



## **Administrative Conference Recommendation 2018-6**

### **Improving Access to Regulations.gov's Rulemaking Dockets**

**Adopted December 13, 2018**

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

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

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

The purposes of the E-Government Act of 2002 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].”<sup>1</sup> The E-Government Act of 2002 requires agencies, to the extent practicable, to maintain electronic rulemaking dockets

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



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(e-dockets).<sup>2</sup> 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 of 2002, 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.”<sup>3</sup>

The Administrative Conference has recommended that agencies 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: (1) notices pertaining to the rulemaking; (2) comments and other materials submitted to the agency related to the rulemaking; (3) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking; (4) reports or recommendations of any relevant advisory committees; (5) other materials required by statute, executive order, or agency rule to be considered or made public in connection with the rulemaking; and (6) any other materials considered by the agency during the course of the rulemaking.<sup>4</sup> Because the E-Government Act of 2002 treats the e-docket as equivalent to the traditional rulemaking docket, agencies should include all these materials in their e-dockets.

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

Regulations.gov and the Federal Docket Management System (FDMS) are the primary vehicles through which all agencies, except for some independent regulatory agencies,<sup>5</sup> comply with the electronic commenting and e-docket requirements of the E-Government Act of 2002.<sup>6</sup>

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<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).

<sup>3</sup> *Id.* § 206(d)(2)(B).

<sup>4</sup> See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ¶ 1, 78 Fed. Reg. 41,358, 41,360 (July 10, 2013).

<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



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FDMS/Regulations.gov therefore houses a large part of the federal government's rulemaking and, for some agencies, non-rulemaking materials (e.g., adjudication dockets and Paperwork Reduction Act notices), spanning nearly 40 years from over 180 federal agencies.

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. 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, which will be described in greater detail below.

FDMS maintains a data feed that is updated daily with contents of the *Federal Register*. Data received through this feed includes all rulemaking materials from participating and non-participating agencies that are published in the *Federal Register*.

The Regulatory Information Service Center (RISC) within the General Services Administration (GSA) also regularly interacts with FDMS/Regulations.gov. RISC maintains the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda), a semi-annual publication of significant regulatory actions that agencies plan to take in the short and long term. The Unified Agenda requires agencies to indicate, among other things, whether a rule has federalism implications, creates unfunded mandates, or affects small entities.<sup>7</sup> When an agency official enters a key identifier assigned by RISC, which is referred to as the Regulation Identifier Number (RIN) into the e-docket in FDMS, the Unified Agenda information publicly appears on Regulations.gov.

### **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. The Committee is co-chaired by the Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA) and the Chief

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THE PRESIDENT, MEMORANDUM No. M-02-08, REDUNDANT INFORMATION SYSTEMS RELATED TO ON-LINE RULEMAKING INITIATIVE (May 6, 2002).

<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 (June 26, 2015).



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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.

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 carry out this responsibility, the EPA created a Project Management Office (PMO), which consists of a small staff of experts in online docket management technology. This staff implements the policy decisions of the Committee. Although some commenters use the term “eRulemaking Program” to refer to the PMO specifically, the term as used in this Recommendation refers not solely to the PMO, but also to the FDMS/Regulations.gov governance structure as a whole, including participating agencies.

There is no direct appropriated funding for FDMS/Regulations.gov.<sup>8</sup> 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 on a number of factors, including the average annual number of rules and non-rule items the agency publishes and the average annual number of comments posted on Regulations.gov.

### **Interaction Among FDMS/Regulations.gov, Other Online eRulemaking Systems, and Commercial Search Engines**

In addition to the eRulemaking Program, there are federal offices that publish rulemaking materials and information. These include the Office of the Federal Register (OFR) and RISC. OIRA (within the Office of Management and Budget) and GSA publish the Unified Agenda on Reginfo.gov. The Unified Agenda indicates, among other pieces of information, whether a rule imposes unfunded mandates and whether it has federalism implications. OFR’s Federalregister.gov provides access to the officially published *Federal Register*. Combined,

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<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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information published by all three of these bodies and others provides the user with important context about rulemakings.

