Unifying Rulemaking Information: Recommendations on the New Federal Docket Management System

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INTRODUCTION

In recent years, regulatory agencies, Congress, and the White House have taken steps to increase the use of information technology in the management of the rulemaking process. The latest such "e-rulemaking" effort is the design of a new, government-wide regulatory information
system being developed by the Bush Administration. The system, known as the Federal Docket Management System (FDMS), aims for the first time to make all information supporting federal regulation available to the public via the Internet. By making information about government regulation available online, the Administration’s e-Rulemaking Initiative seeks to improve the quality and legitimacy of the government’s regulatory decisions.\(^1\)

If developed properly, the Administration’s new online docket management system can also facilitate legal and social scientific research that, in the long term should improve regulatory policymaking. To advance this objective, we recently drafted a detailed letter to the Administration consisting of recommendations for the design of the new FDMS, both to help enhance the general public’s accessibility to docket information, and to improve the availability of docket information for research purposes.\(^2\) Our letter describes the information currently maintained by government agencies and emphasizes the importance of ensuring that no loss of information occurs in making the transition to the online docket system. It also presents a series of steps that the Administration should take to ensure that the information stored in the new system is of the highest quality and has effective search and downloading capabilities.

Shortly after drafting our letter, we obtained formal affirmation of our recommendations from fifty-five academic colleagues from across the country, who joined the letter which we then submitted to the Office of Management and Budget (OMB) and the U.S. Environmental Protection Agency (EPA)—the two agencies that are ultimately overseeing the development of the FDMS. The American Bar Association’s Section on Administrative Law and Regulatory Practice also subsequently endorsed our recommendations in a further submission to the OMB.\(^3\)

Given the importance of the FDMS to future research on rulemaking, as well as to the legal profession and broader public, we reproduce our recommendations at the end of this Article. Before turning to our recommendations, however, we place them in the context of new developments in e-rulemaking, the current Administration’s effort to develop the FDMS, and the current state of empirical research on rulemaking.

\(^1\) See, e.g., http://www.regulations.gov/eRuleMaking.cfm (providing general information on the Administration’s e-Rulemaking Initiative).

\(^2\) A copy of the letter is reproduced infra.

I. RULEMAKING AND EMPIRICAL RESEARCH ON THE REGULATORY PROCESS

For decades, rulemaking has been one of the most common and important modes of policymaking within American government. Many of the most salient social and economic problems result in rules promulgated by regulatory agencies. For example, among the various governmental responses to the terrorist incidents of September 11, 2001 were new rules covering virtually every aspect of travel safety. Over the past several years, the Department of Transportation (DOT) and the Department of Homeland Security (DHS) have adopted many new rules on issues ranging from the screening of checked baggage for explosives, to the collection and sharing of information about air, rail, and maritime passengers. In every area of public policy, whether in efforts to protect the public food supply, promote the integrity of securities markets, or maintain the reliability and efficiency of electricity and telecommunications services, the government operates through rules issued by regulatory agencies.

Rulemaking leaves virtually no aspect of citizens' lives untouched. It governs even the most mundane aspects of life, such as the size of the eyes in Swiss cheese and the fat content of cat food. Given the ubiquity of rulemaking, as well as its overall significance to society, researchers and practitioners have devoted justifiable attention to studying and understanding the processes through which rules are developed, as well as the outcomes that are associated with these processes.

7. Id.
9. 98 C.F.R 355.29.
10. There is, of course, extensive literature on rulemaking in administrative law. For just a small sampling, see, e.g., Michael Asimow, Interim Final Rules, 51 ADMIN. L. REV. 703 (1999); William S. Jordan, III, Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules, 53 ADMIN. L. REV. 45 (2001); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (3d ed. 1998); Thomas O. McGarity, The Internal Structure of EPA Rulemaking, 54 LAW & CONTEMP. PROBS. 57 (Autumn 1991); Richard J. Pierce, Jr., The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts have Contributed to the Electricity Crisis of the 1990's, 43 ADMIN. L. REV. 7 (1991); PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW (2d ed. 2004); Peter L. Strauss, Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law, 74 COLUM. L. REV. 1231 (1974). In addition, a smaller social science literature exists. See, e.g., sources cited supra note 8 and infra notes 11-12, 18. For a sample of our own contributions to this literature, see, e.g., Steven J. Balla, Legislative Success and Failure and Participation in Rulemaking 10 J. PUB. ADMIN. RES. & THEORY 633 (2000); Steven J. Balla, Administrative Procedures and Political Control of the Bureaucracy, 92 AM. POL. SCI. REV.
public commenting, for example, it is clear from the existing literature that some agency proposals attract little or no public attention while others generate thousands upon thousands of responses.\textsuperscript{11} It also appears to be the case that, although agencies tend to consider comments quite carefully, proposed rules tend to be altered very little in response to the arguments and evidence raised in public comments.\textsuperscript{12}

Notwithstanding the attention that rulemaking has received by some researchers, we still lack clear, systematic answers to some of the most fundamental questions about government rulemaking.\textsuperscript{13} For example, we know very little about how different organizations and individuals outside of government try to influence the rulemaking process and how different their strategies affect agency decisionmaking.\textsuperscript{14} Other unanswered questions include: Why do some rules take many years to develop, while others are executed more expeditiously? Why are some rules challenged in court, while others are not? How do different agency procedures affect rulemaking decisions?\textsuperscript{15}


\textsuperscript{13} See Empirical Analysis, supra note 10 (reviewing the literature on rulemaking and discussing remaining open questions).

