Legal Requirements for Maintaining Electronic Rulemaking Dockets

The E-Government Act requires agencies, to the extent practicable, to maintain electronic rulemaking dockets (e-dockets). 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.” The E-Government Act does not specify precisely which kind of materials agencies must include within their e-dockets.

The Administrative Conference of the United States has noted that agencies should manage their public rulemaking dockets to achieve “maximum public disclosure.” 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

---

1 44 U.S.C. § 3501 (note). The statute also requires agencies, to the extent practicable, to accept comments by electronic means.
2 Id.
rulemaking; and (f) any other materials considered by the agency during the course of the rulemaking.4

Because the “public rulemaking docket” is, due to the E-Government Act, the same as the “e-docket,” agencies should include all of these materials in their e-dockets.

Basic Structure of FDMS/Regulations.gov

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

Agencies that participate in Regulations.gov upload materials to Regulations.gov through a system called the Federal Docket Management System (FDMS).8 Agencies create and manage e-dockets and their contents through FDMS.gov, a password-protected site that can be accessed only by authorized agency personnel.9 Agency officials are responsible not only for creating e-dockets but also for appropriately indexing them by selecting relevant docket and document types and subtypes,10 which will be described in greater detail below.

All materials that are published in the Federal Register automatically appear in FDMS, including materials from agencies that do not participate in Regulations.gov.11 This is because there is an

4 Id.
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. 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).
9 Id.
10 Id.
automated, “behind the scenes” link between the Federal Register and FDMS whereby each day, the entirety of the Federal Register’s contents is sent to FDMS.\(^\text{12}\)

The Regulatory Information Services Center (RISC) within the General Services Administration also regularly interacts with FDMS/Regulations.gov. RISC, along with the Office of Information and Regulatory Affairs (OIRA), maintains the Unified Agenda, a semi-annual publication of significant regulatory actions that agencies plan to take in the short and long term. The Unified Agenda indicates whether a rule has federalism implications, creates unfunded mandates, or affects small entities, and it contains other pieces of information about the rule.\(^\text{13}\) When an agency official enters a key identifier assigned by RISC, which is referred to as the “Regulatory Identification Number,” (RIN) into the e-docket in FDMS, the Unified Agenda information publicly appears on Regulations.gov.\(^\text{14}\)

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

FDMS/Regulations.gov is governed by an Executive Steering Committee (Committee) that consists of officials from dozens of federal agencies.\(^\text{15}\) The Committee is co-chaired by the Deputy Administrator of OIRA and the Chief Information Officer of the Environmental Protection Agency (EPA). It makes decisions about the design, operations, maintenance, and budgeting of FDMS/Regulations.gov upon advice from several smaller, lower-tiered bodies. These bodies include a Change Control Board, an Advisory Board, and a Budget Working Group.\(^\text{16}\)

EPA is considered the “managing partner” of FDMS/Regulations.gov. As such, it is responsible for implementing changes to the system that have been approved by the Committee. To facilitate this responsibility, the EPA created a Project Management Office (PMO), which consists of a small staff of experts in online docket management technology.\(^\text{17}\) This staff is responsible for implementing the policy

\(^{12}\) Id.


\(^{15}\) See regulations.gov, *The eRulemaking Initiative*, https://test.regulations.gov/aboutProgram.

\(^{16}\) CURTIS COPELAND, CONG. RESEARCH SERV., RL34210, ELECTRONIC RULEMAKING IN THE FEDERAL GOVERNMENT 6 (2008).

\(^{17}\) Id.
decisions of the Committee. Although some commenters use the term “eRulemaking Program” to refer to the PMO specifically, the term as used in this preamble and recommendation refers to the FDMS/Regulations.gov governance structure as a whole, not solely to the PMO.

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

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

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

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

---

19 See Copeland, supra note 16, at 17.
20 See ENVTL. PROT. AGENCY, OPEN GOVERNMENT PLAN 4.0 9–10 (Sept. 2016).
an agency user creates an e-docket. The RIN is generated when an agency submits rulemaking materials to OIRA for review. When all three key identifiers are entered, users can understand the relationships among related e-dockets and can have access to the entire lifecycle of a rulemaking. If any of these identifiers are missing, or are incorrectly entered, the user will have difficulty discerning key context about the rulemaking.

