

**A Proposal to the Committee on Administration & Management
of
The Administrative Conference of the United States**

Effective Information Management in the Regulatory State

Submitted by:

**Jim Tozzi
Public Member
May 2012**

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EFFECTIVE INFORMATION MANAGEMENT IN THE REGULATORY STATE

Improving records management will improve performance and promote openness and accountability by better documenting agency actions and decisions.

When records are well-managed, agencies can use them to assess the impact of programs, to reduce redundant efforts, to save money, and to share knowledge within and across their organizations. In these ways, proper records management is the backbone of open Government.

-- President Barak Obama; Memorandum for the Heads of Executive Departments and Agencies; Federal Register, December 1, 2011

The President is correct, records management is the foundation of government operations. Modern and effective management of government records, both internally generated materials as well as contributions from the public, is essential to the efficient functioning of all aspects of government, including regulatory functions.

Although records management policies do not generally receive the media attention generated by more “newsworthy” Administration statements, effective public access to public records, combined with measures for ensuring the integrity of those records, is a prerequisite for a free society.

President Obama has recognized that modernizing and improving federal records management is necessary for improving the functioning of government by issuing the Managing Government Records Memorandum quoted above. The Memorandum ordered the Director of OMB, the Archivist, and the Associate Attorney General to “issue a Records Management Directive that directs agency heads to take specific steps to reform and improve records management policies and practices within their agency.”

The Presidential directive set forth six goals for his records management reform initiative:

- (i) creating a Government wide records management framework that is more efficient and cost effective;
- (ii) promoting records management policies and practices that enhance the capability of agencies to fulfill their statutory missions;
- (iii) maintaining accountability through documentation of agency actions;

- (iv) increasing open Government and appropriate public access to Government records;
- (v) supporting agency compliance with applicable legal requirements related to the preservation of information relevant to litigation; and
- (vi) transitioning from paper-based records management to electronic records management where feasible.

The fourth item in the President’s Memorandum, increasing open government and public access to public records, is the subject of this proposal to the Administration and Management Committee of the Administrative Conference of the United States (ACUS). This document represents one part of an ongoing effort by various stakeholders to leverage the President’s commitment to improving the efficiency, openness and collaborative essence of government.

The Purpose of Regulatory Dockets

Regulatory dockets create a central, publicly accessible location where:

1. Agency officials place all relevant rulemaking materials; and
2. Members of the public place all comments and related materials that they want the agency to consider during the deliberative process.

In short, the regulatory docket should ensure that agency officials and all interested members of the public have access to the materials under consideration.

Although the Federal Register Act does not contain a definition of a “regulatory docket,” a definition of regulatory docket that is broadly applicable to agency proceedings is found in the Federal Motor Carrier Safety Administration’s regulations found at 49 C.F.R. PART 389—RULEMAKING PROCEDURES:

§ 389.5 Regulatory docket.

(a) Information and data deemed relevant by the Administrator relating to rule making actions, including notices of proposed rule making; comments received in response to notices; petitions for rule making and reconsideration; denials of petitions for rule making and reconsideration; records of additional rule making proceedings under §389.25; and final rules are maintained at Headquarters, Federal Motor Carrier Safety Administration, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.

(b) Any person may examine docketed material, at any time during regular business hours after the docket is established, except material ordered withheld from the public under section 552(b) of title 5 of the United States Code, and may obtain a copy of it upon payment of a fee.

Two fundamental attributes of regulatory dockets that can be gleaned from the FMSCA's definition are that:

1. Regulatory dockets contain a wide range of materials from federal and public sources; and
2. Effective and timely public access to the docketed materials is essential.

The records management challenges associated with regulatory dockets are growing as the volume and diversity of materials (electronic comments, paper comments, hearing transcripts, various file formats, etc.) continue to grow. We can expect that as the use of social media increases, the diversity in types of records generated will increase, likely to include video, voice and other artifacts of newer technologies.

The Administration has championed enhancing public participation in regulatory processes through the use of social media. For example, OIRA Administrator Sunstein's Memorandum of April 7, 2010, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act* explained that:

Federal agencies are expanding their use of social media and web-based interactive technologies. For example, agencies are increasingly using web-based technologies, such as blogs, wikis, and social networks, as a means of "publishing" solicitations for public comment and for conducting virtual public meetings.

The challenge for docket managers is to keep up with the pace of innovation.