\textsuperscript{14} To be sure, there has been some work surveying interest groups and bureaucrats about their perceptions regarding influence over the rulemaking process. See KERWIN, supra note 6; Scott Furlong, Interest Group Influence on Rulemaking, 29 ADMIN. & SOC. 325 (1997). Still, despite the prevalence of interest groups in rulemaking, the number of empirical studies on their strategies remains remarkably small.

\textsuperscript{15} An important line of research does focus on various procedural, institutional, and political influences on bureaucracies, but much more work certainly remains to be done. See, e.g., William T. Gormley, Jr., TAMING THE BUREAUCRACY: MUSCLES, PRAYERS, AND OTHER STRATEGIES (1989) (exploring the use and effectiveness of incentives, coercion, and other approaches to political control of the bureaucracy); John D. Huber & Charles R. Shiplan, DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY (2002) (demonstrating that delegation from political institutions to bureaucratic
Questions such as these remain largely unanswered because of the difficulty in obtaining information about government rulemaking. For much of the past half-century, since the landmark enactment of the Administrative Procedure Act (APA), public comments, along with the official records of rulemakings in general, have existed in paper form only. These paper records have usually been stored in docket rooms accessible mainly through in-person visits to Washington, D.C. and the area surrounding the nation’s capitol.

Owing to the logistical difficulties associated with access to information about rulemaking, much of the existing research on rulemaking tends to focus on individual, often high-profile, rulemakings or, at most, a limited number of case studies. For example, the interested reader can find books on the Federal Trade Commission’s rulemaking efforts starting in the 1960s to require health warnings on cigarette packages, the EPA’s regulatory proceedings under the Clean Air Act in the 1970s, the National Highway Traffic Safety Administration’s rulemaking activities in the 1970s and 1980s on passive restraints and other automobile safety features, and the Food and Drug Administration’s efforts in the 1990s to regulate cigarettes as drug delivery devices. Efforts by legal scholars and social scientists to study rulemaking more systematically have similarly been limited in scope to relatively small sets of actions taken by particular agencies, during limited periods of time. Given the importance of

...
rulemaking to society, existing social science research on the regulatory process remains remarkably sparse and unsystematic, especially compared to the extensive research devoted to other governmental institutions, such as Congress, the Presidency, or the Supreme Court.  

Rulemaking research that focuses largely on case studies makes it difficult to discern regularities or patterns, distinguishing what generally occurs from unique or idiosyncratic experiences. What is needed is a set of tools that can facilitate the development of a broader, more cumulative and more systematic body of knowledge about rulemaking. New applications of information technology to rulemaking could provide the needed tools to advance the study of rulemaking. The use of e-rulemaking via the Internet holds the potential for fostering the collection, storage, and retrieval, and ultimately, the analysis of data concerning rulemaking processes and outcomes. If designed properly, such applications could make agency proposals, public comments, and other aspects of rulemaking records available and useable at a very low cost to interested persons all around the world.

II. THE DEVELOPMENT OF E-RULEMAKING

A key hallmark of the APA was its encouragement of transparency in governmental decisionmaking and participation by affected interests through the notice and comment process. Although reactions to notice and comment rulemaking range from Kenneth Culp Davis’s praise as “one of the greatest inventions of modern government,” to Donald Elliott’s less favorable characterization as a form of Kabuki theatre, almost every regulatory expert believes that information technology can enhance transparency and the quality of participation in the rulemaking process.


22. In the early 1980s, R. Douglas Arnold characterized bureaucratic policymaking and implementation as an “undertilled” field of research in political science. R. Douglas Arnold, Overtilled and Undertilled Fields in American Politics, 97 POL. SCI. Q. 91, 96 (1982). Although much important work has been published in the intervening years, the rulemaking field still remains much less tilled than others within political science.


25. See E. Donald Elliott, Re-Inventing Rulemaking, 41 DUKE L. J. 1490, 1492 (1992) (describing notice and comment as a style of Japanese theatre in which women are played by men, for the reason that in rulemaking, public comments are routinely ignored by the agencies that formally solicit them).

26. See Barbara H. Brandon & Robert D. Carlitz, Online Rulemaking and Other Tools
The movement toward electronic rulemaking began in the early 1990s when the Administrative Conference of the United States issued several reports on the use of technology and the rulemaking process. The Clinton Administration’s National Performance Review also increased the use of technology by agencies in the development of new rules. Around this same time, the Federal Register and Code of Federal Regulations both became available online.

