

**Memorandum**

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

The following draft recommendation is based on Professor Coglianese's report and the Committee's discussion at its August 24, 2011 meeting. This draft is intended to facilitate the Committee's discussion at its October 6, 2011 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 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 individual agencies' uses of their own websites to promote e-rulemaking and other agency initiatives and activities.

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 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

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



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.

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 speak 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

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



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.

Draft Recommendation

Increasing the Visibility of Rulemakings

1. Agencies should manage their use of the Internet with rulemaking participation in mind.
2. Agencies should provide a one-stop location, 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, having an internal or external facilitator manage online, agency-sponsored discussions regarding the rulemaking on social media sites.

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>.



- (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 members of the public.

5. Agencies should take steps to improve access for persons who have faced barriers to effectively participating in rulemaking in the past, including non-English speakers, users of low-bandwidth Internet connections, and the disabled.

Making Rulemaking Comment Policies Easy to Locate

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

Ensuring Access to Archived Rulemaking Material

7. Agencies should develop systematic protocols to enable the online storage and retrieval of materials from completed rulemakings.

Evaluating Website Accessibility on an Ongoing Basis

8. Agencies should periodically evaluate their use of the Internet in rulemaking and should continue to innovate and experiment with new and cost-effective ways to engage the public in rulemaking via the Internet.