



Agency Innovations in E-Rulemaking

Committee on Rulemaking

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1 The rulemaking function of federal regulatory agencies is typically accomplished today
2 through “e-rulemaking”: that is, through “the use of digital technologies in the development
3 and implementation of regulations,’ before or during the informal rulemaking process, i.e.,
4 notice-and-comment rulemaking under the Administrative Procedure Act (APA).”¹ The website
5 www.regulations.gov centralizes much e-rulemaking activity throughout the executive branch.
6 This recommendation concerns individual agencies’ uses of their own websites to promote e-
7 rulemaking and other agency initiatives and activities.

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9 The proliferation of competing demands for communication makes rulemaking only
10 one—perhaps even to some, a relatively minor one—of the many priorities under consideration
11 when agency officials make decisions about the design and functionality of their websites. As a
12 result, there is a risk agencies will make website design decisions without giving due
13 consideration to enhancing public participation through the use of electronic media. Indeed,
14 an emerging approach to government website design focuses on giving prominence to “top
15 tasks” sought by members of the public. However, an exclusive focus on current website use
16 or demand will probably push information about rulemaking, and online opportunities for
17 public commenting on rulemaking, far into the background—simply because the volume of
18 website traffic generated by online government services performed by many agencies dwarfs
19 the traffic related to rulemaking. Rulemaking may perhaps never be a “top task” in terms of

¹ Administrative Conference of the United States, Recommendation 2011-1, Legal Considerations in e-Rulemaking 1 (quoting Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process* 2 (2004) (working paper), http://lsr.nellco.org/upenn_wps/108).



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20 the numbers of web users, but in a democracy, few tasks compare in significance with the
21 ability of government agencies to create binding law backed up with the threat of civil, and
22 even criminal, penalties.

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24 The Conference studied the websites and e-rulemaking initiatives of 90 agencies, each
25 of which had reported completing an average of two or more rulemakings during each six-
26 month period covered by the semiannual regulatory agenda. The study reveals that individual
27 agencies have used websites in innovative ways to promote e-rulemaking. For example,
28 agencies have developed portions of their own websites to support rulemaking efforts. Some
29 agencies have specialized webpages that allow users to submit and view comments on all of the
30 agency's open rulemakings, or to view information on the status of their priority rulemakings.
31 Links from some agency home pages make rulemaking information easy to locate. Other
32 agencies have innovated by using social media to get the public involved in the rulemaking
33 processes from the earliest stages. These social media tools include blogs, Facebook, Twitter,
34 IdeaScale, and other online discussion platforms.

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36 Agency innovations can improve the availability of information and engage the public in
37 rulemaking activities, often at no great cost to the government. A cost-effective technique to
38 improve the availability of rulemaking information on individual agency websites leverages
39 available centralized data sources. An example of this approach is found on the websites of
40 many members of Congress, who provide a link on their home page to a page listing all the
41 legislation the member sponsors. The list is not drawn from the Member's own database, but
42 rather extracts information from a THOMAS database of all legislation currently pending in
43 Congress. Regulations.gov makes a similar tool available to agencies, thus enabling them to
44 provide easy access to complete and up-to-date rulemaking information without the necessity
45 of maintaining the underlying database.

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47 Agency innovations can also further well-established policies in favor of broadening
48 access by groups that have historically faced barriers to participating effectively in rulemaking.
49 In 2000, President Clinton issued Executive Order 13166 in an effort “to improve access to ...
50 programs and activities for persons who, as a result of national origin, are limited in their
51 English proficiency.”² The Office of Management and Budget’s policy on agency websites
52 reminds agencies that they are “required to provide appropriate access for people with limited
53 English proficiency.”³ Similarly, until high-speed access is pervasive across all strata of society,
54 any agency that makes full public access and participation a priority should explore low
55 bandwidth options, while also remembering that some members of the public do not have
56 Internet access at all. In addition, continued vigilance is needed to ensure that agency websites
57 and other electronic media will be as accessible to individuals with disabilities as they are to
58 other users. This accessibility may grow even more challenging in the wake of new techniques
59 for organizing a large volume of information on a website.

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61 Individual agency websites can also be used to address discrete deficiencies in the
62 availability of critical rulemaking information. One such problem is that comment policies for
63 many agencies cannot be found easily by the public. Even on web pages dedicated to the
64 submission of comments, a comment policy is not always visible to the user. A second difficulty
65 arises with old rulemaking materials, which need to be preserved for archival, historical, and
66 legal reasons, but are often difficult for users to find and search. A third issue is that agency
67 websites are uniformly easy to locate, but do not always include features to ensure that
68 essential information, particularly about rulemaking, is broadly accessible to the public.

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² Exec. Order No. 13166, 65 Fed. Reg. 50121, 50121 (Aug. 11, 2000).

³ OMB Deputy Director for Management Clay Johnson, Memorandum on Policies for Federal Agency Public Websites (Dec. 17, 2004), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/-fy2005/m05-04.pdf>.



93 **Making Comment Policies Easy to Locate**

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95 4. Agencies should display or link to their comment policies in prominent or multiple
96 locations on their websites.

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98 **Improving Access to Agency Websites**

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100 5. Agencies should strive further to improve the accessibility of their websites to members
101 of the public.

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103 6. Agencies should take steps to improve access for persons who have faced barriers to
104 effectively participating in rulemaking in the past, including non-English speakers, users of low-
105 bandwidth Internet connections, and individuals with disabilities.

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107 **Ensuring Access to Archived Rulemaking Material**

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109 7. Agencies should develop systematic protocols to enable the online storage and retrieval
110 of materials from completed rulemakings.

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112 **Evaluating Website Accessibility on an Ongoing Basis**

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114 8. Agencies should periodically evaluate their use of the Internet in rulemaking and should
115 continue to innovate and experiment with new and cost-effective ways to engage the public in
116 rulemaking via the Internet.