Regulatory agencies soon thereafter began to allow members of the public to submit comments via email. A few agencies digitized the rulemaking process further with the establishment of electronic dockets. In 1998, the DOT became the first regulatory agency to make available an online, department-wide regulatory docket, providing full access to all studies, comments, and other documents that form the agency’s rulemaking record. The EPA subsequently adopted its own agency-wide system.

Several other agencies have implemented similar online dockets for

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for Strengthening Our Civil Infrastructure, 54 ADMIN. L. REV. 1421, 1422 (2002) (suggesting that the Internet could have a fundamental impact on how the public participates in federal policymaking); see also Daniel C. Esty, Environmental Protection in the Information Age, 79 N.Y.U. L. REV. 115, 170 (2004) (arguing that “[a]dministrative law . . . stands to be transformed by trends toward increased openness” fostered by information technology); Stephen M. Johnson, The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet, 50 ADMIN. L. REV. 277, 282 (1998) (arguing that electronic technology will enhance the rulemaking process).


29. See, e.g., Cary Coglianese, The Internet and Citizen Participation in Rulemaking, 1/S: J. L. & POL’Y FOR THE INFORMATION SOC’Y (forthcoming 2005) (noting that the U.S. Department of Agriculture permitted citizens to submit comments via e-mail in its organic food rulemaking).


individual rulemaking proceedings. 32

Electronic rulemaking took a particularly significant step forward in 2001 when the OMB announced a major E-Government Initiative. 33 Over the next two years, the OMB pursued twenty-four projects as part of its initiative, one of which focused on "online rulemaking management." 34 The Bush Administration’s online rulemaking project, coordinated by the OMB and the EPA, has three stages. The first of these—the creation of www.regulations.gov—was completed in January 2003. Regulations.gov allows the public to review all agency proposed rules open for public comment and to submit comments from a single website. 35

The second stage of the online rulemaking project, the development of the Federal Docket Management System (FDMS), is the focus of this Article. Currently, the Administration is working to create a single, online clearinghouse for information about the rulemaking proceedings at all federal agencies. 36 The FDMS will store, and allow for the retrieval of, all agency documents related to proposed and final rules issued by any federal agency. Essentially, the FDMS will make the public records of rulemaking activities, in their entirety, readily available via the Internet to anyone interested in tracking government rulemaking.

Administration officials envision a third stage to the online rulemaking project that will focus on the development of desktop tools for government rule-writers. This third stage, focusing mainly on the needs of government staff to process and analyze information, is not expected to be undertaken until a later time. 37

What effects will this movement to electronic rulemaking have on government rulemaking? E-rulemaking has generated considerable interest within the research community and has elicited a variety of predictions about its effects on government decisionmaking.\(^38\) In one of the earliest treatments of e-rulemaking, legal scholar Stephen Johnson predicted that information technology would positively transform the rulemaking process, expanding public participation and educating citizens about regulatory initiatives.\(^39\) However, not everyone has shared Johnson's optimism. Others have expressed concerns that electronic rulemaking could potentially lead to a crowding out of thoughtful analysis, facilitating strategic obfuscation by interest groups or otherwise obscuring sound decisionmaking.\(^40\)

In actuality, the effects of e-rulemaking will likely depend on how it is designed, implemented, and utilized. In order to maximize the positive effects from e-rulemaking, as well as to enable researchers to study more precisely what these effects are, government decision makers should give careful consideration to the design of any new technologies used in rulemaking.

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III. THE DESIGN OF THE FDMS

The most significant web-based application that is expected to become operable in the next year will be the new FDMS. As it is currently envisioned, the FDMS will serve as a single, online clearinghouse for information about the activities of all federal agencies that issue rules. Like the paper-dockets that have traditionally been kept within each agency, the FDMS will store agency proposals and rules, public comments, and agency studies and analyses. But it will do so electronically, in a form accessible to any member of the public with a computer and Internet connection, and eventually it will do so for all agencies within the federal government.

The potential benefits of a government-wide docket system cannot be understated, particularly in terms of helping close the gap that exists between the societal significance of rulemaking and the relative dearth of cumulative knowledge about this crucial mode of policymaking. These prospective benefits, however, will only be fully achieved if the government develops the FDMS in ways that ensure consistency in data fields, flexibility in searching, and ease in the ability to download data. As researchers with considerable experience in collecting and analyzing information about rulemaking, we have taken considerable interest in the design and implementation of the FDMS. We believe the FDMS promises not only to make the entire rulemaking process more transparent to the general public, helping improve rulemaking in the short term, but also to facilitate significantly more comprehensive and useful research on government rulemaking, helping improve rulemaking in the long term.

