



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Regulations.gov and the Federal Docket Management System

(FDMS) Improving Access to Regulations.gov's Rulemaking Dockets

Commented [CMA1]: Proposed amendment from Committee on Regulation

Committee on Regulation

Proposed Recommendation | December 13, 2018

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and an additional amendment from Conference members (with source shown in the margin).

1 As agencies develop regulations, they often seek input from the public. In order to submit
2 an informed comment, a member of the public needs to be able to at least: (1) access the
3 proposed rule and the agency's justification for it; (2) access materials upon which the agency
4 substantially relied to develop the proposed rule; and (3) understand the rationale by which the
5 agency made its decision. Commenters should also be able to access other comments that may
6 have been submitted on the proposed rule in time to submit responsive comments, to the extent
7 this is possible.

8 Members of the public, especially those who are subject to the rule, should be able easily
9 to determine whether further action has been taken on the proposed rule and, when a final rule
10 has been issued, to access the rule and all materials, including public comments, that informed its
11 development. This Recommendation seeks to make it easier for members of the public to access
12 these materials on Regulations.gov, thereby allowing them to contribute more effectively to the
13 rulemaking process and understand their regulatory obligations.

Legal Requirements for Maintaining Electronic Rulemaking Dockets

14 The purposes of the E-Government Act of 2002 are to "improve performance in the
15 development and issuance of agency regulations by using information technology to increase
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17 access, accountability, and transparency,” and to “enhance public participation in Government by
18 electronic means, consistent with [the Administrative Procedure Act].”¹ The E-Government Act
19 of 2002 requires agencies, to the extent practicable, to maintain electronic rulemaking dockets
20 (e-dockets).² An e-docket is simply a virtual folder that contains materials relevant to a particular
21 rulemaking. It ideally includes any relevant notices (e.g., notices of proposed rulemaking
22 (NPRMs)), supporting materials, and comments. Under the E-Government Act of 2002, e-
23 dockets must make publicly available online, to the extent practicable, all comments received
24 “and other materials that by agency rule or practice are included in the rulemaking docket . . .
25 whether or not submitted electronically.”³

26 The Administrative Conference has recommended that agencies manage their public
27 rulemaking dockets to achieve “maximum public disclosure.”⁴ This means that, to the extent
28 feasible, agencies should include the following within their public rulemaking dockets: (1)
29 notices pertaining to the rulemaking; (2) comments and other materials submitted to the agency
30 related to the rulemaking; (3) transcripts or recordings, if any, of oral presentations made in the
31 course of a rulemaking; (4) reports or recommendations of any relevant advisory committees; (5)
32 other materials required by statute, executive order, or agency rule to be considered or made
33 public in connection with the rulemaking; and (6) any other materials considered by the agency
34 during the course of the rulemaking. Because the E-Government Act of 2002 treats the e-docket
35 as equivalent to the traditional rulemaking docket, agencies should include all these materials in
36 their e-dockets.

¹ E-Government Act of 2002, Pub. L. No. 107-347, § 206(a), 116 Stat. 2899, 2915 (amending 44 U.S.C. § 3501).

² The E-Government Act of 2002 also requires agencies, to the extent practicable, to accept comments by electronic means. *Id.* § 206(c).

³ *Id.* § 206(d)(2)(B).

⁴ See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ¶ 2, 78 Fed. Reg. 41,358, 41,360 (July 10, 2013).



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

38 Regulations.gov and the Federal Docket Management System (FDMS) are the primary
39 vehicles through which all agencies, except for some independent regulatory agencies,⁵ comply
40 with the electronic commenting and e-docket requirements of the E-Government Act of 2002.⁶
41 FDMS/Regulations.gov therefore houses a large part of the federal government's rulemaking
42 and, for some agencies, non-rulemaking materials (e.g., adjudication dockets and Paperwork
43 Reduction Act notices), spanning nearly 40 years from over 180 federal agencies.