The Need for Unified Administration of Docket Management

Records management needs to evolve in response to the docket management challenges discussed above. Although the goals and need are clear, what is missing is a single official or office which is responsible for managing collection, storage and access to regulatory information.

Currently, the regulatory docket management function is split between two organizations handling opposite sides of the same coin. Publication of virtually all official regulatory-related Notices and other official regulatory-related communications is the responsibility of Office of Federal Register (OFR). The Office's Director, a career Senior Executive Service (SES) official, has responsibility for the notice publication process. The Director, in turn, reports to the Archivist of the United States, a Presidential appointee confirmed by the Senate.

Thus, there are clear lines of authority and accountability for publication of Notices. Administration and accountability is fragmented, however, on the other side of the regulatory information coin, the submission and retrieval of information by the public to and from the docket.

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Instead of being managed by a single organization with clear lines of authority and accountability from political and SES leadership, the government's central docket site, Regulations.gov, is managed by a Program Management Office "with the assistance of partner Federal agencies."

The structure of the eRulemaking Program Management Office is complex, its leadership structure is unclear to all but insiders, and accountability is shrouded. Instead of having clear lines of management authority, the Regulations.gov site states that the "eRulemaking Program is governed by dozens of Federal organizations participating in a tiered governance structure."

The Regulations.gov site further explains that,

Since 2002, the U.S. Environmental Protection Agency (EPA) has served as the managing partner of the eRulemaking Program. EPA established a Program Management Office (PMO) to oversee the system development, maintenance and collaboration of agency partners.

In addition to the leadership provided by the PMO, many of the participating Federal departments and agencies are involved in the program's governance. An Executive Committee is comprised of Chief Information Officers (CIO), Regulatory Policy Officers, and/or Deputy Secretaries from 30 departments and agencies. An Advisory Board is made up of senior representatives from partner agencies. Workgroups provide additional technical and business process expertise in a variety of areas, including usability, budget and legal issues.

What's missing from the above description is the equivalent of the Archivist and the Director – publicly identified individuals who are in charge. As the situation currently stands, many organizations participate in the management of Regulations.gov with no individual having overall responsibility.

The difference in management structures between the administration of NARA/OFR and Regulations.gov are reflected in the usability of their respective information products. NARA and OFR have set the gold standard for records management. Although improvements have been made in the operations of Regulations.gov, the program remains troubled. Specifically, it remains exceedingly difficult for members of the public to quickly locate relevant dockets, particularly when analyzing materials in dockets which have closed for comment.

The experiment discussed below details the problems users face in attempting to locate public comments submitted through Regulations.gov.

The experiment consisted of taking two random *Federal Register* notices and assessing how well Regulations.gov is able to provide reasonably easy access to the comments submitted. The first *Federal Register* notice selected was the first one in the *Register* on June 16, 2011, the first day of the ACUS' 54th Plenary Session. The second notice selected from the *Federal Register* on December 9, 2011, the last day of the 55th Plenary Session.

The assessment process consisted of two tests:

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1. Accessing the selected Notice from Regulations.gov; and
2. Determining how difficult it is to access the comments of specific parties who have commented on the proposed rule.

The First Regulations.gov Test – A USDA ICR

The first Notice to be analyzed was a USDA Request for Comment on an Information Collection Request (ICR), *Evaluation of the Summer Food Service Program Enhancement Demonstration Food Backs and Meal Delivery*. The Notice was for the second (30 day) comment period mandated by the Paperwork Reduction Act (PRA).

Analysis of the ICR Notice immediately revealed that it contains some particular challenges for a comment filing and retrieval system because it requires that comments be submitted to two different parties; the USDA Desk Officer at the Office of Information and Regulatory Affairs (OIRA), and USDA's Departmental Clearance Officer. The public is not directed to submit their comments through Regulations.gov. Instead, the Notice directs the public to submit their ICR comments:

- Via E-mail to OMB; and
- Via US Postal Service mail to USDA.

As far as can be determined through various search attempts on Regulations.gov, the public ICR comments, if any, are not publicly available – in contradiction to the President's efforts to make the public comments process easier and more transparent and to increase public access to federal information.

By using the Advance search feature on Regulations.gov and providing the agency name (USDA) and the date the Notice was published as the Comment Start Date and the Comment Stop Date, it was possible to locate the selected *Federal Register* ICR Notice but it was not possible to determine whether or not any comments were submitted. An extract from the search results is show below to illustrate the difficulty in finding out whether or not any comments were submitted.