During the summer of 2004, Cary Coglianese worked with the EPA's e-Rulemaking Initiative staff to develop a public outreach strategy on the design of the FDMS. As part of that strategy, the EPA held a series of public meetings around the country in August, one of which Coglianese facilitated at the John F. Kennedy School of Government in Cambridge, Massachusetts. At that session, as well as the others held in California and Washington, D.C., the latter of which was attended by Steven Balla, the EPA shared with the public its current plans for the design of the FDMS, including displaying a mock-up of the FDMS interface.

The mock-up that the EPA displayed revealed something surprising to

those who follow rulemaking closely: It did not appear to contain all the data fields found in existing online dockets, such as the DOT’s Docket Management System. It also did not include data fields for all the information currently reported by agencies to the Federal Register. While those who participated in the public meetings recognized that the EPA was displaying a mock-up rather than the final FDMS interface, the existence of glaring data gaps nevertheless prompted Coglianese to advise the EPA to pay closer attention to the information stored in the FDMS and Balla to emphasize the importance of the search and download capabilities of the system. At the time, it appeared to those outside the e-Rulemaking Initiative that the EPA and its contractor, the Lockheed Corporation, were more preoccupied with other concerns, such as technical issues about communication and data storage protocols for the new system. While such technical issues are clearly important, the ultimate value of the FDMS for the public and those who study rulemaking will depend on the information it contains, as well as on how it displays that information and allows users to search and download it.

In the early fall of 2004, we began to draft a detailed set of recommendations for the design of the new FDMS to help enhance both the general public accessibility of docket information, as well as its availability for research purposes. While we believed the input provided during the summer public meetings was valuable, we wanted to make sure that the staff at the OMB, the EPA, and Lockheed had clear and concrete suggestions about how to design the FDMS so it would have maximum value for both the public and the research community.

Having secured support of our recommendations from fifty-five academic colleagues from across the country, we submitted our recommendations on November 11, 2004 to Karen Evans, Administrator of the Office of Electronic Government and Information Technology, and John Graham, Administrator of the Office of Information and Regulatory Affairs, both at the OMB. We also sent copies of the letter to the key leaders of the e-Rulemaking Initiative at the EPA, including Kim Nelson, Rick Otis, and Oscar Morales, as well as to the principal liaison from Lockheed Corporation overseeing the project.

While we made the decision to limit signatures on the letter only to those who had published academic research on rulemaking from within the fields of law, political science, and economics, we nevertheless recognized that the recommendations we offered, if followed, would bring value to lawyers and other professionals whose work brings them into contact with

administrative rulemaking. Within less than a week from the time we submitted our recommendations to the OMB, the American Bar Association's Section on Administrative Law and Regulatory Practice formally endorsed our recommendations in a separate submission to the OMB.45 Given the potential importance of the FDMS to future research on rulemaking, as well as to the legal profession and broader public more generally, we reproduce our recommendations as part of this Article.

In making our recommendations, we emphasized three key principles in the design of the FDMS:

- **Consistency in Data.** We urged the OMB and the EPA to work to keep data fields consistent, both across agencies and over time.
- **Flexibility of Search.** We recommended that the FDMS be designed so that users will be able to define their own searches using any of the fields within the docket system.
- **Ease of Downloading.** We stressed that users should be able to download and export search results in large batches and in commonly used formats.

We believe these three principles capture both the needs of researchers who will use the FDMS to study the rulemaking process, as well as the needs of the informed public who will use the FDMS to find regulatory documents that impact their interests.

Each section of our letter to the OMB elaborates on these principles, offering specific recommendations about the design of the FDMS. The first section addresses the often confusing relationship that exists in the non-electronic world between dockets and *Federal Register* notices. We have noticed over the years that agency dockets and rulemaking filings do not often have a one-to-one relationship, as agencies sometimes open dockets for non-rulemaking activities and other times open multiple dockets for a single rulemaking. Unless the correspondence between agency dockets and rulemakings is addressed, users of the new FDMS will face considerable confusion. We recommend that the OMB consider designing the FDMS so that users will be able to search the system for a particular *Federal Register* notice and then easily find all other documents associated with that notice. Toward this end, it will be crucial to develop a system for coding *Federal Register* documents in a consistent way across agencies.

In the second section of our letter, we discuss the data fields that will be important to include in the FDMS. From our perspective, it is important that as much relevant data about each rulemaking be included so that researchers can gain a better understanding of how the regulatory process

45. See supra note 3.
works across large numbers of rulemakings and agencies. From the perspective of the broader public, individuals or interest groups should be able to quickly access all the information that would help them contribute to the regulatory process. We strongly urge the OMB to ensure that the move to the new FDMS result in no loss of information currently available to the public. Information that all agencies currently submit to the Office of the Federal Register, the Regulatory Information Service Center, and OMB, and the information that particular agencies currently maintain in their own public dockets should continue to be available as part of the FDMS. Moreover, the current information reported by agencies should only be treated as a lower bound for the information available in the FDMS, not an upper bound. The FDMS should have the flexibility and capacity to evolve and include new data fields necessary both for researchers and the public to understand agency rulemaking. Toward this end, we make certain suggestions for fields that it would be useful to include in the FDMS.