44 Agencies create and manage e-dockets and their contents through FDMS.gov, a
45 password-protected site that can be accessed only by authorized agency personnel. Agency
46 officials are responsible not only for creating e-dockets but also for appropriately indexing them
47 by selecting relevant Docket and Document Types and Subtypes, which will be described in
48 greater detail below.

49 All materials that are published in the *Federal Register* automatically appear in FDMS,
50 including materials from agencies that do not participate in FDMS/Regulations.gov. This is
51 because there is an automated link between the *Federal Register* and FDMS whereby each day
52 all the *Federal Register's* contents are sent to FDMS.

53 The Regulatory Information Services Center (RISC) within the General Services
54 Administration (GSA) also regularly interacts with FDMS/Regulations.gov. RISC maintains the
55 Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda), a semi-annual
56 publication of significant regulatory actions that agencies plan to take in the short and long term.
57 The Unified Agenda requires agencies to indicate, among other things, whether a rule has

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).



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58 federalism implications, creates unfunded mandates, or affects small entities.⁷ When an agency
59 official enters a key identifier assigned by RISC, which is referred to as the Regulatory Identifier
60 Number (RIN) into the e-docket in FDMS, the Unified Agenda information publicly appears on
61 Regulations.gov.

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

63 FDMS/Regulations.gov is governed by an Executive Steering Committee (Committee)
64 that consists of officials from dozens of federal agencies. The Committee is co-chaired by the
65 Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA) and the Chief
66 Information Officer of the Environmental Protection Agency (EPA). It makes decisions about
67 the design, operations, maintenance, and budgeting of FDMS/Regulations.gov upon advice from
68 several smaller, lower-tiered bodies.

69 EPA is considered the “managing partner” of FDMS/Regulations.gov. As such, it is
70 responsible for implementing changes to the system that have been approved by the Committee.
71 To carry out this responsibility, the EPA created a Project Management Office (PMO), which
72 consists of a small staff of experts in online docket management technology. This staff
73 implements the policy decisions of the Committee. Although some commenters use the term
74 “eRulemaking Program” to refer to the PMO specifically, the term as used in this
75 Recommendation refers not solely to the PMO, but also to the FDMS/Regulations.gov
76 governance structure as a whole, including participating agencies.

77 There is no direct appropriated funding for FDMS/Regulations.gov.⁸ Agencies that
78 participate in FDMS/Regulations.gov fund the system through contributions, decided by a
79 formula. The formula for contributions, established by the EPA in its Capital Asset Plan and
80 Business Case, is based primarily on: (1) the size of a participating agency’s budget, (2) the

⁷ Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 Fed. Reg. 36,757 (June 26, 2015).

⁸ 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).



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81 average annual number of rules and non-rule items the agency publishes, and (3) the average
82 annual number of comments the agency receives in its rulemakings.

83 **Interaction Among FDMS/Regulations.gov, Other Online e-Rulemaking Systems,** 84 **and Commercial Search Engines**

85 In addition to the eRulemaking Program, there are federal offices that publish rulemaking
86 materials and information. These include the Office of the Federal Register (OFR) and RISC.
87 OIRA (within the Office of Management and Budget) and GSA publish the Unified Agenda on
88 Reginfo.gov. The Unified Agenda indicates, among other pieces of information, whether a rule
89 imposes unfunded mandates and whether it has federalism implications. OFR's
90 Federalregister.gov provides access to the officially published *Federal Register*. Combined,
91 information published by all three of these bodies and others provides the user with important
92 context about rulemakings.