List Table Learn more about these Results

Agency Information Collection Activities; Proposals, Submissions, and Approvals
- Document Contents : ...EOP.GOV or fax (202) 395-5806 and to Departmental Clearance Office, **USDA**, OCIO, Mail Stop 7602, Washington, DC 20250- 7602.
Comments regarding these information...

Notice | Posted: 06/16/2011 | ID: USDA_FRDOC_0001-0736
Agency: USDA | RIN: Not Assigned | Docket ID: [USDA_FRDOC_0001](#)

Meetings: Deschutes Provincial Advisory Committee
- Document Contents : ...EOP.GOV or fax (202) 395-5806 and to Departmental Clearance Office, **USDA**, OCIO, Mail Stop 7602, Washington, DC 20250- 7602.
Comments regarding these information...

Notice | Posted: 06/16/2011 | ID: USDA_FRDOC_0001-0737
Agency: USDA | RIN: Not Assigned | Docket ID: [USDA_FRDOC_0001](#)

Federal Agricultural Mortgage Corporation Funding and Fiscal Affairs: Farmer Mac Risk-Based Capital Stress Test, Version 5.0
- Document Contents : ...as program business.4 Farmer Mac also provides a secondary market for **USDA**-guaranteed farm program and rural development loans.

As can be seen, below the ICR’s Document ID number, was the Docket ID with a hyperlink. However, instead of taking the user to a docket that containing the Notice and any comments received, it takes users to a folder with 873 different *Federal Register* notices, primarily, though not exclusively, ICR notices. A screen shot of the first page of the folder is available in Appendix A of this proposal. As can be seen in the Appendix, Regulations.gov provides a comments due date for some of the ICR notices but not others for reasons that are not clear – particularly since the many of comment due dates highlighted by the system are from 2010.

The file folder with hundreds of ICR Notices did provide the opportunity for an additional, not originally planned, test of Regulations.gov – ease of submitting comments. After organizing the 873 Notices by date, a USDA ICR was located which was still open for comment, for which Regulations.gov noted when comments were due, and which contained a link to submit comments. The ability for a user to move easily and directly from the Notice to submitting comments on the Notice should be a hallmark of a unified docket management system. The link was for comments on a USDA/Agricultural Marketing Service ICR, *Specialty Crop Block Grant Program--2008 Farm Bill*, published on May 10, 2012.

Unfortunately, while the submit a comment link brings users to a Submit a Comment page for Notice, it is not clear that any such comments would make their way to OMB and USDA. As the case with the original test ICR Notice, the new Notice stated that comment should be submitted by E-mail and by paper mail but did not mentioned Regulations.gov as a valid way of submitting comments. Thus, for this ICR, **there is a conflict between how the *Federal Register* Notice directed the public to submit comments and how Regulations.gov directed the public to submit comments.**

Although it is within an agency’s discretion to decide where comments should be submitted, it should not be within Regulations.gov’s discretion to change the agency’s decision.

The Second Regulations.gov Test – A DOL NPRM

The last Notice in the December 9, 2011 Federal Register was an ICR comment notice from the US Patent and Trademark Office. Since we have already examined Regulations.gov’s handling of ICRs, the Notice of Proposed Rulemaking (NPRM) which came above the ICR and other assorted notices was selected instead, a Department of Labor/Office of Federal Contract Compliance Programs

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rulemaking, *Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities*.

The DOL NPRM listed Regulations.gov as the first option for submitting comments (with alternatives available for people who lack or prefer not to use computer access). The Notice stated that:

- “You may submit comments, identified by RIN number 1250-AA02, by any of the following methods:”

The first effort to find the docket involved putting the RIN Number into the prominent search box on the home page of Regulations.gov. The search brought up 556 results. The search was then re-run but with placing the RIN number in quote marks (“1250-AA02”). The revised search returned 556 results. Appendix B contains the first 25 of the 556 search results.

The search results were quite diverse, ranging from the Spring 2010 Semi-Annual Regulatory, the first search result returned (such Agendas accounted for three of the first five hits), to documents labeled *Establishment of User Fees for Filovirus Testing of Nonhuman Primate Liver Samples* (which did not indicate what type of document it was, NPRM, ICR, etc.) to another document of unknown type titled “*Transitional Program for Covered Business Method Patents: Definition of Technological Invention*.”

The results also included many documents labeled “comment” but without any indication as to a comment from whom although the RIN indicated that it was on the subject NPRM. A sample example is below with more examples seen in Appendix B.