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

Problems with FDMS/Regulations.gov

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

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

---

22 See Farina, supra note 18, at 285–86.
23 See eRULEMAKING PROGRAM, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (Nov. 30, 2010).
rule and created the second e-docket. In any case, there are often at least two e-dockets, each containing documents that are part of a single rulemaking. At best, this is confusing. At worst, it misleads the user as to the status of the rulemaking if her search does not locate both e-dockets and enable her to recognize the relationship between them.

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

However, many of the filters that appear within Regulations.gov’s “Advanced Search” feature do not helpfully narrow down the relevant results. A user can search by “Document Type,” with the options listed as “Notice,” “Proposed Rule,” “Rule,” “Public Submission,” and “Other.” These options do not capture the vast array of rulemaking materials, such as advanced and supplemental notices of proposed rulemaking, that are stored within the FDMS database. Agencies also use these labels inconsistently, which further hinders the public’s ability to use the “Document Type” advanced search filter to successfully locate materials.24 Some agencies, for example, label an Advanced Notice of Proposed Rulemaking as a “Notice,” and others label it as a “Proposed Rule.”25 Additionally, there are “Document Subtypes” and “Docket Subtypes,” which offer a more comprehensive list of options that some agencies use and others do not. The existence of these subtypes exacerbates the problem of inconsistent use and generates more confusion for the user of Regulations.gov who is trying to locate relevant results.26

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

24 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.


26 See id.
(e.g., the Bureau of the Census) may not be available when one searches for rules issued by the parent agency (e.g., the Department of Commerce). Visitors who use the “Agency” filter and select a parent agency may erroneously conclude that a particular document has not been published.\(^\text{27}\)

When users do find relevant e-dockets, they may discover that they do not always contain supporting materials and Unified Agenda information that are visible to the public.\(^\text{28}\) There are good, practical reasons for agencies to include supporting materials within their e-dockets. Doing so helps boost the quality of public comments. Furthermore, if no Unified Agenda information appears within the e-docket, members of the public cannot easily determine, among other things, whether a rule is considered a “major rule,” whether it has “federalism implications,” and whether it affects small entities. The absence of this information may diminish the public’s ability to comment adequately and therefore undermines the statutory goals of informed public participation and transparency in rulemaking.\(^\text{29}\)

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

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

---

\(^{27}\) See id. at 7.

\(^{28}\) See Farina, supra note 18, at 287.

\(^{29}\) See 44 U.S.C. § 3501 (note).
RECOMMENDATION

1. The Office of the Chairman of the Administrative Conference of the United States should work with the eRulemaking Program to provide, on an ongoing basis, resources to help identify and meet user needs in navigating and finding materials on Regulations.gov, both in its current form and as it continues to evolve.

2. The default should be for agencies to use one e-docket for each rulemaking proceeding to the maximum extent possible. In instances in which agencies must use more than one e-docket for a single rulemaking, they should link the related e-dockets by using relevant identifiers and making clear to users in each of the related e-dockets that the e-dockets are linked. The eRulemaking Program should offer tools both on Regulations.gov to help users identify instances of related e-dockets, and on FDMS to help agency administrators, docket managers and other agency officials implement the concept of one e-docket and highlight any related e-dockets.

3. The eRulemaking Program should work with the Office of the Federal Register, other federal officials, and other experts as needed to analyze the current list of Document and Docket Types and Subtypes and make any changes to these labels that will facilitate consistent use within and across agencies.

4. The eRulemaking Program, the Office of the Federal Register, the Regulatory Information Services Center, and offices that have statutory responsibilities related to rulemaking such as the National Institute of Standards and Technology, should work to achieve data interoperability so that information in e-dockets could be connected to other relevant information, reflecting the entire lifecycle of a rulemaking proceeding.

5. The eRulemaking Program should ensure that agencies receive prompts that alert them to any e-dockets that do not have supporting and related materials. The prompt should remind agencies of their legal obligation to include, to the extent practicable, all materials that by agency rule or practice are included in the rulemaking docket, whether or not 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).
6. The eRulemaking Program should make its underlying publicly available data as open, accessible, and searchable as possible, so that interested third parties such as commercial search engines can allow people to search for rulemaking content.