



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

Committee on Regulation

Proposed Recommendation for Committee | September 25, 2018

1 **Legal Requirements for Online Rulemaking**

2 The E-Government Act requires agencies, to the extent practicable, to accept comments on
3 rulemaking actions by electronic means, and to maintain electronic rulemaking dockets (e-dockets).¹ An
4 e-docket is simply a virtual folder that contains materials relevant to a particular rulemaking, including
5 any relevant notices (e.g., notices of proposed rulemaking (NPRM)), supporting materials, and comments.
6 Under the Act, e-dockets must make publicly available online, to the extent practicable, all comments
7 received “and other materials that by agency rule or practice are included in the rulemaking docket . . .
8 whether or not submitted electronically.”²

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

¹ 44 U.S.C. § 3501 (note).

² *Id.*

³ *Id.*

⁴ *Id.*



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15 **Basic Structure of FDMS, Regulations.gov, and Related Online Rulemaking Systems**

16 Regulations.gov and FDMS are the vehicles through which all agencies, except for some
17 independent regulatory agencies,⁵ attempt to comply with the E-Government Act’s electronic commenting
18 and e-docket requirements.⁶ Regulations.gov is the repository for a large part of the federal government’s
19 rulemaking materials. Members of the public can search the site for rulemakings spanning nearly 40 years
20 from over 180 federal agencies.⁷

21 Agencies that participate in Regulations.gov upload materials to Regulations.gov through a
22 system called the Federal Docket Management System (FDMS). Agencies create and manage e-dockets
23 and their contents through FDMS.gov, a password-protected site that can be accessed only by authorized
24 agency personnel. Agency officials are responsible not only for creating e-dockets but also for
25 appropriately indexing them by selecting relevant docket and document types and subtypes, which will be
26 described in greater detail below.

27 All materials that are published in the *Federal Register* automatically appear in FDMS, including
28 materials from agencies that do not participate in Regulations.gov. This is because there is an automated,
29 “behind the scenes” link between the *Federal Register* and FDMS whereby each day, the entirety of the
30 *Federal Register’s* contents is sent to FDMS. Agencies can then decide which of those materials become
31 publicly visible on Regulations.gov.

32 The Regulatory Information Services Center (RISC) within the General Services Administration
33 also regularly interacts with FDMS/Regulations.gov. RISC, along with the Office of Information and
34 Regulatory Affairs (OIRA), maintains the Unified Agenda, a semi-annual publication of significant
35 regulatory actions that agencies plan to take in the short and long term. The Unified Agenda indicates
36 whether a rule has federalism implications, creates unfunded mandates, or affects small entities, and it
37 contains other pieces of information about the rule.⁸ When an agency official enters a key identifier

⁵ 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.

⁶ 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.

⁷ See REGULATIONS.GOV, PARTICIPATING AGENCIES, https://www.regulations.gov/docs/Participating_Agencies.pdf (March 2018).

⁸ 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).



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38 assigned by RISC, which is referred to as the “Regulatory Identification Number,” into the e-docket in
39 FDMS, the Unified Agenda information publicly appears on Regulations.gov.

40 **Governance and Funding of FDMS/Regulations.gov**

41 FDMS/Regulations.gov is governed by an Executive Steering Committee (Committee) that
42 consists of officials from dozens of federal agencies. The Committee is co-chaired by the Deputy
43 Administrator of OIRA and the Chief Information Officer of the Environmental Protection Agency
44 (EPA). It makes decisions about the design, operations, maintenance, and budgeting of
45 FDMS/Regulations.gov upon advice from several smaller, lower-tiered bodies. These bodies include a
46 Change Control Board, an Advisory Board, and a Budget Working Group.⁹

47 EPA is considered the “managing partner” of FDMS/Regulations.gov. As such, it is responsible
48 for implementing changes to the system that have been approved by the Committee. To facilitate this
49 responsibility, the EPA created a Project Management Office, which consists of a small staff of experts in
50 online docket management technology. This staff is responsible for implementing the policy decisions of
51 the Committee. Combined, this governance structured is called the “eRulemaking Program.”

52 There is no direct appropriated funding stream for FDMS/Regulations.gov.¹⁰ Rather, the system is
53 funded through what eRulemaking officials term a “cost allocation model.” Agencies that participate in
54 eRulemaking fund the system through contributions, decided by a formula. The formula for contributions,
55 established by the EPA in its Capital Asset Plan and Business Case, is based primarily on: 1) the size of a
56 participating agency’s budget; 2) the average annual number of rules and non-rule items the agency
57 publishes; and 3) the average annual number of comments the agency receives in its rulemakings.¹¹

⁹ CURTIS COPELAND, CONG. RESEARCH SERV., RL34210, ELECTRONIC RULEMAKING IN THE FEDERAL GOVERNMENT 6 (2008).

¹⁰ 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).

¹¹ See Copeland, *supra* note 9, at 17.



