



Legal Considerations in e-Rulemaking

Committee on Rulemaking

Proposed Recommendation | June 16-17, 2011

1 Agencies are increasingly turning to e-Rulemaking to conduct and improve regulatory
2 proceedings. “E-Rulemaking” has been defined as “the use of digital technologies in the
3 development and implementation of regulations”¹ before or during the informal rulemaking
4 process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA). It
5 may include many types of activities, such as posting notices of proposed and final rulemakings,
6 sharing supporting materials, accepting public comments, managing the rulemaking record in
7 electronic dockets, and hosting public meetings online or using social media, blogs, and other
8 web applications to promote public awareness of and participation in regulatory proceedings.

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10 A system that brings several of these activities together is operated by the eRulemaking
11 program management office (PMO), which is housed at the Environmental Protection Agency
12 and funded by contributions from partner Federal agencies. This program contains two
13 components: Regulations.gov, which is a public website where members of the public can view
14 and comment on regulatory proposals, and the Federal Docket Management System (FDMS),
15 which is a restricted-access website agency staff can use to manage their internal files and the
16 content on Regulations.gov. According to the Office of Management and Budget, FDMS
17 “provides . . . better internal docket management functionality and the ability to publicly post
18 all relevant documents on regulations.gov (e.g., Federal Register documents, proposed rules,

¹ Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process at 2 (2004) (working paper), http://lsr.nellco.org/upenn_wps/108.



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19 notices, supporting analyses, and public comments).”² Electronic docketing also provides
20 significant costs savings to the Federal government, while enabling agencies to make proposed
21 and final regulations, supplemental materials, and public comments widely available to the
22 public. These incentives and the statutory prompt of the E-Government Act of 2002, which
23 required agencies to post rules online, accept electronic comments on rules, and keep
24 electronic rulemaking dockets,³ have helped ensure that over 90% of agencies post regulatory
25 material on Regulations.gov.⁴

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27 Federal regulators, looking to embrace the benefits of e-Rulemaking, face uncertainty
28 about how established legal requirements apply to the web. This uncertainty arises because
29 the APA, enacted in 1946, still provides the basic framework for notice-and-comment
30 rulemaking. While this framework has gone largely unchanged, the technological landscape has
31 evolved dramatically.

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33 The Conference has therefore examined some of the legal issues agencies face in e-
34 Rulemaking and this recommendation provides guidance on these issues. The Conference has
35 examined the following issues:

- 36 • *Processing large numbers of similar or identical comments.* The Conference has
37 considered whether agencies have a legal obligation to ensure that a person

² OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FY 2009 REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE E-GOVERNMENT ACT OF 2002, at 10 (2009), http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/2009_egov_report.pdf.

³ See Pub. L. 107-347 § 206

⁴ Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies, p. D-1 (Nov. 30, 2010), http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf. Some agencies rely on their own electronic docketing systems, such as the Federal Trade Commission (which uses a system called CommentWorks) and the Federal Communications Commission, which has its own electronic comment filing system (<http://fjallfoss.fcc.gov/ecfs/>).



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- 38 reads every individual comment received, even when comment-processing
39 software reports that multiple comments are identical or nearly identical.
- 40 • *Preventing the publication of inappropriate or protected information.* The
41 Conference has considered whether agencies have a legal obligation to prevent
42 the publication of certain types of information that may be included in
43 comments submitted in e-Rulemaking.
 - 44 • *Efficiently compiling and maintaining a complete rulemaking docket.* The
45 Conference has considered issues related to the maintenance of rulemaking
46 dockets in electronic form, including whether an agency is obliged to retain
47 paper copies of comments once they are scanned to electronic format and how
48 an agency that maintains its comments files electronically should handle
49 comments that cannot easily be reduced to electronic form, such as physical
50 objects.
 - 51 • *Preparing an electronic administrative record for judicial review.* The Conference
52 has considered issues regarding the record on review in e-Rulemaking
53 proceedings.

