

# RECENT DEVELOPMENTS

## LEGAL ISSUES IN E-RULEMAKING

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Since the enactment of the Administrative Procedure Act (APA) in 1946, the technological landscape has changed dramatically while the basic framework for notice-and-comment rulemaking has largely gone unchanged. Federal regulators, looking to embrace the benefits of electronic rulemaking, face considerable ambiguity about how established, procedural legal requirements apply to the web.<sup>1</sup> For example, does the APA permit agencies to require comments to be submitted online? Are agencies required to screen the content of public comments before they are placed on Regulations.gov? Are electronic dockets a legally sufficient means of preserving the rulemaking record? Many of these issues and others have been swirling around electronic rulemaking (e-Rulemaking) since its inception, and exist whether rulemaking is accomplished entirely on paper or using more electronic means.<sup>2</sup> This Article focuses on the legal

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1. Others have taken stock of these legal issues. *See generally* Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1471–78 (2002) (anticipating the rise of Internet technology in rulemaking during the Bush Administration); Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 480 (2008) (noting the docketing, copyright, and spam issues that accompany e-Rulemaking); Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda* (Regulatory Policy Program, John F. Kennedy Sch. of Gov't, Working Paper RPP-2002-04, 2002), available at <http://www.hks.harvard.edu/m-rcbg/research/rpp/RPP-2002-04.pdf> (highlighting issues to be resolved with e-Rulemaking and urging further research); HENRY H. PERRITT, JR., ELECTRONIC DOCKETS: USE OF INFORMATION TECHNOLOGY IN RULEMAKING AND ADJUDICATION: REPORT TO THE ADMIN. CONFERENCE OF THE UNITED STATES (1995) [hereinafter PERRITT REPORT], available at [http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic\\_dockets.htm](http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm) (discussing hurdles faced by the Department of Transportation and Nuclear Regulatory Commission during their initiatives to automate agency proceedings); Neil Eisner, Ass't Gen. Counsel, U.S. Dep't of Transp., Presentation at the Joint ACUS–Brookings Forum, E-Rulemaking: Digital Dilemmas (Nov. 30, 2010), available at [http://www.brookings.edu/~media/Files/events/2010/1130\\_electronic\\_rulemaking/1130\\_electronic\\_rulemaking\\_eisner.pdf](http://www.brookings.edu/~media/Files/events/2010/1130_electronic_rulemaking/1130_electronic_rulemaking_eisner.pdf) (discussing legal questions e-Rulemaking raises pertaining to copyright, obscenities, and the legal record, among other issues).

2. This Article follows up on previous ACUS research. On October 19, 1995, a mere twelve days before ACUS closed its doors on October 31, 1995, Professor Henry H. Perritt, Jr. delivered a report titled *Electronic Dockets: Use of Information Technology in Rulemaking and*

issues that present themselves entirely, or more prominently, when agencies engage in e-Rulemaking.

Following a short background section on e-Rulemaking, Part I explains why updating the APA to address e-Rulemaking is unnecessary. Part II explores whether and how agencies should screen public comments before sharing them online and suggests a fundamental change to the way comments are posted on the biggest online rulemaking website, Regulations.gov. Part III analyzes the legal issues associated with using an electronic docket to compile the rulemaking record, finding that well-designed electronic dockets pose no significant legal risks but that the courts could probably do more to embrace electronic filing. Part IV shows that the most basic of federal requirements, the recordkeeping requirements of the Federal Records Act, apply to e-Rulemaking and suggests ways to ensure compliance. The Article concludes with a recap of the Article's recommendations.

