



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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Memorandum

To: Committee on Rulemaking
From: Emily F. Schleicher (Staff Counsel)
Date: ~~March 23~~ April 15, 2011
Re: ~~Revised~~ Draft Recommendation

The following draft recommendation is based on Bridget C.E. Dooling’s report “Legal Issues in e-Rulemaking” (the “e-Rulemaking Report²”) and the Committee’s discussion at its ~~March 25~~ April 20, 2011 public meeting, and not to preempt the Committee’s discussion and consideration of the proposed recommendations. In keeping with the Conference’s past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

Draft Preamble

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 is a restricted-access website agency staff can use to manage their internal files and the 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 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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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 ambiguity about how established legal requirements apply to the web. This ambiguity arises because the APA, enacted in 1946, still provides the basic framework for notice and comment rulemaking. ~~And while~~ While this framework has gone largely unchanged, the technological landscape has evolved dramatically. ~~Agencies engaged in e-Rulemaking thus face a plethora of legal issues. Does the APA permit agencies to require comments to be submitted online? Are agencies required to screen the content of public comments before they are placed on Regulations.gov? Are electronic dockets a legally sufficient means of preserving the rulemaking record? Many of these issues, and others, have been swirling around e-Rulemaking since its inception, and exist whether rulemaking is accomplished entirely on paper, or using more electronic means.~~⁵

~~This recommendation seeks to provide agencies with some guidance to navigate the issues they may face in e-Rulemaking.~~

~~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 human reads every~~

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/>).

⁵ ~~This report follows up on previous work of the Administrative Conference. On October 19, 1995, a mere 12 days before the Administrative Conference closed its doors on October 31, 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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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 whether agencies face unique legal requirements regarding the record on review in e-Rulemaking proceedings.

This recommendation seeks to provide all agencies, including those who do not subscribe to Regulations.gov, with guidance to navigate some of the issues they may face in e-Rulemaking.⁶ 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 Committee finds that a practice is not only legally defensible, but also sound policy, it recommends that agencies use it. 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 are beyond the scope of this recommendation and warrant further study.

Draft Recommendation

1. The Administrative Procedure Act contains sufficient APA provides flexibility to support e-Rulemaking, and agencies should:

⁶ This report follows up on previous work of the Administrative Conference. On October 19, 1995, a mere 12 days before the Administrative Conference closed its doors on October 31, 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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~~1-a. Use comment analysis software to organize and consider public comments. Agencies may use reliable software to identify duplicate comments, and agencies' obligation under 5 U.S.C. § 553 to provide "consideration" of comments received does not need to be amended for this purpose at the present require agencies to ensure that a human reads each one of multiple, identical comments. Agencies should consider whether, in light of their comment volume, they could save substantial time- and effort by making such use of comment analysis software. Agencies should also work together and with the eRulemaking PMO to share experiences and best practices with regard to the use of such software.~~

~~b. Agencies should work together and Work with the eRulemaking PMO and its interagency counterparts to share experiences explore providing a method for members of public who read Regulations.gov to flag inappropriate or protected content, in order to call the agency's attention to it for possible removal.~~

~~c. Work with the eRulemaking PMO and best practices in the use of its interagency counterparts to explore mechanisms to allow a commenter to indicate prior to or upon submittal that a comment analysis software to organize and consider public filed on Regulations.gov contains confidential or trade secret information.~~

~~2-d. Confirm they have procedures in place to review comments identified upon submission as containing confidential or trade secret information before posting them in the online docket.~~

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~~3-2. Agencies should assess whether the 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.~~

~~4. The eRulemaking PMO, working with its interagency counterparts, should explore the merits of providing a method for members of public who read Regulations.gov to flag inappropriate content.~~

~~5. The eRulemaking PMO, working with its interagency counterparts, should explore how to permit a commenter to indicate upon submittal that a comment filed on Regulations.gov contains confidential or trade secret information.~~

~~6. The eRulemaking PMO, working with its interagency counterparts, should explore changing the defaults on Regulations.gov to permit public comments (with the exception of those flagged as containing confidential or trade secret information) to post automatically to Regulations.gov without agency processing.~~



~~7. For comments flagged as containing confidential or trade secret information, agencies should confirm that they have procedures in place to review these submissions before posting them in the online docket.~~

~~8. Agencies receiving material that appears to be copyrighted should consider posting only the pertinent portion to the online docket.~~

~~9. Agencies using electronic docketing need not retain paper copies of comments stored therein.~~

Maintaining Rulemaking Comment 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 (“NARA”) 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 conditions under which such destruction is permitted are governed by each agency’s records schedule. Agencies should examine this authoritative document and maintain electronic records in place of paper records to the greatest extent permitted thereunder.~~

~~10.4. Agencies should include in the electronic docket a descriptive entry ~~in the electronic docket~~ or photograph for all physical objects received during the comment period.~~

Providing Rulemaking Records to Courts for Judicial Review

~~11.5. In judicial actions involving review of agency regulations, agencies should work with parties ~~should strive~~ and courts early in litigation to provide electronic copies of relevant materials; in lieu of paper copies, particularly where the record is of substantial size. Courts should continue their efforts to embrace electronic filing and ~~curtail~~ minimize requirements to file ~~additional paper copies~~ paper copies of rulemaking records. The Judicial Conference should support these efforts.~~

Regarding Complying With Recordkeeping Requirements in e-Rulemaking

~~12.6. Regarding recordkeeping requirements under the Federal Records Act, agencies should consider whether ensure their records schedules ~~should be updated to~~ include records ~~that are~~ generated during e-Rulemaking.~~