



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## **Regulations.gov and the Federal Docket Management System (FDMS)**

**Committee on Regulation**

**Proposed Recommendation for Committee | October 10, 2018**

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

1           The E-Government Act requires agencies, to the extent practicable, to maintain electronic  
2 rulemaking dockets (e-dockets).<sup>1</sup> An e-docket is simply a virtual folder that contains materials relevant to  
3 a particular rulemaking. It ideally includes any relevant notices (e.g., notices of proposed rulemaking  
4 (NPRMs)), supporting materials, and comments. Under the E-Government Act, e-dockets must make  
5 publicly available online, to the extent practicable, all comments received “and other materials that by  
6 agency rule or practice are included in the rulemaking docket . . . whether or not submitted  
7 electronically.”<sup>2</sup> The E-Government Act does not specify precisely which kind of materials agencies must  
8 include within their e-dockets.  
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10           The Administrative Conference of the United States has noted that agencies should manage their  
11 public rulemaking dockets to achieve “maximum public disclosure.”<sup>3</sup> This means that, to the extent  
12 feasible, agencies should include the following within their public rulemaking dockets: (a) notices  
13 pertaining to the rulemaking; (b) comments and other materials submitted to the agency related to the  
14 rulemaking; (c) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking;  
15 (d) reports or recommendations of any relevant advisory committees; (e) other materials required by  
16 statute, executive order, or agency rule to be considered or to be made public in connection with the

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<sup>1</sup> 44 U.S.C. § 3501 (note). The statute also requires agencies, to the extent practicable, to accept comments by electronic means.

<sup>2</sup> *Id.*

<sup>3</sup> See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,352, 41,360 (July 10, 2013).



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17 rulemaking; and (f) any other materials considered by the agency during the course of the rulemaking.<sup>4</sup>  
18 Because the “public rulemaking docket” is, due to the E-Government Act, the same as the “e-docket,”  
19 agencies should include all of these materials in their e-dockets.

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

21 Regulations.gov and FDMS are the vehicles through which all agencies, except for some  
22 independent regulatory agencies,<sup>5</sup> attempt to comply with the E-Government Act’s electronic commenting  
23 and e-docket requirements.<sup>6</sup> Regulations.gov is therefore the repository for a large part of the federal  
24 government’s rulemaking materials. Members of the public can search the site for rulemakings spanning  
25 nearly 40 years from over 180 federal agencies.<sup>7</sup>

26 Agencies that participate in Regulations.gov upload materials to Regulations.gov through a  
27 system called the Federal Docket Management System (FDMS).<sup>8</sup> Agencies create and manage e-dockets  
28 and their contents through FDMS.gov, a password-protected site that can be accessed only by authorized  
29 agency personnel.<sup>9</sup> Agency officials are responsible not only for creating e-dockets but also for  
30 appropriately indexing them by selecting relevant docket and document types and subtypes,<sup>10</sup> which will  
31 be described in greater detail below.

32 All materials that are published in the *Federal Register* automatically appear in FDMS, including  
33 materials from agencies that do not participate in Regulations.gov.<sup>11</sup> This is because there is an

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<sup>4</sup> *Id.*

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

<sup>7</sup> See REGULATIONS.GOV, PARTICIPATING AGENCIES, [https://www.regulations.gov/docs/Participating\\_Agencies.pdf](https://www.regulations.gov/docs/Participating_Agencies.pdf) (Mar. 2018).

<sup>8</sup> See FEDERAL DOCKET MANAGEMENT SYSTEM, *Welcome to the e-Rulemaking Initiative*, <https://www.fdms.gov/fdms/public/aboutus>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See U.S. DEPARTMENT OF STATE, FEDERAL DOCKET MANAGEMENT SYSTEM (FDMS), <https://www.state.gov/m/a/dir/rulemaking/fdms/>.



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34 automated, “behind the scenes” link between the *Federal Register* and FDMS whereby each day, the  
35 entirety of the *Federal Register’s* contents is sent to FDMS.<sup>12</sup>

36 The Regulatory Information Services Center (RISC) within the General Services Administration  
37 also regularly interacts with FDMS/Regulations.gov. RISC, along with the Office of Information and  
38 Regulatory Affairs (OIRA), maintains the Unified Agenda, a semi-annual publication of significant  
39 regulatory actions that agencies plan to take in the short and long term. The Unified Agenda indicates  
40 whether a rule has federalism implications, creates unfunded mandates, or affects small entities, and it  
41 contains other pieces of information about the rule.<sup>13</sup> When an agency official enters a key identifier  
42 assigned by RISC, which is referred to as the “Regulatory Identification Number,” (RIN) into the e-  
43 docket in FDMS, the Unified Agenda information publicly appears on Regulations.gov.<sup>14</sup>