93 As used in this Recommendation, the term "data interoperability" means that rulemaking
94 data published or housed by different entities is connected. Complete data interoperability in this
95 context is achieved when a user is able to find all relevant information about a rule in one place.
96 Currently, a basic level of data interoperability among FDMS/Regulations.gov, RISC, and OFR
97 begins when agencies enter certain identifying numbers (key identifiers) pertaining to a rule into
98 e-dockets. The three key identifiers are: (1) the Regulations.gov Document Number, (2) the RIN
99 (described above), and (3) the Federal Register Document Number. The Regulations.gov Docket
100 Number is generated by FDMS when an agency user creates an e-docket. The RIN is generated
101 when an agency requests it from RISC. The Federal Register Document Number is assigned by
102 OFR when an agency sends a document to it for publication in the *Federal Register*. Because e-
103 dockets often contain more than one document that has been published in the *Federal Register*,
104 there are often two or more Federal Register Document Numbers associated with any given
105 rulemaking. When all three key identifiers are entered, users can understand the relationships
106 among related e-dockets and can have access to the entire lifecycle of a rulemaking. If any of
107 these key identifiers are missing, or are incorrectly entered, users may have difficulty discerning
108 important context about the rulemaking.



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109 In addition to these other offices, FDMS/Regulations.gov interacts, to a limited
110 extent, with commercial search engines. Currently, commercial search engines capture materials
111 that have appeared on the “front page” of Regulations.gov (e.g., “What’s Trending” notices).
112 However, for technical reasons that are beyond the scope of this Recommendation, search
113 engines currently do not capture the vast majority of materials on Regulations.gov.⁹

114 Third parties, including commercial search engines, may submit a request to the
115 eRulemaking Program for an application programming interface (API) key. An API key allows a
116 user to download all dockets and documents that appear on Regulations.gov. If a commercial
117 search engine were to request and be granted an API key, it could therefore have access to all
118 such dockets and documents. By working with commercial search engines to capture this data,
119 the eRulemaking Program could harness the technological expertise of the private sector to make
120 it easier for people to find rulemaking materials.

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

122 Many users of Regulations.gov have found that the system does not allow them to
123 consistently and reliably search for and find particular e-dockets and access supporting materials
124 and other relevant information about rulemakings.¹⁰

125 One reason it is difficult to search for and find particular e-dockets is because agencies
126 sometimes create multiple e-dockets for the same rulemaking.¹¹ For example, if an agency
127 moves its rulemaking action from an NPRM to a final rule, the agency sometimes creates a
128 separate e-docket for the final rule, instead of maintaining a single e-docket to which all
129 documents related to the rulemaking are assigned. A user who tries to find this proposed rule
130 might come across the first e-docket the agency created and conclude incorrectly that there was

⁹ See Cary Coglianese, *A Truly “Top Task”: Rulemaking and Its Accessibility on Agency Websites*, 44 ENVTL. L. REP. 10,660, 10,661–63 (2014).

¹⁰ See Farina, *supra* note 8, at 285–86.

¹¹ 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 no final rule issued. Sometimes the “multiple e-docket” problem happens because a sub-agency
132 (e.g., the Occupational Safety and Health Administration) issued the NPRM and created the
133 initial e-docket, and the parent agency (e.g., the Department of Labor) issued the final rule and
134 created the second e-docket. In any case, there are often at least two e-dockets, each containing
135 documents that are part of a single rulemaking. At best, this is confusing. At worst, it misleads
136 users as to the status of the rulemaking if their searches do not locate both e-dockets and enable
137 them to recognize the relationship between them.

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

145 However, many of the filters that appear within Regulations.gov’s “Advanced Search”
146 feature do not helpfully narrow down the relevant results. A user can search by Document Type,
147 with the options listed as “Notice,” “Proposed Rule,” “Rule,” “Public Submission,” and “Other.”
148 These options do not capture the vast array of rulemaking materials, such as advanced and
149 supplemental notices of proposed rulemaking, that are on Regulations.gov. Agencies also use
150 these labels inconsistently, which further hinders the public’s ability to use the Document Type
151 filter to successfully locate materials.¹² Some agencies, for example, label an advanced notice of
152 proposed rulemaking as a “Notice,” and others label it as a “Proposed Rule.”¹³ Additionally,
153 there are Document Subtypes and Docket Subtypes, which offer a more comprehensive list of

¹² 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.

¹³ See Todd Rubin, *Regulations.gov and the Federal Docket Management System 9* (Dec. 1, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/regulationsgov-and-fdms-final-report>.



