



Administrative Conference Recommendation 2011-1

Legal Considerations in e-Rulemaking

Adopted June 16, 2011

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

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

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

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

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

- *Processing large numbers of similar or identical comments.* The Conference has 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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reads every individual comment received, even when comment-processing software reports that multiple comments are identical or nearly identical.

- *Preventing the publication of inappropriate or protected information.* The Conference has considered whether agencies have a legal obligation to prevent the publication of certain types of information that may be included in comments submitted in e-Rulemaking.
- *Efficiently compiling and maintaining a complete rulemaking docket.* The Conference has considered issues related to the maintenance of rulemaking dockets in electronic form, including whether an agency is obliged to retain paper copies of comments once they are scanned to electronic format and how an agency that maintains its comments files electronically should handle comments that cannot easily be reduced to electronic form, such as physical objects.
- *Preparing an electronic administrative record for judicial review.* The Conference has considered issues regarding the record on review in e-Rulemaking proceedings.

This recommendation seeks to provide all agencies, including those that do not participate in Regulations.gov, with guidance to navigate some of the issues they may face in e-Rulemaking.⁵ With respect to the issues addressed in this recommendation, the APA contains sufficient flexibility to support e-Rulemaking and does not need to be amended for these purposes at the present time. Although the primary goal of this recommendation is to dispel some of the legal uncertainty agencies face in e-Rulemaking, where the Conference finds that a 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 at: http://www.kentlaw.edu/faculty/rstaude/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm.



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

RECOMMENDATION

Considering Comments

1. Given the APA's flexibility, agencies should:
 - (a) Consider whether, in light of their comment volume, they could save substantial time and effort by using reliable comment analysis software to organize and review public comments.
 - (1) While 5 U.S.C. § 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.
 - (2) Agencies should also work together and with the eRulemaking program management office (PMO), to share experiences and best practices with regard to the use of such software.

⁶ The Conference has a concurrent recommendation which focuses on issues relating to the comments phase of the notice-and-comment process independent of the innovations introduced by e-Rulemaking. See *Administrative Conference of the United States, Recommendation 2011-2, Rulemaking Comments*.



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- (b) Work with the eRulemaking PMO and its interagency counterparts to explore providing a method, including for members of public, for flagging inappropriate or protected content, and for taking appropriate action thereon.
- (c) Work with the eRulemaking PMO and its interagency counterparts to explore mechanisms to allow a commenter to indicate prior to or upon submittal that a comment filed on Regulations.gov contains confidential or trade secret information.
- (d) Confirm they have procedures in place to review comments identified as containing confidential or trade secret information. Agencies should determine how such information should be handled, in accordance with applicable law.

Assessing Privacy Concerns

2. Agencies should assess whether the Federal Docket Management System (FDMS) System of Records Notice provides sufficient Privacy Act compliance for their uses of Regulations.gov. This could include working with the eRulemaking PMO to consider whether changes to the FDMS System of Records Notice are warranted.

Maintaining Rulemaking Dockets in Electronic Form

3. The APA provides agencies flexibility to use electronic records in lieu of paper records. Additionally, the National Archives and Records Administration has determined that agencies are not otherwise legally required, at least under certain circumstances, to retain paper copies of comments properly scanned and included in an approved electronic recordkeeping system. The circumstances under which such destruction is permitted are governed by each agency's



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records schedules. Agencies should examine their record schedules and maintain electronic records in lieu of paper records as appropriate.

4. To facilitate the comment process, agencies should include in a publicly available electronic docket of a rulemaking proposal all studies and reports on which the proposal for rulemaking draws, as soon as practicable, except to the extent that they would be protected from disclosure in response to an appropriate Freedom of Information Act request.⁷

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

Providing Rulemaking Records to Courts for Judicial Review

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

Complying With Recordkeeping Requirements in e-Rulemaking

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

⁷ See also Exec. Order No. 13,563, § 2(b), 76 Fed. Reg. 3,821 (Jan. 18, 2011) (requiring agencies to provide timely online access to “relevant scientific and technical findings” in the rulemaking docket on regulations.gov).