



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## **Regulations.gov and the Federal Docket Management System**

**(FDMS)**

### **Committee on Regulation**

#### **Proposed Recommendation from Committee on Regulation | October 10, 2018**

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 proposed  
3 rule and the agency's justification for it; 2) access materials upon which the agency substantially  
4 relied to develop the proposed rule; and 3) understand the rationale by which the agency made its  
5 decision. Commenters should also be able to access other comments that may have been  
6 submitted on the proposed rule in time to submit responsive comments, to the extent this is  
7 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 more effectively contribute to the  
13 rulemaking process and understand their regulatory obligations.

#### **Legal Requirements for Maintaining Electronic Rulemaking Dockets**

15 The purposes of the E-Government Act of 2002 are to "improve performance in the  
16 development and issuance of agency regulations by using information technology to increase  
17 access, accountability, and transparency," and to "enhance public participation in Government by

**Commented [CO1]:** The Committee voted to change the title to: "Improving Access to Regulations.gov's Rulemaking Dockets."



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18 electronic means, consistent with [the Administrative Procedure Act].”<sup>1</sup> The E-Government Act  
19 of 2002 requires agencies, to the extent practicable, to maintain electronic rulemaking dockets  
20 (e-dockets).<sup>2</sup> 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.”<sup>3</sup>

26 The Administrative Conference has recommended that agencies manage their public  
27 rulemaking dockets to achieve “maximum public disclosure.”<sup>4</sup> This means that, to the extent  
28 feasible, agencies should include the following within their public rulemaking dockets: (a)  
29 notices pertaining to the rulemaking; (b) comments and other materials submitted to the agency  
30 related to the rulemaking; (c) transcripts or recordings, if any, of oral presentations made in the  
31 course of a rulemaking; (d) reports or recommendations of any relevant advisory committees; (e)  
32 other materials required by statute, executive order, or agency rule to be considered or made  
33 public in connection with the rulemaking; and (f) 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.

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<sup>1</sup> E-Government Act of 2002, Pub. L. No. 107-347, § 206(a), 116 Stat. 2899, 2915 (included as a note in 44 U.S.C. § 3501 (2018)).

<sup>2</sup> The E-Government Act of 2002 also requires agencies, to the extent practicable, to accept comments by electronic means. *Id.* § 206(c), 116 Stat. at 2916.

<sup>3</sup> *Id.* § 206(d)(2)(B), 116 Stat. at 2916.

<sup>4</sup> See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,352, 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,<sup>5</sup> comply  
40 with the electronic commenting and e-docket requirements of the E-Government Act of 2002.<sup>6</sup>  
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, a semi-annual publication of significant regulatory actions that agencies plan to  
56 take in the short and long term. The Unified Agenda requires agencies to indicate, among other  
57 things, whether a rule has federalism implications, creates unfunded mandates, or affects small

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<sup>5</sup> 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.

<sup>6</sup> 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 entities.<sup>7</sup> When an agency official enters a key identifier assigned by RISC, which is referred to  
59 as the Regulatory Identifier Number (RIN) into the e-docket in FDMS, the Unified Agenda  
60 information publicly appears on Regulations.gov.

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

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

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

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

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<sup>7</sup> 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).

<sup>8</sup> 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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80 average annual number of rules and non-rule items the agency publishes, and 3) the average  
81 annual number of comments the agency receives in its rulemakings.

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

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

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



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

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

### 119 **Problems with FDMS/Regulations.gov**

120 Many users of Regulations.gov have found that the system does not allow them to  
121 consistently and reliably: a) search for and find particular e-dockets and b) access supporting  
122 materials and other relevant information about rulemakings.<sup>10</sup>

123 One reason it is difficult to search for and find particular e-dockets is because agencies  
124 sometimes create multiple e-dockets for the same rulemaking.<sup>11</sup> For example, if an agency  
125 moves its rulemaking action from an NPRM to a final rule, the agency sometimes creates a  
126 separate e-docket for the final rule, instead of maintaining a single e-docket to which all  
127 documents related to the rulemaking are assigned. A user who tries to find this proposed rule  
128 might come across the first e-docket the agency created and conclude incorrectly that there was  
129 no final rule issued. Sometimes the “multiple e-docket” problem happens because a sub-agency

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

<sup>10</sup> See Farina, *supra* note 8, at 285–86.

<sup>11</sup> 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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130 (e.g., the Occupational Safety and Health Administration) issued the NPRM and created the  
131 initial e-docket, and the parent agency (e.g., the Department of Labor) issued the final rule and  
132 created the second e-docket. In any case, there are often at least two e-dockets, each containing  
133 documents that are part of a single rulemaking. At best, this is confusing. At worst, it misleads  
134 users as to the status of the rulemaking if their searches do not locate both e-dockets and enable  
135 them to recognize the relationship between them.

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

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

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<sup>12</sup> 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.

<sup>13</sup> See Todd Rubin, Regulations.gov and the Federal Docket Management System 9 (Aug. 31, 2018) (report to the Admin. Conf. of the U.S.), [www.acus.gov/report/fdms-and-regulationsgov-draft-report-8-31-2018](http://www.acus.gov/report/fdms-and-regulationsgov-draft-report-8-31-2018).



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153 the problem of inconsistent use and generates more confusion for the user of Regulations.gov  
154 who is trying to locate relevant results.

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

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

170 Yet another problem with FDMS/Regulations.gov is that it is not seamlessly  
171 interoperable with the other two main rulemaking sites: Reginfo.gov and Federalregister.gov. For  
172 example, if an agency user of FDMS neglects to enter the RIN for an e-docket, or enters an  
173 incorrect RIN, Unified Agenda information will not be displayed on Regulations.gov. A user of  
174 Federalregister.gov can search by whether a rule is “economically significant,” but no such

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<sup>14</sup> See Farina, *supra* note 8, at 287.

<sup>15</sup> See E-Government Act of 2002, Pub. L. No. 107-347, § 206(a), 116 Stat. 2899, 2915 (included as a note in 44 U.S.C. § 3501 (2018)) (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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175 search option is available on Regulations.gov. Complete interoperability among these three sites  
176 would allow users to seamlessly locate essential context about rulemakings.

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

### RECOMMENDATION

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



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