#### BACKGROUND

E-Rulemaking has been described as “the use of digital technologies in the development and implementation of regulations.”<sup>3</sup> While there are many ideas about how agencies might use technology to enforce or otherwise implement their rules, for the purposes of this Article, e-Rulemaking is defined as using web technologies before or during the APA's informal rulemaking process, i.e., notice-and-comment rulemaking under 5 U.S.C. § 553. This includes many types of activities, such as: posting notices of proposed and final rulemakings; sharing supporting materials; accepting public comments; managing the rulemaking record in electronic dockets; and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.<sup>4</sup>

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*Adjudication.* Professor Perritt's report focused on the efforts of two federal agencies, the Department of Transportation and the Nuclear Regulatory Commission, to use information technology to automate certain agency proceedings. Although it was not published, the Perritt Report continues to be a helpful resource on the legal issues and policy choices facing increased use of information technology (IT) in administrative proceedings. See PERRITT REPORT, *supra* note 1.

3. Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 355 (2004).

4. For a detailed discussion on the timeline and development of e-Rulemaking, see Coglianese, *supra* note 3, at 363–66. See also Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 399–403 (2011); COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, A.B.A. SECTION OF ADMIN. LAW & REGULATORY PRACTICE, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* 21–32 (2008), available at <http://ceri.law.cornell.edu/documents/report-web-version.pdf>.

A system that brings several of these activities together is operated by the eRulemaking Program Management Office (eRulemaking PMO or PMO), which is housed at the Environmental Protection Agency (EPA) and funded by contributions from partner federal agencies. This program contains two components: Regulations.gov, which is a public website where members of the public can view and comment on regulatory proposals, and the Federal Docket Management System (FDMS), which is a restricted-access website that agency staff can use to manage their internal files and the content on Regulations.gov. According to the Office of Management and Budget (OMB), FDMS provides “better internal docket management functionality and the ability to publicly post all relevant documents on [R]egulations.gov (e.g., Federal Register documents, proposed rules, notices, supporting analyses, and public comments).”<sup>5</sup> A recent report estimated the federal government’s cost savings at \$30 million over five years when compared to paper-based docketing.<sup>6</sup> Additionally, electronic docketing enables the agencies to make proposed and final regulations, supplemental materials, and public comments widely available to the public. These incentives and the statutory prompt of the E-Government Act of 2002, which required agencies to post rules online, accept electronic comments on rules, and keep electronic rulemaking dockets,<sup>7</sup> have helped ensure that over 90% of agencies post regulatory material on Regulations.gov.<sup>8</sup>

The Obama Administration recently placed its imprimatur on Regulations.gov in Executive Order 13,563, which directs agencies to provide, *inter alia*, “timely online access to the rulemaking docket on [R]egulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded.”<sup>9</sup> As more

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5. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, REPORT TO CONGRESS ON THE BENEFITS OF THE E-GOVERNMENT INITIATIVES 10 (2010), [http://www.whitehouse.gov/sites/default/files/omb/assets/egov\\_docs/FY10\\_E-Gov\\_Benefits\\_Report.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/FY10_E-Gov_Benefits_Report.pdf).

6. *Id.*

7. E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915–16 (codified in scattered sections of 44 U.S.C. (2006)).

8. eRULEMAKING PROGRAM MGMT. OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES at D-1 (2010), [http://www.regulations.gov/exchange/sites/default/files/doc\\_files/20101130\\_eRule\\_Best\\_Practices\\_Document\\_rev.pdf](http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf). Some agencies rely on their own electronic docketing systems, such as the Federal Trade Commission (which uses a system called CommentWorks) and the Federal Communications Commission (FCC), which has its own electronic comment filing system. See Fed. Commc'ns Comm'n, *Welcome to the New Electronic Comment Filing System*, FCC.GOV, <http://fjallfoss.fcc.gov/ecfs/> (last visited Nov. 2, 2011).

9. Exec. Order No. 13,563 § 2(b), 76 Fed. Reg. 3821, 3821–22 (Jan. 21, 2011).

agencies explore e-Rulemaking as a way to promote openness in government, its benefits and its challenges are becoming more apparent.<sup>10</sup> The time may be right to evaluate the legal frameworks that surround rulemaking. The most central of these is the APA.

