



Administrative Conference Recommendation 2011-8

Agency Innovations in E-Rulemaking

Adopted December 9, 2011

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

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

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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compare in significance with the ability of government agencies to create binding law backed up with the threat of civil, and even criminal, penalties.

The Conference studied the websites and e-rulemaking initiatives of 90 agencies, each of which had reported completing an average of two or more rulemakings during each six-month period covered by the semiannual Unified Regulatory Agenda in 2009-2010. The study reveals that individual agencies have used websites in innovative ways to promote e-rulemaking. For example, agencies have developed portions of their own websites to support rulemaking efforts. Some agencies have specialized webpages that allow users to submit and view comments on all of the agency's open rulemakings, or to view information on the status of their priority rulemakings. Links from some agency home pages make rulemaking information easy to locate. Other agencies have innovated by using social media to get the public involved in the rulemaking process from the earliest stages. These social media tools include blogs, Facebook, Twitter, IdeaScale, and other online discussion platforms.

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



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

Individual agency websites can also be used to address discrete deficiencies in the availability of critical rulemaking information. One such problem is that many agencies’ policies relating to comments⁴ cannot be found easily by the public. Even on Web pages dedicated to the submission of comments, a comment policy is not always visible to the user. A second difficulty arises with old rulemaking materials, which need to be preserved for archival, historical, and legal reasons, but are often difficult for users to find and search. A third issue is that agency websites are uniformly easy to locate, but do not always include features to ensure that essential information, particularly about rulemaking, is broadly accessible to the public.

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>.

⁴ See generally Administrative Conference of the United States, Recommendation 2011-2, Rulemaking Comments (recommending that agencies establish and publish certain policies governing rulemaking comments).



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The Conference believes that, as a general matter, agencies should continue to improve their websites to facilitate public accessibility and engagement so as to achieve the promise of e-rulemaking. This recommendation is intended to broadly encourage agencies to develop and use innovative, cost-effective ways to use individual websites to solve some of the discrete problems identified above and generally engage the public in rulemaking.

RECOMMENDATION

Increasing the Visibility of Rulemakings

1. Agencies should design and manage their presence on the Web (including the Web as accessed by mobile devices) with rulemaking participation in mind.⁵

2. Each agency should provide access to a one-stop location, which should be easily reachable from its home page, for all of its pending rulemakings, highlighting those that are currently open for comment. This may take the form of providing pinpoint links to specific information about the agency's rulemakings available on websites such as Regulations.gov, RegInfo.gov, Federal Register 2.0, and so forth, which would allow the agency to efficiently enable the public to retrieve all available information the federal government has about its ongoing rulemakings.

⁵ Throughout this recommendation, the term "rulemaking" includes, but is not limited to, the following proceedings, providing an agency is seeking or intends to seek public comment on them: planned rulemakings that have appeared in the Unified Agenda, rules at the advanced notice of proposed rulemaking stage, and proposed nonlegislative rules. The recommendation also extends to guidance documents on which an agency is seeking or intends to seek public comment.



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3. Agencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemakings. When an agency sponsors a social media discussion of a rulemaking, it should provide clear notice as to whether and how it will use the discussion in the rulemaking proceeding.

Making Comment Policies Easy to Locate

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

Improving Access to Agency Websites

5. Agencies should continue to improve the accessibility of their websites to members of the public.

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

Ensuring Access to Materials from Completed Rulemakings

7. Agencies should develop systematic protocols to enable the online storage and retrieval of materials from completed rulemakings. Such protocols should, to the extent feasible, ensure that website visitors using out-of-date URLs are automatically redirected to the current location of the material sought.



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Periodically Evaluating Agency Use of the Internet in Rulemaking

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