The final section of our letter addresses the search and download capabilities of the FDMS. This question is of particular import to the research community, for the FDMS has the potential to pave the way for more studies of large numbers of rulemakings. The ability of researchers to undertake such studies depends on the ease and flexibility of searching the FDMS. We urge the OMB and the EPA to ensure that users will be able to generate their own searches of any data field or combination of fields contained in the system. Users should also be able to easily download batches of data, not just individual documents, from these searches in any several commonly used formats.

Each of these three sets of recommendations corresponds to a crucial set of decisions that the architects of the FDMS will have to make. If designed properly to respond to these recommendations, the FDMS should allow researchers to conduct large-scale studies that have the potential to enhance our understanding of the rulemaking process. In addition, any interested member of the public will have access to a far wider range of information about agency intentions and views, which may provide the basis for more informed and useful comments.

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CODA

On March 11, 2005, as this Article was in production, we received a formal response to our letter from John Graham and Karen Evans at OMB, in which they expressed their commitment to designing the FDMS in a
manner consistent with our recommendations. Their response letter stated that "FDMS will support the vast majority of [our] recommendations" and that the new system will, at a minimum, "contain all the data currently used by Agencies, OMB, and the Office of Federal Register." We are, of course, encouraged at the expressed receptivity of the Administration to the ideas advanced in our letter. Ultimately, though, any verdict on the usefulness of the FDMS and the effectiveness of its design must await its actual implementation and use. As we have indicated, the benefits for future research on rulemaking, and more importantly the benefits that such research can generate in terms of improving regulation and the regulatory process, will depend on how users are able to interact with, access, and download the information contained in docket management system.

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November 11, 2004 Scholar’s Letter to OMB Containing Recommendations on the Design of the Federal Docket Management System

The Administration’s eRulemaking Initiative will have important implications for access to regulatory information both for those who work on rules and those organizations and citizens who are affected by rules. We write as scholars of rulemaking to suggest priorities that should guide the eRulemaking Initiative so that all interested parties can better understand and contribute to this common and important mode of policymaking.


47. Id.

Collectively, we have studied rulemaking at dozens of regulatory agencies across the federal government. Based on our extensive experience using agencies' rulemaking dockets and accessing information from them for our research, we believe three principles are vital in designing the forthcoming Federal Docket Management System (FDMS):

- **Consistency in Data.** Every effort should be made to keep data fields consistent, both across agencies and over time. Consistency over time is especially important, so that information available in a post-Regulations.Gov era can be matched with earlier information.

- **Flexibility of Search.** Users should be able to define their own searches using any of the fields within the docket system. They should also be able to combine different fields.

- **Ease of Access.** Users should be able not only to search docket data in a self-defined way, but should be able to download and export search results in commonly used formats, such as comma-separated or Excel or both.

Adherence to these three principles will make it easier for researchers and other members of the public to follow, understand, and contribute to the rulemaking process. Using these principles to guide the FDMS will advance the eRulemaking Initiative's goal of making the regulatory process more transparent to the American public.

In addition to these principles, we offer several specific recommendations about the design, data, and downloading features of the FDMS. Our recommendations are divided into three parts. In Part I, we address the relationship between individual agency dockets and Federal Register documents. The Federal Register is the publication of record for regulatory policymaking and the relationship between individual dockets and specific Federal Register notices must be made clear in the new FDMS. In Part II, we enumerate the specific data fields that the FDMS should contain. We believe that important progress can be made with little effort by beginning with data currently reported by agencies as part of the Unified Agenda, Federal Register, and OMB's 83-R Form. Building existing reported data into the online docket system should be readily feasible, as it does not require agencies to report any new data. Finally, in Part III, we discuss in detail the kind of search and download capabilities that should be part of the FDMS. In each Part, we offer specific recommendations to the Administration as it goes forward to develop the new government-wide docket system.

**DOCKETS AND FEDERAL REGISTER NOTICES**

To make the information in the online docket system useful to researchers who study rulemaking, care will need to be given to matching
dockets with the *Federal Register* notices that agencies use to announce their rulemaking activities. This need arises because the way that dockets are used, as well as the type of information they contain, varies markedly across different agencies. Although individual dockets are closely related to individual rulemakings, the correspondence is not always one to one. Some dockets are opened for proceedings other than rulemakings. Some dockets are opened for rulemakings that are later abandoned. Some provide supporting documents for more than one rule. Sometimes agencies have multiple dockets for the same rulemaking (such as when an agency opens a new docket for addressing a petition for an amendment or reconsideration of a rule).