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154 options that some agencies use and others do not. The existence of these Subtypes exacerbates
155 the problem of inconsistent use and generates more confusion for the user of Regulations.gov
156 who is trying to locate relevant results.

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

163 When users do find relevant e-dockets, they may discover that the e-dockets do not
164 always contain supporting materials and Unified Agenda information that are visible to the
165 public.¹⁴ There are good, practical reasons for agencies to include supporting materials within
166 their e-dockets. **Doing so likely helps boost the quality of public comments, because the public**
167 **can then better understand the agency’s rationale and evidentiary support for the rule.**
168 Furthermore, if no Unified Agenda information appears within the e-docket, members of the
169 public cannot easily determine, among other things, whether a rule is considered a “major rule,”
170 whether it has “federalism implications,” and whether it affects small entities. The absence of
171 this information may diminish the public’s ability to comment adequately and therefore
172 undermines the E-Government Act of 2002’s goals of informed public participation and
173 transparency in rulemaking.¹⁵

174 Yet another problem with FDMS/Regulations.gov is that it is not seamlessly
175 interoperable with the other two main rulemaking sites: Reginfo.gov and Federalregister.gov. For
176 example, if an agency user of FDMS neglects to enter the RIN for an e-docket, or enters an

¹⁴ See Farina, *supra* note 8, at 287.

¹⁵ See E-Government Act of 2002, Pub. L. No. 107-347, § 206(a), 116 Stat. 2899, 2915 (amending 44 U.S.C. § 3501) (stating that two of its purposes are to “improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency,” and to “enhance public participation in Government by electronic means, consistent with [the Administrative Procedure Act].”)



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177 incorrect RIN, Unified Agenda information will not be displayed on Regulations.gov. A user of
178 Federalregister.gov can search by whether a rule is “economically significant,” but no such
179 search option is available on Regulations.gov. Complete interoperability among these three sites
180 would allow users to seamlessly locate essential context about rulemakings.

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

RECOMMENDATION

- 185 1. The Office of the Chairman of the Administrative Conference should work with the
186 eRulemaking Program to provide, on an ongoing basis, resources to help identify and
187 meet user needs in navigating and finding materials on Regulations.gov, both in its
188 current form and as it continues to evolve.
- 189 2. The default requirement should be for agencies to use one e-docket for each rulemaking
190 proceeding to the maximum extent possible. In instances in which agencies must use
191 more than one e-docket for a single rulemaking, they should link the related e-dockets by
192 using relevant identifiers and making clear to users in each of the related e-dockets that
193 the e-dockets are linked. The eRulemaking Program should offer tools both on
194 Regulations.gov, to help users identify instances of related e-dockets, and on the Federal
195 Docket Management System, to help agency administrators, docket managers, and other
196 agency officials implement the concept of one e-docket and highlight any related e-
197 dockets.
- 198 3. The eRulemaking Program should work with the Office of the Federal Register, other
199 federal officials, and other experts as needed to analyze the current list of Document and
200 Docket Types and Subtypes and make any changes to these labels that will facilitate
201 consistent use within and across agencies.



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- 202 4. The e-Rulemaking Program, the Office of the Federal Register, the Regulatory
203 Information Services Center, and offices that have statutory responsibilities related to
204 rulemaking such as the National Institute of Standards and Technology, should work to
205 achieve data interoperability so that information in e-dockets can be connected to other
206 relevant information, reflecting the entire lifecycle of a rulemaking proceeding.
- 207 5. The eRulemaking Program should ensure that agencies receive prompts that alert them to
208 any e-dockets that do not have supporting and related materials. The prompt should
209 remind agencies of their legal obligation to include, to the extent practicable, all materials
210 that by agency rule or practice are included in the rulemaking docket, whether or not
211 submitted electronically.
- 212 6. The eRulemaking Program should work with commercial search engines to make its
213 publicly-available data as open, accessible, and searchable as possible.