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

59 Many users of Regulations.gov have found that the system does not allow people to consistently
60 and reliably: a) search for and find particular e-dockets and b) access supporting materials and other
61 relevant information about rulemakings.¹²

62 One reason it is difficult to search for and find particular e-dockets is because agencies sometimes
63 create multiple e-dockets for the same rulemaking. For example, if an agency moves its rulemaking action
64 from an NPRM to a final rule, the agency sometimes creates a separate e-docket for the final rule, instead
65 of maintaining a single e-docket to which all documents related to the rulemaking are assigned. A user
66 who tries to find this rule might come across the first e-docket the agency created and conclude
67 incorrectly that there has been no final rule issued. Sometimes this “multiple e-docket” problem happens
68 because a sub-agency (e.g., the Occupational Safety and Health Administration) issued the NPRM and
69 created the initial e-docket, and the parent agency (e.g., Department of Labor) issued the final rule and
70 created the second e-docket. In any case, there are often at least two e-dockets, each containing
71 documents that are part of a single rulemaking. At best, this is confusing. At worst, it misleads the user as
72 to the status of the rulemaking if her search does not locate both e-dockets and enable her to recognize the
73 relationship between them.

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

80 However, many of the filters that appear within Regulations.gov’s “Advanced Search” feature do
81 not helpfully narrow down the relevant results. A user can search by “Document Type,” with the options
82 listed as “Notice,” “Proposed Rule,” “Rule,” “Public Submission,” and “Other.” These options do not
83 capture the vast array of rulemaking materials, such as advanced and supplemental notices of proposed
84 rulemaking, that are stored within the FDMS database. Agencies also use these labels inconsistently,
85 which further hinders the public’s ability to use the “Document Type” advanced search filter to

¹² See Farina, *supra* note 10, at 285–86.



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86 successfully locate materials.¹³ Some agencies, for example, label an Advanced Notice of Proposed
87 Rulemaking as a “Notice,” and others label it as a “Proposed Rule.” Additionally, there are “Document
88 Subtypes” and “Docket Subtypes,” which offer a more comprehensive list of options that some agencies
89 use and others do not. The existence of these subtypes exacerbates the problem of inconsistent use and
90 generates more confusion for the user of Regulations.gov who is trying to locate relevant results.

91 An additional problem with advanced searching is that selecting a parent agency as the
92 “Agency” does not include results for sub-agencies. For example, a rule listed by a specific sub-agency
93 (e.g., the Bureau of the Census) may not be available when one searches for rules issued by the parent
94 agency (e.g., the Department of Commerce). Visitors who use the “Agency” filter and select a parent
95 agency may erroneously conclude that a particular document has not been published.

96 When users do find relevant e-dockets, they may discover that they do not always contain
97 supporting materials and Unified Agenda information that are visible to the public. There are good,
98 practical reasons for agencies to include supporting materials within their e-dockets. Doing so helps boost
99 the quality of public comments. Furthermore, if no Unified Agenda information appears within the e-
100 docket, members of the public cannot easily determine, among other things, whether a rule is considered a
101 “major rule,” whether it has “federalism implications,” and whether it affects small entities. Combined,
102 the absence of this information may diminish the public’s ability to comment adequately.

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

¹³ 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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RECOMMENDATION

- 107 1. The Office of the Chairman of the Administrative Conference of the United States should work
108 with the eRulemaking Program to create resources to help members of the public navigate and
109 find materials on Regulations.gov. These resources should address the practical problems that
110 members of the public will encounter when using Regulations.gov and should offer advice on
111 how to work around those problems.
- 112 2. The eRulemaking Program should require participating agencies to use one e-docket per
113 rulemaking. It should train docket managers and other agency officials on how to comply with the
114 requirement and should use available technologies to enforce it.
- 115 3. The eRulemaking Program should work with federal officials and other experts as needed to
116 analyze the current list of Document and Docket Types and Subtypes and make any changes to
117 these labels that will facilitate consistent use within and across agencies. It should also offer
118 training to docket managers to further promote consistent use of these labels.
- 119 4. The eRulemaking Program and the General Service Administration's Regulatory Information
120 Services Center should work closely together to ensure that e-dockets contain all available
121 Unified Agenda information.
- 122 5. The eRulemaking Program should use available technology and databases to ensure that when a
123 user searches by parent agency, the system suggests relevant sub-agencies for the user to search,
124 along with the results for the parent agency.
- 125 6. The eRulemaking Program should ensure that agencies receive prompts that alert them to any e-
126 dockets that do not have supporting and related materials. The prompt should remind agencies of
127 their legal obligation to include, to the extent practicable, all materials that by agency rule or
128 practice are included in the rulemaking docket, whether or not submitted electronically.
- 129 7. The eRulemaking Program should make its underlying data as open and accessible as possible to
130 commercial search engines to allow people to search for rulemaking materials using such search
131 engines.