For researchers who study rulemaking, the relationship between dockets and rules needs to be clearly delineated and consistently treated. There are at least two main ways to address this issue: (1) create a system that allows for varied uses of dockets but still clearly links rules with associated dockets; or (2) require a strict one-to-one relationship between each rule and a corresponding docket. The latter should be feasible if the data in each docket are completely digitized, as it would be just a matter of copying all the pertinent records (even if they were previously in another docket) into the new docket. No matter how the connections between dockets and rules are made, it should be possible for researchers to search the online docket by *Federal Register* notices and identify the pertinent information from the supporting docket for each proposed or final rulemaking.

_**Recommendation:**_ The designers of the new government-wide online docket system should recognize that currently not every docket corresponds to a separate rulemaking. Recognizing this fact, the system should be designed to allow users to search the system according to documents filed in the *Federal Register* (such as a proposed or final rule notice) and then to identify the supporting information associated with each *Federal Register* notice.

One possible way to create a system that accommodates varied agency use of dockets might be to create a structure so that information in the “docket detail” is general enough to apply to any and all *Federal Register* notices that might be filed in connection with a rulemaking. Such a docket detail probably should include a paragraph describing the activity that the docket supports. In addition, the docket would include nested “sub­domains” for each *Federal Register* notice associated with the docket. Some of the information in the docket system – such as whether a rule is
economically significant and requires OMB review – would be placed in the Federal Register notice sub-domain for the proposed or final rule, not in the overall docket detail itself. This is important because fields of data do sometimes change during the rulemaking process. For example, a proposed rule might not initially be considered economically significant, but changes made to it may make it more costly, making the final rule economically significant under the definition in Executive Order 12866 and the Unfunded Mandates Reform Act.

Recommendation: The FDMS should be designed so that information associated with individual Federal Register documents filed during a rulemaking can be included in the appropriate dockets and distinguished from information that applies across the board to the entire rulemaking.

Contemplating subdomains for each Federal Register notices highlights another important issue: the need for consistent categories to organize and categorize Federal Register notices. One important decision will be how to distinguish between “rule” and “non-rule” Federal Register notices. For example, some agencies may open dockets in connection with studies or non-binding guidance documents in addition to rulemakings. These non-rule proceedings should be kept distinct from rulemakings, but sometimes the distinction will not be known until later in the process. An agency may open a docket thinking it will create a new rule, but later may decide only to issue a non-binding guidance document instead.

Even for those Federal Register notices associated just with rulemaking, there is a need for consistency, both within and across agencies, in how to code the associated notices. Some categories seem to be places to start:

- ANPRM
- NPRM
- Supplemental NPRM
- Request for Comments
- Direct Final Rule
- Final Rule
- Correction/Technical Amendment
- Unified Agenda Notice or Entry
- Other (perhaps with a box allowing agency to enter a description)

Recommendation: The FDMS should make use of consistent coding of Federal Register documents, both across different rulemakings in the same agency as well as across different agencies.
DATA FIELDS FOR THE ONLINE DOCKET SYSTEM

Realizing the docket system’s potential for improving scholarly and public understanding of the rulemaking process rests both upon the data within each individual docket and the ability to search and organize that data. We turn next to issues related to developing a complete set of the data fields for each docket. In Part III, we address issues about searching and downloading.

Including complete and appropriate data will not only facilitate scholarly research, but will also be useful to the broader public. The more complete the information in electronic dockets, the greater the likely contribution electronic dockets will make to the quality of public discourse on regulatory issues. Electronic dockets can help inform members of the public about proposed regulations and their impacts, but their impact will depend on having information in these dockets that is useful, complete, consistent, and easy to find.

TABLE 1
CURRENTLY SUBMITTED DATA FIELDS FOR RULEMAKING PROCEEDINGS

<table>
<thead>
<tr>
<th>Data Submitted to the Office of the Federal Register</th>
<th>Data Submitted to the Regulatory Information Service Center</th>
<th>Data Submitted to the Office of Management and Budget</th>
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<tbody>
<tr>
<td>• Name of Rule</td>
<td>• Name of Rule</td>
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<tr>
<td>• Agency</td>
<td>• Agency</td>
<td>• Agency</td>
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<tr>
<td>• Department (if any)</td>
<td>• Priority</td>
<td>• Legal Deadline</td>
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<td>• CFR Volume</td>
<td>• Legal Authority</td>
<td>• Is Deadline Statutory or Judicial?</td>
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<tr>
<td>• Date</td>
<td>• CFR Citation</td>
<td>• Stage of Development</td>
</tr>
<tr>
<td>• Date of NPRM (for final rules)</td>
<td>• Legal Deadline</td>
<td>• Is rule economically significant under E.O. 12866?</td>
</tr>
<tr>
<td>• Effective Date (for final rules)</td>
<td>• Regulatory Flexibility Analysis Required?</td>
<td>• Is rule an Unfunded Mandate under 2 U.S.C. 1532?</td>
</tr>
<tr>
<td>• Whether it is a direct or interim final rule</td>
<td>• Small Entities Affected?</td>
<td>• Agency Contact</td>
</tr>
<tr>
<td>• End of comment period (for NPRMs)</td>
<td>• Government Levels Affected?</td>
<td>• RIN</td>
</tr>
<tr>
<td>• RIN</td>
<td>• Agency Contact</td>
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The starting point for data to include in each regulatory docket should be those data that are already reported by agencies in the rulemaking process. This includes data that agencies submit to (1) the Office of the Federal Register for notices of proposed and final rulemakings, (2) the Regulatory Information Service Center for use in the Unified Agenda, and (3) the Office of Management and Budget for all significant proposed rules. (Table 1 lists the data included in each of these three categories.) It also
includes information OMB already makes available in association with its review of each proposed rule. Maintaining these existing data within the new online docket system will not only serve the principle of consistency, but could also facilitate future development of agency reporting practices that avoid the duplication Table 1 shows exists in the current system.