### 44 **Governance and Funding of FDMS/Regulations.gov**

45 FDMS/Regulations.gov is governed by an Executive Steering Committee (Committee) that  
46 consists of officials from dozens of federal agencies.<sup>15</sup> The Committee is co-chaired by the Deputy  
47 Administrator of OIRA and the Chief Information Officer of the Environmental Protection Agency  
48 (EPA). It makes decisions about the design, operations, maintenance, and budgeting of  
49 FDMS/Regulations.gov upon advice from several smaller, lower-tiered bodies. These bodies include a  
50 Change Control Board, an Advisory Board, and a Budget Working Group.<sup>16</sup>

51 EPA is considered the “managing partner” of FDMS/Regulations.gov. As such, it is responsible  
52 for implementing changes to the system that have been approved by the Committee. To facilitate this  
53 responsibility, the EPA created a Project Management Office (PMO), which consists of a small staff of  
54 experts in online docket management technology.<sup>17</sup> This staff is responsible for implementing the policy

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<sup>12</sup> *Id.*

<sup>13</sup> Admin. Conf. of the U.S., Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*, 80 Fed. Reg. 36,757, 36,757 (June 26, 2015).

<sup>14</sup> See, e.g., Alaska; Hunting and Trapping in National Preserves, available at <https://www.regulations.gov/document?D=NPS-2018-0005-0001> (last accessed Oct. 2, 2018).

<sup>15</sup> See REGULATIONS.GOV, *The eRulemaking Initiative*, <https://test.regulations.gov/aboutProgram>.

<sup>16</sup> CURTIS COPELAND, CONG. RESEARCH SERV., RL34210, ELECTRONIC RULEMAKING IN THE FEDERAL GOVERNMENT 6 (2008).

<sup>17</sup> *Id.*



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55 decisions of the Committee. Although some commenters use the term “eRulemaking Program” to refer to  
56 the PMO specifically, the term as used in this preamble and recommendation refers to the  
57 FDMS/Regulations.gov governance structure as a whole, not solely to the PMO.

58 There is no direct appropriated funding stream for FDMS/Regulations.gov.<sup>18</sup> Rather, the system is  
59 funded through what eRulemaking Program officials term a “cost allocation model.” Agencies that  
60 participate in FDMS/Regulations.gov fund the system through contributions, decided by a formula. The  
61 formula for contributions, established by the EPA in its Capital Asset Plan and Business Case, is based  
62 primarily on: 1) the size of a participating agency’s budget; 2) the average annual number of rules and  
63 non-rule items the agency publishes; and 3) the average annual number of comments the agency receives  
64 in its rulemakings.<sup>19</sup>

### 65 **Interaction Among FDMS/Regulations.gov, Other Online e-Rulemaking Systems, and** 66 **Commercial Search Engines**

67 In addition to the eRulemaking Program, there are federal offices that house rulemaking materials  
68 and information. These include the Office of the Federal Register (OFR) and RISC. RISC houses Unified  
69 Agenda information, such as whether a rule imposes unfunded mandates and whether it has federalism  
70 implications, on Reginfo.gov. OFR’s Federalregister.gov provides access to the officially published  
71 document. Combined, information housed by all three of these bodies and others provides the user with  
72 important context about rulemakings.

73 The concept of connecting data housed by different entities is called “data interoperability.”<sup>20</sup>  
74 Data interoperability among Regulations.gov, RISC, and OFR is realized when agencies enter certain  
75 identifying numbers about a rule into e-dockets. The three key identifiers are: 1) the Federal Register  
76 Document Number; 2) the RIN (described above); and 3) the Regulations.gov Docket Number. The  
77 Federal Register Document Number is assigned by OFR when an agency sends a document to it for  
78 publication in the *Federal Register*. Because e-dockets often contain more than one document that has  
79 been published in the *Federal Register*, there are often two or more Federal Register Document Numbers  
80 associated with any given rulemaking. The Regulations.gov Docket Number is generated by FDMS when

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<sup>18</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).

<sup>19</sup> See Copeland, *supra* note 16, at 17.

<sup>20</sup> See ENVTL. PROT. AGENCY, OPEN GOVERNMENT PLAN 4.0 9–10 (Sept. 2016).