Comment on FR Doc # 2010-18104

- RIN : 1250-AA02

Public Submission | Posted: 07/27/2010 | ID: OFCCP-2010-0001-0002

Agency: OFCCP | RIN: 1250-AA02 | Docket ID: OFCCP-2010-0001

The second document returned was selected since it had the title of the NPRM. The document turned out to be an Advance Notice of Proposed Rulemaking (ANPRM) not the NPRM. Since the third document concerned *National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Intent to Partially Delete Letterkenny Army Depot Southeastern (SE) Area, et al.*, the search was re-run again, this time using the advance search function to try and locate the NPRM.

On the Advance Search page, the RIN number was placed in the “By Keyword or ID” and the Agency selected was DOL. For the box labeled “By Document Type” Proposed Rule was selected. Under Docket Type, “Rulemaking” was selected. See Appendix C.

The Advance Search returned zero results. See Appendix D.

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At this point, efforts to directly find the NPRM on Regulations.gov were terminated. Instead, the second test was run, trying to find specific comments in the docket with the idea that it might be possible to use this method to find the NPRM.

For the second test, the RIN number was put into the search box on the Regulations.gov homepage. Based on previous experience, the second search result (an unidentified document labeled Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors: Evaluation of Affirmative Action Provisions) was selected and, instead of clicking on the document title (which goes to a pdf of the ANPRM), the link labeled “Docket ID: OFCCP-2010-0001” was followed.

Clicking on the Docket ID list brought up a list of three documents, all identified as having the document type of Proposed Rule. Based on the Posted Date, the NRPM was located. Adding a check mark to the Public Submission box under Document Type brought up a list of the 500+ comments received. It was then possible to sort by Organization and identify specific comments.

Conclusion: The process of locating a given docket to read the NPRM and identify specific comments was navigable by an experienced, persistent user. It would be an understatement to say that even such basic research would be daunting for more casual users.

It's a Management Issue, Not a Software Issue

The problems with Regulations.gov appear to be one of management, not software, *i.e.*, the problems are not going to be solved by tweaks to the search engine. Issues such as Regulations.gov providing submission instructions which conflict with the *Federal Register* notice's request for comment and its search engine turning up hundreds of useless and irrelevant results is not a problem that can be solved by handing a punch list to a contractor. Improving the regulatory docket management system will take leadership, solid management, and in-depth experience with records management. Unfortunately, as was seen above, Regulations.gov is an example of management by committee.

A Better Way to Manage Regulatory Dockets

The White House Open Government Initiative announced Federal Register 2.0.¹ The posting stated that “Federal Register 2.0 was launched on July 26, 2010 as an online news journal.” It further explained,

The new Federal Register website has a clear layout and Web 2.0 tools to help users find what they need. Users can check timelines for the entire history of rulemaking actions and set up RSS feeds on any topic or search term. Readers can easily connect with Regulations.gov to submit their comments on regulatory actions and read other public comments and supporting material.

¹ <http://www.whitehouse.gov/open/innovations/FederalRegister>

Of particular note and importance in this era of budget stringency, the White House explained,

The site was built at minimal cost in just three months by using open source software and through collaboration with non-profit organizations, universities, and the open government community. The open source programming code is available for reuse by all.

On April 29, 2012, The Federal Register blog announced that “FederalRegister.gov (FR2) is now tightly integrated with the electronic dockets on Regulations.gov. Comments submitted to Regulations.gov and processed for public display are now accessible from FR2.”²

The Federal Register blog posting provided additional information about FR2, including that it was designed for close integration with regulatory information found on other federal sites and it provides quick and easy access to the comments received and other relevant materials. As the Federal Register’s posting explained,

When we launched FR2 in mid-2010, one of our goals was to integrate access to regulatory information found on other Federal websites. We started with links to Unified Agenda abstracts on [Reginfo.gov](http://www.reginfo.gov) and added a “big green easy button” that directs readers to comment forms on Regulations.gov. But we had to crawl through a lot of electronic haystacks to find the right needles to link up to. We couldn’t always make a solid connection. When Regulations.gov released its Application Programming Interface, we jumped at the chance to tap into it. Now we believe there will be no more dead ends for Federal Register readers who want to delve into the background of a regulatory action and submit comments.