### I. DO WE NEED AN APA 2.0?

Given that the APA was enacted in 1946, well ahead of the Internet, one could question whether the statute needs to be amended to account for and support the rise of e-Rulemaking. In 1995, toward the beginning of the federal government's efforts to explore ways to use the Internet in rulemaking, Professor Henry H. Perritt, Jr. explored this issue in a report (the Perritt Report) to the Administrative Conference of the United States (ACUS) and concluded that the APA provided no legal barriers to what is now known as e-Rulemaking.<sup>11</sup> Since then, many federal agencies have adopted at least some form of e-Rulemaking.

The apparent compatibility between e-Rulemaking and the APA may result from the APA's design as a flexible, procedural statute. The statute provides agencies with flexibility to use different procedural devices so long as they meet the basic statutory requirements.<sup>12</sup> For example, the APA requires an agency to provide notice on proposed rules in the *Federal Register* but does not prevent it from doing more. Agencies have developed other devices, not described in the APA, to engage the public ahead of a proposed rule. Agencies sometimes use an advance notice of proposed rulemaking (ANPRM) to gather early feedback on regulatory issues.<sup>13</sup> The APA contains no reference to ANPRMs or other "pre-rule" efforts such as

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10. See, e.g., Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About e-Rulemaking*, 62 ADMIN. L. REV. 451, 474 (2010) ("[W]hile rulemakers are quite impressed with the internal administrative and coordination benefits provided by the new technology, they also have heightened concerns about hacking and the potential problems of inappropriate worldwide exposure of certain information in their electronic dockets.").

11. Perritt found that "there is no reason that electronic formats may not be used for all aspects of an informal rulemaking proceeding, as long as an appropriate [notice of proposed rulemaking (NPRM)] is published in the Federal Register." PERRITT REPORT, *supra* note 1, at VIII.A. The Perritt Report also notes that the *Federal Register* was only available in paper format. *Id.* While the paper copy is still the official record, the *Federal Register* is now available online, going back to 1994.

12. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996) (explaining that the Administrative Procedure Act (APA) "has provided agencies with broad freedom"). See generally Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389 (1996) (highlighting that the essence of the Administrative Procedure Act over the years has been its flexibility).

13. E.g., OSHA Combustible Dust, 74 Fed. Reg. 54,334 (proposed Oct. 21, 2009) (to be codified at 29 C.F.R. pt. 1910) (publicizing an advance notice of proposed rulemaking).

Requests for Information (RFIs),<sup>14</sup> but that has not precluded the practice. Similarly, agencies seeking to conduct other pre-rule activities online, such as encouraging the public to participate in an online forum to discuss ideas for regulatory reform, can do so without concern of violating the APA. Of course, in both the online and offline contexts, the APA requires agencies to conduct notice-and-comment rulemaking if the agency intends to revise or promulgate new regulations.

Still, some have questioned whether the federal government's current approach to APA rulemaking in general, and e-Rulemaking in particular, does enough to engage the public.<sup>15</sup> This includes a concern that e-Rulemaking merely moves the APA's existing notice-and-comment procedure online, rather than using technology in a more transformational manner, thus failing to "exploit opportunities to enhance on-line deliberation and more robust forms of interpersonal communication" in rulemaking.<sup>16</sup> This is not a critique of the APA's notice-and-comment framework, but rather a critique of how the government uses technology to operate within that framework. Expanding on this concept, one scholar recently called on the federal government to use social media to seek public feedback before rules are drafted and solicit evidence-backed proposals from the public on problems the government plans to address.<sup>17</sup> Both of these ideas are pre-rule activities that do not implicate the APA.

In keeping with scholarly critiques of e-Rulemaking, which have not sought amendments to the APA, this Article concludes that at this point the APA does not need to be amended to support e-Rulemaking. Some scholars have called for innovative approaches to supplement the APA's notice-and-comment requirements with more meaningful engagement, such as consulting members of the public who might not otherwise take an

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14. *E.g.*, HIPAA Privacy Rule Accounting of Disclosures Under the Health Information Technology for Economic and Clinical Health Act; Request for Information, 75 Fed. Reg. 23,214 (May 3, 2010).