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55 This recommendation seeks to provide all agencies, including those that do not
56 participate in Regulations.gov, with guidance to navigate some of the issues they may face in e-
57 Rulemaking.⁵ With respect to the issues addressed in this recommendation, the APA contains
58 sufficient flexibility to support e-Rulemaking and does not need to be amended for these
59 purposes at the present time. Although the primary goal of this recommendation is to dispel
60 some of the legal uncertainty agencies face in e-Rulemaking, where the Committee finds that a
61 practice is not only legally defensible, but also sound policy, it recommends that agencies use it.

⁵ This report follows up on previous work of the Administrative Conference. On October 19, 1995, Professor Henry H. Perritt, Jr. delivered a report entitled “Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication.” Although never published, the Perritt Report continues to be a helpful resource and is available here: http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm.



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62 It bears noting, however, that agencies may face other legal issues in e-Rulemaking, particularly
63 when using wikis, blogs, or similar technological approaches to solicit public views, that are not
64 addressed in this recommendation. Such issues, and other broad issues not addressed herein,
65 are beyond the scope of this recommendation, but warrant further study.⁶

RECOMMENDATION

66 **Considering Comments**

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68 1. Given the APA's flexibility, agencies should:

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70 (a) Consider whether, in light of their comment volume, they could save substantial time
71 and effort by using reliable comment analysis software to organize and review public
72 comments.

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74 (1) While 5 U.S.C. § 553 requires agencies to consider all comments received, it does
75 not require agencies to ensure that a person reads each one of multiple, identical or
76 nearly identical comments.

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78 (2) Agencies should also work together and with the eRulemaking PMO to share
79 experiences and best practices with regard to the use of such software.

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81 (b) Work with the eRulemaking PMO and its interagency counterparts to explore providing
82 a method for members of the public who read Regulations.gov to flag inappropriate or
83 protected content, in order to call the agency's attention to it for possible removal.

⁶ The Conference has a concurrent project entitled "Rulemaking Comments," which focuses on issues relating to the comments phase of the notice-and-comment process independent of the innovations introduced by e-Rulemaking.



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85 (c) Work with the eRulemaking PMO and its interagency counterparts to explore
86 mechanisms to allow a commenter to indicate prior to or upon submittal that a
87 comment filed on Regulations.gov contains confidential or trade secret information.

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89 (d) Confirm they have procedures in place to review comments identified by commenters
90 upon submission as containing confidential or trade secret information. The agency
91 should review and determine how such information should be handled, in accordance
92 with applicable law.

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94 **Assessing Privacy Concerns**

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96 2. Agencies should assess whether the FDMS system of records notice provides sufficient
97 Privacy Act compliance for their uses of Regulations.gov. This could include working with the
98 eRulemaking PMO to consider whether changes to the FDMS system of records notice are
99 warranted.

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101 **Maintaining Rulemaking Comment Dockets in Electronic Form**

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103 3. The APA provides agencies flexibility to use electronic records in lieu of paper records.
104 Additionally, the National Archives and Records Administration has determined that agencies
105 are not otherwise legally required, at least under certain circumstances, to retain paper copies
106 of comments properly scanned and included in an approved electronic recordkeeping system.
107 The conditions under which such destruction is permitted are governed by each agency's
108 records schedules. Agencies should examine their record schedules and maintain electronic
109 records in lieu of paper records to the greatest extent permitted thereunder.

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111 4. Agencies should include in the electronic docket a descriptive entry or photograph for
112 all physical objects received during the comment period.

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114 **Providing Rulemaking Records to Courts for Judicial Review**

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116 5. In judicial actions involving review of agency regulations, agencies should work with
117 parties and courts early in litigation to provide electronic copies of the rulemaking record in lieu
118 of paper copies, particularly where the record is of substantial size. Courts should continue
119 their efforts to embrace electronic filing and minimize requirements to file paper copies of
120 rulemaking records. The Judicial Conference should consider steps to facilitate these efforts.

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122 **Complying With Recordkeeping Requirements in e-Rulemaking**

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124 6. In implementing their responsibilities under the Federal Records Act, agencies should
125 ensure their records schedules include records generated during e-Rulemaking.