As used in this Recommendation, the term “data interoperability” means that rulemaking data published or housed by different entities is connected. Complete data interoperability in this context is achieved when a user is able to find all relevant information about a rule in one place. Currently, a basic level of data interoperability among FDMS/Regulations.gov, RISC, and OFR begins when agencies enter certain identifying numbers (key identifiers) pertaining to a rule into e-dockets. The three key identifiers are: (1) the Regulations.gov Document Number, (2) the RIN (described above), and (3) the Federal Register Document Number. The Regulations.gov Docket Number is generated by FDMS when an agency user creates an e-docket. The RIN is generated when an agency requests it from RISC. 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. 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 key identifiers are missing, or are incorrectly entered, users may have difficulty discerning important context about the rulemaking.

In addition to these other offices, FDMS/Regulations.gov interacts, to a limited extent, with commercial search engines. Currently, commercial search engines capture materials that have appeared on the “front page” of Regulations.gov (e.g., “What’s Trending” notices). 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.<sup>9</sup>

Third parties, including commercial search engines, may submit a request to the eRulemaking Program for an application programming interface (API) key. An API key allows a user to download all dockets and documents that appear on Regulations.gov. If a commercial

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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).



search engine were to request and be granted an API key, it could therefore have access to all such dockets and documents. By working with commercial search engines to capture this data, the eRulemaking Program could 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 them to consistently and reliably search for and find particular e-dockets and access supporting materials and other relevant information about rulemakings.<sup>10</sup>

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.<sup>11</sup> 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 was no final rule issued. Sometimes the “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., the Department of Labor) issued the final 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 users as to the status of the rulemaking if their searches do not locate both e-dockets and enable them 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 users to search by different filters (e.g., date range, type of source, and author), reduce the

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<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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number of search results, and therefore increase the likelihood of finding what they are 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 on Regulations.gov. Agencies also use these labels inconsistently, which further hinders the public's ability to use the Document Type filter to successfully locate materials.<sup>12</sup> Some agencies, for example, label an advanced notice of proposed rulemaking as a "Notice," and others label it as a "Proposed Rule."<sup>13</sup> 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.

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 (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.

When users do find relevant e-dockets, they may discover that the e-dockets do not always contain supporting materials and Unified Agenda information that are visible to the

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<sup>12</sup> 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 (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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public.<sup>14</sup> Although agencies may have legitimate reasons for not posting some comments on Regulations.gov (e.g., concerns about confidential business information or copyrighted materials, a high volume of duplicate comments, or materials not subject to disclosure under the Freedom of Information Act), there are good, practical reasons for agencies to include supporting materials within their e-dockets.<sup>15</sup> Doing so likely helps boost the quality of public comments, because the public can then better understand the agency’s rationale and evidentiary support for the rule. 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 E-Government Act of 2002’s goals of informed public participation and transparency in rulemaking.<sup>16</sup>

Yet another problem with FDMS/Regulations.gov is that it is not seamlessly interoperable with the other two main rulemaking sites: Reginfo.gov and Federalregister.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. A user of Federalregister.gov 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, FDMS and Regulations.gov can be improved to allow the public, agency officials, and members of Congress to find rulemaking materials easily and understand how rulemakings were developed.

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

<sup>15</sup> See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

<sup>16</sup> 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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### RECOMMENDATION

1. The eRulemaking Program should work with the Office of the Chairman of the Administrative Conference on an ongoing basis 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 requirement 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 the Federal Docket Management System, 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 Service 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 can 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.



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6. The eRulemaking Program should work with commercial search engines to make its publicly-available data as open, accessible, and searchable as possible.
7. Participating agencies should strive to ensure rulemaking comments are posted on Regulations.gov as soon as feasible.
8. Agencies should indicate in their e-dockets which, if any, types of comments were not posted and whether these comments can be accessed.