15. *See generally* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (analyzing aspects of the notice-and-comment process in recent regulatory proceedings to explore whether exiting methods for obtaining public input on regulations work); Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 I/S J.L. & POL'Y FOR INFO. SOC'Y 1 (2005) (suggesting that electronic rulemaking should focus on developing software to enable participation from the public to its fullest extent).

16. Noveck, *supra* note 15, at 8; *see also* Coglianesi, *supra* note 3, at 385 ("[E]-rulemaking has the potential to go well beyond just digitizing the current process.").

17. Beth S. Noveck, *Turning Rule Writers Into Problem Solvers: Creating a 21st Century Government That's Open and Competent by Improving Regulation and Regulatory Review*, CAIRNS BLOG (Jan. 26, 2011, 8:31 AM), <http://cairns.typepad.com/blog/2011/01/turning-rule-writers-into-problem-solvers-creating-a-21st-century-government-thats-open-and-competen.html>.

interest in the regulation<sup>18</sup> or using social media to improve pre-rule consultation.<sup>19</sup> These suggestions are consistent with the notion that the APA contains adequate flexibility for agencies to explore alternative ways to engage the public—online and offline.

Moving on from this general concern, this Article turns to two other APA-related inquiries. First, the following section will explore whether an increased number of organized mail campaigns present challenges for agency “consideration” of public comments as required by the APA. Second, this Article will address whether the APA permits agencies to require the public to comment electronically.

#### A. Ensuring “Consideration” of Organized Mail Campaigns

If e-Rulemaking tends to increase the number of comments received by agencies, how can agencies ensure consideration of material received as required by the APA? A threshold issue is whether e-Rulemaking increases the number of comments. One scholar explored e-Rulemaking by the Federal Communications Commission (FCC) between 1999 and 2004, finding that, in general, e-Rulemaking merely shifted commenters from paper to online means.<sup>20</sup> That is, with a few exceptions, the increase of electronic comments was offset by the decrease in paper comments.<sup>21</sup> The study uncovered notable exceptions when the number of electronic comments “spiked.” One of these events was during the FCC’s revision of the media ownership rules.<sup>22</sup> The study found despite the “complex” subject matter of the rulemaking, it drew tens of thousands of public comments, many of which were “largely identical texts” and “mass electronic mailings.”<sup>23</sup>

While there is no comprehensive study of how online commenting behavior differs from its offline counterpart, the results of the study on the

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18. Cuéllar, *supra* note 15, at 493–95. This proposal includes an acknowledgement that the benefits of a redesigned process that engages the public more fully must be weighed against its costs, which might include increased staff and other resources. *See id.* at 492 n.245.

19. *See* Noveck, *supra* note 17.

20. John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 986–87 (2006).

21. *Id.*

22. Press Release, Fed’l Commc’ns Comm’n, FCC’s Media Bureau Adopts Procedures for Public Access to Data Underlying Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review of Commission’s Media Ownership Rules (Nov. 5, 2002), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-02-2980A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2980A1.pdf).

23. de Figueiredo, *supra* note 20, at 988. The comments so overwhelmed the FCC’s system that staff contacted one “mass marketer” to slow down the submissions. *Id.* at 989.

FCC suggest that, at least for some subset of rules, e-Rulemaking increases the number of comments received due to organized mail campaigns or to the increased ease of commenting in general.

This conclusion is consistent with anecdotal evidence of other sporadic increases in comments received through online advocacy campaigns, which have sometimes generated the submission of hundreds of thousands of comments.<sup>24</sup> One scholar has described this phenomenon as “notice and spam.”<sup>25</sup> As currently designed, e-Rulemaking reduces the costs of viewing proposals and submitting comments, especially when the proposals and calls for comments are aggregated on a government-wide website such as Regulations.gov.<sup>26</sup> The risk of this approach to e-Rulemaking is that “quality input will be lost; malicious, irrelevant material will rise to the surface, and information will not reach those who need it. In short, e-rulemaking will frustrate the goals of citizen participation.”<sup>27</sup> Those concerned with the strain on agency resources caused by large spikes in comments echo this sentiment.<sup>28</sup>

