively in rulemaking. In 2000, President Clinton issued Executive Order 13166 in an effort “to improve access to ... programs and activities for persons who, as a result of national origin, are limited in their English proficiency.”² The Office of Management and Budget’s policy on agency websites reminds agencies that they are “required to provide appropriate access for people with limited English proficiency.”³ Similarly, until high-speed access is pervasive across all strata of society, any agency that makes full public access and participation a priority should explore low bandwidth options. In addition, continued vigilance is needed to ensure that agency websites and other electronic media will be as accessible to disabled individuals as they are to other users. This accessibility may grow even more challenging in the wake of new techniques for organizing a large volume of information on a website.

Individual agency websites can also be used to address discrete deficiencies in the availability of critical rulemaking information. One such problem is that comment policies for many agencies cannot be found easily by the public. Even on web pages dedicated to the submission of comments, a comment policy is not always visible to the user. A second difficulty arises with old rulemaking materials, which need to be preserved for archival, historical, and legal reasons, but are often difficult for users to find and search. A third issue is that agency websites are uniformly easy to locate, but do not always include features to ensure that essential information, particularly about rulemaking, is broadly accessible to the public.

The Conference believes that, as a general matter, agencies should continue to improve their websites to facilitate public accessibility and engagement so as to achieve the promise of e-rulemaking.—This Recommendation is intended to broadly encourage agencies to develop and use innovative, cost-effective ways to use individual websites to solve some of the discrete problems identified above and generally engage the public in rulemaking.

~~Based on its study of innovations at individual agencies, the Conference has identified ideas that can promote better public involvement in the rulemaking process.—The recommendations below are intended to guide agencies as they move towards this goal.~~

² Exec. Order No. 13166, 65 Fed. Reg. 50121, 50121 (Aug. 11, 2000).

³ OMB Deputy Director for Management Clay Johnson, *Memorandum on Policies for Federal Agency Public Websites* (Dec. 17, 2004), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-04.pdf>.



Draft Recommendation

Increasing the Visibility of Rulemakings

1. Agencies should manage their use of the Internet with rulemaking participation ~~by the general public~~ in mind.
2. Agencies should provide a one-stop location ~~on their~~, which should be easily reachable from agencies' home pages, for all rulemakings currently open for comment. By linking to available websites—such as Regulations.gov, RegInfo.gov, Federal Register 2.0, and so forth—and integrating underlying data, agencies could efficiently enable the public to retrieve all the information the federal government has about ongoing rulemakings.
3. Agencies should consider, in appropriate rulemakings, ~~retaining~~having an internal or external facilitator ~~services to manage discussion with respect to online, agency-sponsored discussions regarding~~ the rulemaking on social media sites.
 - (a) The facilitator may summarize the social media discussion and file the summary in the rulemaking docket.
 - (b) When an agency sponsors a social media discussion of a rulemaking, it should provide clear notice to participants as to whether and how it will use the discussion in the rulemaking proceeding.

Improving Access to Agency Websites

4. Agencies should strive further to improve the accessibility of their websites to ~~all~~ members of the public.
5. ~~Agencies should take steps to improve access for persons who do not speak have faced barriers to effectively participating in rulemaking in the past, including non-English as a primary language.~~
 - (a) ~~While agencies need not translate their entire websites into other languages, they should provide translations speakers, users of vital information. More agencies should provide a sealed-down version of their website in other languages.~~
 - (b) ~~Agencies should provide translations of materials into appropriate languages for specific rulemakings that can be anticipated to have disproportionate effects upon or elicit a substantial interest by individuals with limited English proficiency.~~
6. ~~Agencies should take steps to improve access to their websites by members of the public using low-bandwidth Internet connections by providing a text-only option.~~



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~~7.5. _____ Agencies should ensure Section 508 compliance, and make their websites accessible to those with disabilities the disabled.~~

Making Rulemaking Comment Policies Easy to Locate

~~8.6. _____ Agencies should display their rulemaking comment policies in accessible prominent locations on their websites or provide links to the comment policy in multiple, ~~accessible~~ locations, especially on ~~webpages~~ web pages that elicit comments from the public.~~

Ensuring Access to Archived Rulemaking Material

~~9.7. _____ Agencies should develop systematic protocols ~~for to enable~~ the online storage and retrieval of old material online materials from completed rulemakings.~~

Evaluating Website Accessibility on an Ongoing Basis

~~10.8. _____ Agencies should ~~conduct ongoing evaluations of~~ periodically evaluate their use of the Internet ~~against the goals of e-in~~ rulemaking and should continue to innovate and experiment with new and cost-effective ways to engage the public in rulemaking via the Internet.~~