**Recommendation:** The FDMS should contain all the unique data that currently exist in the reports each agency already routinely submits to the Office of the Federal Register, the Regulatory Information Service Center, and the Office of Management and Budget.

The data listed in Table 1 represent the minimum data reported by each agency for every rule (or in the case of the data submitted to OMB, for every "significant" rule). Many agencies provide the public with still more information through their existing, agency-specific dockets. Table 2 gives examples of such data for the Department of Transportation (DOT) and the Environmental Protection Agency (EPA). The movement to a uniform, government-wide docketing system should not result in the loss of any information currently being made available by individual agencies, so at a minimum the new government-wide docket system should include the data fields shown in Table 2. Most of the relevant data are relatively simple to gather and can be of great use both to the general public and to scholars who study rulemaking.
<table>
<thead>
<tr>
<th>Department of Transportation</th>
<th>Environmental Protection Agency</th>
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<tr>
<td><strong>Data for Docket as a Whole</strong></td>
<td><strong>Data Specific to Each Docket Document</strong></td>
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<tr>
<td>• Category (e.g. Rulemaking)</td>
<td>• Data Entry Date</td>
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<tr>
<td>• Docket Status</td>
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<td>• Subcategory (e.g. Airworthiness Directive)</td>
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</tr>
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<td>• CFR Citation</td>
<td>• Submissions</td>
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<td>• Abstract</td>
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**Environmental Protection Agency**

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<th><strong>Data Specific to Each Docket Document</strong></th>
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<td>• Effective Date</td>
</tr>
<tr>
<td>• Comment Period Ends</td>
<td>• Page Count</td>
</tr>
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</table>

* With links to Related Dockets, Contacts, Organizations, CFR citations, Acts, Chemicals, Goals, Documents and all of the above.

* Restricted Viewing
Recommendation: If it has not already done so, the eRulemaking Initiative should ask participating agencies to submit a list of data fields currently contained in their agency-specific dockets, or otherwise conduct a survey of the data fields in existing agency dockets.

Recommendation: Moving to the new FDMS should result in no loss of information to the public. The new system should require agencies to submit information for all the data fields that are already found in regulatory agencies’ existing dockets.

In addition to the data already contained in existing regulatory filings and agency dockets, we believe there are several new data elements that would be easily added to the new online docket system and should be made available to the user for every docket. These additional data elements include:

- The number of documents in the docket.
- The number of Federal Register documents in the docket.
- The number of public comments in the docket.
- The number of agency documents in the docket.
- The file size of the docket as a whole.
- A sortable (by author, title, and date) table of contents linking to individual documents and indicating their file size.

We anticipate that these additional elements, which could be added using automated functions, will help greatly in the organization and usefulness of the online docket system.

Recommendation: Each docket in the FDMS should contain basic summary data, such as the number of documents or comments filed, that could easily be added to the new online docket system in an early stage of its development.

Finally, to enhance researchers’ ability to study the regulatory process and the public’s ability to understand it, we believe that additional fields of data eventually should be added to the FDMS that are not currently reported by agencies in their docket systems. Although developing protocols for inclusion of some of these data will involve a longer-term effort, we hope that the work of the eRulemaking Initiative will establish a process for the future enhancement of the online docket system that can include consideration of additional data fields. Table 3, while neither definitive nor complete, simply illustrates some of the possible types of information that could be added to the online docket system in the future.
TABLE 3
DATA FIELDS TO CONSIDER ADDING TO THE DOCKET SYSTEM OVER THE LONGER TERM

- All associated *Federal Register* notices (from earlier, related rulemakings through to ANPRMs)
- Pre- and Post-NPRM consultations with outside groups such as advisory committees or stakeholder meetings
- Whether Negotiated Rulemaking was used
- Associated information collections under Paperwork Reduction Act and their burden hours
- Word count of Regulatory text
- Word count of Preamble
- Length of time for OIRA review (for significant rules)
- Whether OIRA recommended changes to the rule
- Summary of economic data on the rule, such as:
  - Total Benefits (a range if appropriate)
  - Total Costs (a range if appropriate)
  - Timing of benefits and costs
  - Discount Rate Used
  - Value of statistical life or life-year used (if appropriate)

Recommendation: Although the new online docket system should be designed at the outset to include all the data fields contained in existing docket systems, the system must have the capacity to evolve and have new data fields added that will improve both researchers' and the public's ability to understand agency rulemaking. The eRulemaking Initiative should avoid setting unnecessarily modest longer-term goals.