Of course, organized mail campaigns are not unique to e-Rulemaking; letter-writing campaigns have long been used to convey views to regulators.<sup>29</sup> The legal question for e-Rulemaking is the extent to which agencies must consider duplicative comments received online. The Supreme Court explained that not all comments must be scrutinized in

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24. Dr. Stuart Shulman has written most extensively on this topic. *E.g.*, Stuart W. Shulman, *Perverse Incentives: The Case Against Mass Email Campaigns* (U. Pitt. Ctr. for Soc. & Urban Research, Working Paper, 2007), available at <http://shulman.ucsur.pitt.edu/Doc/Papers/APSA07-Perverse.pdf>; Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T 41, 44–47 (2006) [hereinafter Shulman, *Whither Deliberation*]; Stuart W. Shulman, *The Internet Still Might (But Probably Won't) Change Everything*, 1 I/S.J.L. & POL'Y FOR INFO. SOC'Y 111, 115 (2005) [hereinafter Shulman, *The Internet*].

25. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 441 (2004).

26. *See id.* at 441–42; *see also* de Figueiredo, *supra* note 20, at 992 (“[T]here are initial indications that electronic filings and e-mail may make it cheaper for parties to express preferences.”); Lubbers, *supra* note 10, at 455 (“Blizzards of comments have become increasingly common in controversial rulemakings, and e-rulemaking can only further this trend.”).

27. Noveck, *supra* note 25, at 442. Professor Cuéllar has suggested that several factors, such as the topic of the regulation, the level of media interest, and the dynamics of the relevant interest groups, can influence the likelihood of an organized mail campaign on a particular proposed rule. Cuéllar, *supra* note 15, at 470.

28. *See, e.g.*, Farina et al., *supra* note 4, at 408.

29. Letter-writing campaigns are sometimes directed at members of Congress, too. *See* Reggie Beehner, *Does Congress Read its E-mail?*, PCWORLD (Apr. 30, 2001, 4:00 PM), [http://www.pcworld.com/article/48788/does\\_congress\\_read\\_its\\_email.html](http://www.pcworld.com/article/48788/does_congress_read_its_email.html).

exhaustive detail: “[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of . . . consideration becomes of concern.”<sup>30</sup> It is reasonable to argue that duplicative comments, perhaps except for some acknowledgment of the number of them, do not cross the materiality threshold.<sup>31</sup> The APA’s provisions on formal hearings, which note, “Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or *unduly repetitious* evidence,”<sup>32</sup> provide some support for this. Although this provision technically applies only to formal adjudication and the rarely used formal rulemaking, it suggests that the APA does not require slavish consideration of repetitive submissions.

An overly cautious approach to APA requirements in mass comment scenarios forces agencies to sink considerable staff resources into reading or at least skimming comments that are word-for-word identical. For example, if an agency takes this approach with a docket that contains 250,000 comments from an organized mail campaign, even if it takes less than ten seconds to identify and skim each comment, that effort still accounts for almost 700 staff hours or \$21,000.<sup>33</sup> This excludes any time needed to summarize the comments for use internally or for the preamble of the final rule. The voluminous influx of comments can drive some agencies to turn to contractors, either to help organize and save public comments in the docket, or to actually review and summarize those comments.<sup>34</sup>

The APA, however, does not require such an exhaustive approach to identical or nearly identical comments. It permits agencies to leverage technology to bolster consideration by sorting through comments once they

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30. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978) (alteration in original) (quoting *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973)); *see also* *North Carolina v. FAA*, 957 F.2d 1125, 1135 (4th Cir. 1992) (“An agency establishing a rule need not respond to every comment. It must, however, reasonably respond to those comments that raise significant problems.”).

31. This does not imply that rulemaking is a plebiscite. That point is settled. *See, e.g.*, Farina et al., *supra* note 4, at 430 (citing Stuart Shulman’s work on this topic). Some have characterized duplicative comments as “the poster child for public participation that completely misses the point of the process.” *Id.* at 417. This Article does not opine on the value of these comments; it just explores whether they trigger any legal issues. For an interesting discussion of the weight that agencies could assign to this type of public comments, *see* generally Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

32. 5 U.S.C. § 556(d) (2006) (emphasis added).