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81 an agency user creates an e-docket. The RIN is generated when an agency submits rulemaking materials  
82 to OIRA for review. When all three key identifiers are entered, users can understand the relationships  
83 among related e-dockets and can have access to the entire lifecycle of a rulemaking. If any of these  
84 identifiers are missing, or are incorrectly entered, the user will have difficulty discerning key context  
85 about the rulemaking.

86 In addition to these other offices, FDMS/Regulations.gov interacts, to a limited extent, with  
87 commercial search engines. However, for technical reasons that are beyond the scope of this  
88 recommendation, search engines currently do not capture the vast majority of materials on  
89 Regulations.gov.<sup>21</sup> Currently, they only capture materials that have appeared on the “front page” of  
90 Regulations.gov (e.g., “What’s Trending” notices). Most materials in FDMS never make it to the front  
91 page. By allowing search engines to capture all of FDMS’s publicly available underlying data, the  
92 eRulemaking Program would harness the technological expertise of the private sector to make it easier for  
93 people to find rulemaking materials.

### 94 **Problems with FDMS/Regulations.gov**

95 Many users of Regulations.gov have found that the system does not allow people to consistently  
96 and reliably: a) search for and find particular e-dockets and b) access supporting materials and other  
97 relevant information about rulemakings.<sup>22</sup>

98 One reason it is difficult to search for and find particular e-dockets is because agencies sometimes  
99 create multiple e-dockets for the same rulemaking.<sup>23</sup> For example, if an agency moves its rulemaking  
100 action from an NPRM to a final rule, the agency sometimes creates a separate e-docket for the final rule,  
101 instead of maintaining a single e-docket to which all documents related to the rulemaking are assigned. A  
102 user who tries to find this proposed rule might come across the first e-docket the agency created and  
103 conclude incorrectly that there has been no final rule issued. Sometimes this “multiple e-docket” problem  
104 happens because a sub-agency (e.g., the Occupational Safety and Health Administration) issued the  
105 NPRM and created the initial e-docket, and the parent agency (e.g., Department of Labor) issued the final

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<sup>21</sup> See Cary Coglianese, *A Truly “Top Task”: Rulemaking and Its Accessibility on Agency Websites*, 44 *Env’tl. L. Rep.* 10660, 10661–63 (2014).

<sup>22</sup> See Farina, *supra* note 18, at 285–86.

<sup>23</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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106 rule and created the second e-docket. In any case, there are often at least two e-dockets, each containing  
107 documents that are part of a single rulemaking. At best, this is confusing. At worst, it misleads the user as  
108 to the status of the rulemaking if her search does not locate both e-dockets and enable her to recognize the  
109 relationship between them.

110 Another reason it is difficult to search for and find particular e-dockets is because the “Advanced  
111 Search” feature on Regulations.gov often does not helpfully narrow down the number of results that come  
112 up in a search. The purpose of an “advanced search” is to allow a user to search by different filters (e.g.,  
113 date range, type of source, and author), reduce the number of search results, and therefore increase the  
114 likelihood of finding what she is looking for. An advanced search function is especially important on  
115 Regulations.gov, given the millions of materials, many with similar titles, that are in the system.

116 However, many of the filters that appear within Regulations.gov’s “Advanced Search” feature do  
117 not helpfully narrow down the relevant results. A user can search by “Document Type,” with the options  
118 listed as “Notice,” “Proposed Rule,” “Rule,” “Public Submission,” and “Other.” These options do not  
119 capture the vast array of rulemaking materials, such as advanced and supplemental notices of proposed  
120 rulemaking, that are stored within the FDMS database. Agencies also use these labels inconsistently,  
121 which further hinders the public’s ability to use the “Document Type” advanced search filter to  
122 successfully locate materials.<sup>24</sup> Some agencies, for example, label an Advanced Notice of Proposed  
123 Rulemaking as a “Notice,” and others label it as a “Proposed Rule.”<sup>25</sup> Additionally, there are “Document  
124 Subtypes” and “Docket Subtypes,” which offer a more comprehensive list of options that some agencies  
125 use and others do not. The existence of these subtypes exacerbates the problem of inconsistent use and  
126 generates more confusion for the user of Regulations.gov who is trying to locate relevant results.<sup>26</sup>

127 An additional problem with advanced searching is that selecting a parent agency as the  
128 “Agency” does not include results for sub-agencies. For example, a rule listed by a specific sub-agency

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<sup>24</sup> Additionally, 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>25</sup> See Todd Rubin, Regulations.gov and the Federal Docket Management System 9 (Aug. 31, 2018) (report to the Admin. Conf. of the U.S.), [www.acus.gov/report/fdms-and-regulationsgov-draft-report-8-31-2018](http://www.acus.gov/report/fdms-and-regulationsgov-draft-report-8-31-2018).