We recognize that including all of the fields we have suggested will not be a simple task. Thus, the first step should be to incorporate data already reported by agencies. The movement to a government-wide online docketing system, however, presents a significant opportunity for enhancing the current system of rulemaking reporting. Serious consideration needs to be given to the precise data fields to include in the FDMS.

SEARCH AND DOWNLOAD CAPABILITIES

For researchers, one of the most exciting aspects of the pending government-wide docket management system is its potential to transform the scope and method of the study of rulemaking. By making it possible
for researchers to access and retrieve large numbers of agency records electronically, the system promises to bring us to the cusp of a new era in understanding both the management of rulemaking and the public's participation in this important mode of policymaking. These prospective benefits, however, will only be fully realized if the system is designed to facilitate particular kinds of searches and downloads.

Historically, research on rulemaking has usually been oriented around the study of a single rule or a small number of rules. Such intensive case study approaches are certainly of great value, and this kind of research is likely to (and should) continue to be done in the years ahead. Another important approach to research, however, has been for the most part been infeasible in the era of paper dockets, namely studies that include a large number of rulemakings. Such "large-N" studies can significantly add to our knowledge of rulemaking by helping illuminate general patterns in rulemaking, thus complementing the detailed information provided by case studies.

How specifically can the docket management system open the door up to large-N research and all of the benefits that come from this mode of inquiry? Right now, information about a large number of rulemakings can only be assembled by visiting a wide variety of online sources or the physical docket rooms in Washington, D.C. that remain to this day the sole depository of documents for many rulemakings. The FDMS will make a major step forward by serving as a central clearinghouse for locating and piecing together the official written records of rulemakings conducted by agencies from across the federal government.

The advantages of the government-wide online docket system for scholarly research will be still further strengthened if two elements are built into it. First, the new docket system should allow users to search for dockets or documents with user-defined search terms of any data field or combination of fields. Second, the new docket system should allow users to download a large number of documents obtained through their searches.

The first element is the capacity to search for rulemakings according to particularly broad search criteria. For many users of the system, several relatively narrow search criteria are likely to suffice. These criteria might include docket numbers, keywords, and Federal Register citations. For researchers interested in breaking new ground in the study of rulemaking, the assembly of information for large samples of rulemakings necessitates searches that cast wide nets across time and jurisdiction or issue space. For example, a researcher might seek to identify the dockets that go along with all of the rulemakings that were completed by the Environmental Protection Agency over the past five years. Another researcher might want to track down the dockets for all of the rulemakings that were open for
public comment during the first six months of 2004. The general point is that the system would best facilitate research on rulemaking if a broad range of search criteria such as the following were present:

- Search by specific date or date range;
- Search by agency;
- Search by specific editions of the Unified Agenda;
- Search by stage in the rulemaking process;
- Search by a combination of these criteria.

_Recommendation:_ Flexibility should be the guiding principle when it comes to searching capabilities. The FDMS should permit users to generate their own searches of any data field or combination of fields.

In addition to accepting user-defined searches, the new docket system also must enable users to transfer information off the system to the researchers themselves. This transferred information can then be formatted and organized in ways that are directly amenable to data analysis and interpretation. Thus, a second key element of the system is the capacity to download large numbers of documents and even entire dockets in a transparent and useful way. Since all of the data in the FDMS will already be available to the public and are subject to FOIA, building a flexible download capability is consistent with current E-FOIA requirements and should actually save agencies the burden of having to respond to FOIA requests.

_Recommendation:_ The FDMS should enable the user to download any and all data or documents retrieved through the system's search engine.

The needs of the research community, as one of a variety of communities with a stake in the development of the government-wide online docket system, are likely to dovetail in important ways with the eRulemaking Initiative's goal of making the regulatory process more transparent. For the research community, the FDMS promises not only to make existing modes of research far more efficient, but also to make possible underutilized modes of inquiry that can enhance our understanding of the management of and public involvement in the rulemaking process. This possibility, however, can only be fully achieved if the FDMS is designed to facilitate searches and downloads that are broadly defined across time and space, rather than limited to a handful of very specific criteria and pieces of information.
CONCLUSION

The creation of an online docket system has important implications both for academic researchers and anyone interested in better understanding government regulation. The principles we have enunciated will not require any dramatic changes to the regulatory process, nor even much additional commitment of resources. But we believe following these recommendations will help significantly advance the Administration's laudable goal of making it easier for the public to understand and participate in the rulemaking process.