So how do these new connections work? We added a “Regulations.gov Docket Info” sidebar to the right of Federal Register articles (scroll down past the FR info sidebar). It identifies the public comment docket and links to the docket folder, the comments received, and any supporting materials. We also show a running count of comments received in electronic dockets, based on the information currently available from Regulations.gov. [Emphasis added]

The Federal Register 2.0 site has achieved immediate acclaim among federal administrative and management experts. For example, the Administrative Conference of the United States has awarded the Office of Federal Register its first Walter Gellhorn Innovation Award.

See, <http://www.acus.gov/congratulations-federalregister-gov/> and <https://www.federalregister.gov/blog/2011/12/federalregister-gov-wins-award-for-innovation-best-practices>.

FederalRegister.gov is still essentially a demonstration website for research purposes since its database is limited. Nonetheless, a sample inquiry on an NPRM was attempted. Since the Federal

² <https://www.federalregister.gov/blog/2012/04/in-synch-with-regulations-gov>

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Register was the starting point for the new test, there was no need to try and find Federal Register notices in the docket. Instead, the test consisted of:

1. Ease of filing comments on the selected Notice; and
2. Determining how difficult it was to access the comments of specific parties who have commented on the Notice.

Of greatest interest is determining whether using the FR2 site improves a user's ability to access the data contained in a docket.

The NPRM selected was a proposed rule from USDA's Food Safety and Inspection Service, Modernization of Poultry Slaughter Inspection. FR2's text of the NPRM is available in an easy-to-read, hyperlinked format. Thus, it's easy for users to use make use of not only the Table of Contents near the top of the rule but also to have easy to access the legal citations and other materials referenced in the document (CFR, USC, Executive Orders, Unified Agenda, agency websites, etc.). The format of the FR2 notice is definitely easier to make effective use out of compared with the Federal Register's current standard.

Integrated into the top of the NPRM is the big green Submit A Formal Comment button the Register had mentioned in their discussion of the FR2 site which takes users to the Submit a Comment form on Regulations.gov.

The greater innovation in the FR2 site is found right below the submit comments button, a link that tells users how many comments have been submitted to the docket so far (923 in this instance). The read comments link can be seen in the screen shot below just under the green button.

Modernization of Poultry Slaughter Inspection

A Proposed Rule by the [Food Safety and Inspection Service](#) on 04/26/2012



This article has a comment period that ends in 11 days (05/29/2012)

[SUBMIT A FORMAL COMMENT](#)

[Read the 923 submitted public comments](#)

SUMMARY

The Food Safety and Inspection Service (FSIS) is extending the comment period for the proposed rulemaking “Modernization of Poultry Slaughter Inspection” and responding to questions and addressing issues that have been raised concerning the proposed rule. The comment period was scheduled to close on April 26, 2012. During the comment period, a coalition of consumer advocacy organizations and two trade associations representing the poultry industry asked that FSIS clarify certain aspects of the proposed rule to help inform their comments. This document summarizes the issues raised by these groups and FSIS’s response. FSIS is also soliciting additional comments on how it should implement the final rule resulting from the proposal and requesting available data on any worker safety issues associated with increased line speeds.

FSIS received a request to hold a public technical meeting on the proposed rule. FSIS does not believe that such a meeting would be useful. The Agency will, however, assess public understanding of the proposed rule in connection with its review and evaluation of the comments submitted and will respond as appropriate.

[UNIFIED AGENDA](#) [New Poultry Slaughter Inspection](#)

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Publication Date:

Thursday, April 26, 2012

Agencies:

[Department of Agriculture](#)
[Food Safety and Inspection Service](#)

Action:

Proposed Rule; Extension Of
Comment Period.

Dates:

The proposed rule published
January 27, 2012 (77 FR 4408) is
extended. Comments are due May
29, 2012.

Comments Close:

What is most noteworthy about the Read comments link, particularly after the frustrations documented above with performing comment research on Regulations.gov, is that it works.

The link from the NPRM on FR2 takes users to the comments on Regulations.gov – without extraneous materials – and provided them in chronological order. The fact that Regulations.gov is capable of providing the comments this easily adds further evidence to the proposition that the underlying issues with the site are related to its fragmented management structure, not software or other technical problems.

Conclusion: The Federal Register’s FR2 site works very well.

RECOMENDATIONS

- The Committee on Administration and Management should assess whether the public would be better served if administration of the Regulations.gov site were transferred to the Office of Federal Register.
- Since the Committee's membership provides unparalleled expertise in federal administration and management, the Committee should undertake on a continuing basis the preparation of analyses and reports on improving records management throughout the federal government.