<sup>26</sup> See *id.*



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129 (e.g., the Bureau of the Census) may not be available when one searches for rules issued by the parent  
130 agency (e.g., the Department of Commerce). Visitors who use the “Agency” filter and select a parent  
131 agency may erroneously conclude that a particular document has not been published.<sup>27</sup>

132 When users do find relevant e-dockets, they may discover that they do not always contain  
133 supporting materials and Unified Agenda information that are visible to the public.<sup>28</sup> There are good,  
134 practical reasons for agencies to include supporting materials within their e-dockets. Doing so helps boost  
135 the quality of public comments. Furthermore, if no Unified Agenda information appears within the e-  
136 docket, members of the public cannot easily determine, among other things, whether a rule is considered a  
137 “major rule,” whether it has “federalism implications,” and whether it affects small entities. The absence  
138 of this information may diminish the public’s ability to comment adequately and therefore undermines the  
139 statutory goals of informed public participation and transparency in rulemaking.<sup>29</sup>

140 Yet another problem with FDMS/Regulations.gov is that it is not completely interoperable with  
141 the other two main rulemaking sites: Federalregister.gov and Reginfo.gov. For example, if an agency user  
142 of FDMS neglects to enter the RIN for an e-docket, or enters an incorrect RIN, Unified Agenda  
143 information will not be displayed on Regulations.gov. An even more fundamental problem is that there is  
144 no common “look and feel” across the three websites. A user of Federalregister.gov, for example, can  
145 search by whether a rule is “economically significant,” but no such search option is available on  
146 Regulations.gov. Complete interoperability among these three sites would allow users to seamlessly  
147 locate essential context about rulemakings.

148 FDMS and Regulations.gov are remarkable achievements, made possible by the diligent work of  
149 many government officials over many years. However, they can be improved to allow the public, agency  
150 officials, and members of Congress to find rulemaking materials easily and understand how rulemakings  
151 were developed.

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<sup>27</sup> See *id.* at 7.

<sup>28</sup> See Farina, *supra* note 18, at 287.

<sup>29</sup> See 44 U.S.C. § 3501 (note).



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### RECOMMENDATION

- 152 1. The Office of the Chairman of the Administrative Conference of the United States should  
153 work with the eRulemaking Program to provide, on an ongoing basis, resources to help  
154 identify and meet user needs in navigating and finding materials on Regulations.gov, both  
155 in its current form and as it continues to evolve.
- 156 2. The default should be for agencies to use one e-docket for each rulemaking proceeding to  
157 the maximum extent possible. In instances in which agencies must use more than one e-  
158 docket for a single rulemaking, they should link the related e-dockets by using relevant  
159 identifiers and making clear to users in each of the related e-dockets that the e-dockets  
160 are linked. The eRulemaking Program should offer tools both on Regulations.gov to help  
161 users identify instances of related e-dockets, and on FDMS to help agency administrators,  
162 docket managers and other agency officials implement the concept of one e-docket and  
163 highlight any related e-dockets.
- 164 3. The eRulemaking Program should work with the Office of the Federal Register, other  
165 federal officials, and other experts as needed to analyze the current list of Document and  
166 Docket Types and Subtypes and make any changes to these labels that will facilitate  
167 consistent use within and across agencies.
- 168 4. The e-Rulemaking Program, the Office of the Federal Register, the Regulatory  
169 Information Services Center, and offices that have statutory responsibilities related to  
170 rulemaking such as the National Institute of Standards and Technology, should work to  
171 achieve data interoperability so that information in e-dockets could be connected to other  
172 relevant information, reflecting the entire lifecycle of a rulemaking proceeding.
- 173 5. The eRulemaking Program should ensure that agencies receive prompts that alert them to  
174 any e-dockets that do not have supporting and related materials. The prompt should  
175 remind agencies of their legal obligation to include, to the extent practicable, all materials  
176 that by agency rule or practice are included in the rulemaking docket, whether or not  
177 submitted electronically.

**Commented [TR1]:** Given that the Office of the Chairman is a separate entity from the Assembly, and that this is ultimately a recommendation from the Assembly, "should" is more appropriate than "will." Furthermore, this accords with our precedent. See, e.g., Recommendation 2014-7, Best Practices for Using Video Teleconferencing for Hearings, 79 Fed. Reg. 75,114, 75,119 (Dec. 17, 2014).



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178 6. The eRulemaking Program should make its underlying publicly available data as open,  
179 accessible, and searchable as possible, so that interested third parties such as commercial  
180 search engines can allow people to search for rulemaking content.