33. This estimate assumes staff members are paid at the level of GS-11, Step 1 in Washington, D.C. U.S. OFFICE OF PERS. MGMT., SALARY TABLE 2011-DCB (2011), [http://www.opm.gov/oca/11tables/html/dcb\\_h.asp](http://www.opm.gov/oca/11tables/html/dcb_h.asp).

34. *See* Noveck, *supra* note 25, at 442–43.

have been loaded into the electronic docket. Software that uses natural language processing is one promising technology,<sup>35</sup> because it could help staff identify duplicate comments, providing confidence that all unique comments and personalized portions of partially duplicative comments are considered efficiently.<sup>36</sup> This time-saving approach does not diminish agency consideration because it would still give agencies access to the number and content of all comments received.

Agencies should cooperate with each other and the eRulemaking PMO to explore whether the use of these tools makes sense for them. While some agencies are already using or exploring software to perform more efficient review of public comments, for others such software is unavailable, either because of budget or procurement constraints, or because agency staff are unaware of or uncertain about the value of using software in this manner. This Article recommends that agencies assess how much staff time and other resources are devoted to organizing and considering duplicative comments. If the amount is high, this Article recommends evaluating

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35. A description of how this would work:

Text analysis software can identify letters that are exact duplicates (e.g., form letters from a letter-writing campaign) and near-duplicates (e.g., “form+” letters that have been modified to represent their opinions better or append extra information). Simple phrase recognition techniques can identify concepts that people mention frequently, which can serve as a starting point for “drill down” activities that examine comments addressing particular topics or points of view. People often identify their roles with respect to a particular regulation—for example, “As a mother, I believe . . .,” or “I have been a truck driver for 25 years and . . .” Relatively simple techniques can be used to find and organize such references, enabling policy makers, rule writers, and other interested parties to understand better who commented on a particular aspect of the rule.

These and a wide variety of similar techniques are possible in the near future. Today regulatory agencies are struggling with basic ICT [information and communications technologies] issues related to capturing public comments electronically. Soon these will be mastered, and attention will turn to better use of language analysis and text mining software. At present there is an opportunity to provide better tools for rapidly analyzing large public comment databases, and, consequently, for increasing transparency and efficacy in the comment submission and analysis process.

Shulman, *The Internet*, *supra* note 24, at 116–17 (further noting, “Although computers cannot understand human language the way people do, they can still be useful in helping people make sense of large public comment databases”); *see also* Farina et al., *supra* note 4, at 435, 445 (discussing natural language software and “algorithms that aggregate, categorize or summarize comment text”); Noveck, *supra* note 17 (arguing that the White House should employ a software platform that provides templates by which agencies can organize and respond to public comments).

36. *See* Cuéllar, *supra* note 15, at 487 (noting that “some senders edit the underlying language and others leave it in place”).

whether software could help. Additionally, interagency discussion might help raise awareness and encourage agency staff to explore whether these technologies are worth pursuing. Such interagency discussion should include the staff of the eRulemaking PMO, who are already exploring whether natural language comment analysis tools could be incorporated into FDMS.<sup>37</sup> Steps in this direction would alleviate the need for agencies to evaluate and purchase these tools separately, while learning from agencies that have already used these tools.

*B. An Electronic Comment Requirement?*

Whether the APA permits agencies to require comments to be submitted electronically is less clear, but there are policy reasons why the time may not be right for such an approach. Although the APA does not explicitly address this issue, it does require agencies to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”<sup>38</sup> One could argue that this language prohibits agencies from restricting the methods by which interested persons are given the opportunity to participate. The problem with this argument is that agencies already do restrict the ways in which members of the public can file comments. At present, agencies typically offer many ways to submit comments—by mail, courier, fax, e-mail, or Regulations.gov, for example. If, however, a member of the public wanted to file a comment by leaving a voicemail, this would generally not be accepted into the docket without prior agreement from the agency to provide a voicemail transcription service. This may be because agencies have determined that the cost of operating such a system for each proposed rule is prohibitive, despite the fact that this decision may preclude some individuals from participating in rulemaking in the manner they prefer. To argue, however, that the APA requires agencies to offer a voicemail transcription service, translation of comments in foreign languages, or other accommodations suggests that by requiring agencies to provide “an” opportunity, the APA requires that agencies provide “every” opportunity without consideration of costs. In balancing efficiency against the goal of public participation, it appears that agencies are already operating under the perception that it is lawful to place some limits on commenting practice for the sake of efficiency or cost reduction, so long as those limits do not foreclose the public’s opportunity

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37. See ERULEMAKING PROGRAM MGMT. OFFICE, *supra* note 8, at 22–23 (identifying uses for an improved rulemaking docket, such as categorizing, analyzing, and summarizing public comments).

38. 5 U.S.C. § 553(c) (2006).

to participate.<sup>39</sup>

Whether agencies could require electronic submission of comments without statutory amendment to the APA may depend on the availability of the Internet<sup>40</sup> and an understanding of how it is used. If almost all members of the public have access to the Internet, even if that access is not at home, it is at least conceivable that concerns about foreclosing the public's opportunity to participate are outweighed by the efficiency gains of electronic commenting.<sup>41</sup>

To be clear, this Article does not advocate that agencies require electronic submission of comments in the near future. There may be good policy reasons why it is not the best practice in 2011. For example, studies that have explored the extent to which different groups have access to the Internet have found that certain segments of the population lag behind others.<sup>42</sup> Instead, this Article more modestly suggests that the APA does not, in and of itself, preclude an electronic commenting requirement as long as the agency can demonstrate that it has provided the public with an opportunity to participate in its rulemakings.

In summary, while some might welcome the opportunity to update the

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39. Henry H. Perritt, Jr., *The Electronic Agency and the Traditional Paradigms of Administrative Law*, 44 ADMIN. L. REV. 79, 88–89 (1992).

40. Estimates from the U.S. Census Bureau's Current Population Survey show that Internet access at home is on the rise, with the 2009 figure at 68.7%. U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES: OCTOBER 2009 (2010), <http://www.census.gov/hhes/computer/publications/2009.html>. However, this estimate does not give the complete picture of Americans' Internet access because it does not include Internet access from work, public libraries, schools, or other locations. As a result, these are underestimates of overall Internet access. Based on updated statistics from the U.S. Department of Commerce, one could argue that availability of Internet access in the United States is rising. *See generally* NAT'L TELECOMM'NS & INFO. ADMIN., U.S. DEP'T OF COMMERCE, DIGITAL NATION: 21ST CENTURY AMERICA'S PROGRESS TOWARD UNIVERSAL BROADBAND INTERNET ACCESS (2010), [http://www.ntia.doc.gov/reports/2010/NTIA\\_internet\\_use\\_report\\_Feb2010.pdf](http://www.ntia.doc.gov/reports/2010/NTIA_internet_use_report_Feb2010.pdf) (noting increased Internet availability, but that not all homes actually utilize this availability).

41. Any analysis should include a consideration of costs to process comments. While the expense of processing paper comments does not entirely disappear when comments are sent electronically, it is reduced. *See infra* Part II.A.

42. *See, e.g.*, SUSANNAH FOX, PEW RESEARCH CTR., AMERICANS LIVING WITH DISABILITY AND THEIR TECHNOLOGY PROFILE 3 (2011), [http://www.pewinternet.org/~media/Files/Reports/2011/PIP\\_Disability.pdf](http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Disability.pdf) (recognizing that only 54% of its survey respondents living with disabilities use the Internet as compared to 81% of adults not living with disabilities, and those who do use the Internet are less likely to have high-speed or wireless access). A recent report from the FCC found that 22% of survey respondents did not use the Internet, for reasons including cost and lack of interest. John B. Horrigan, *Broadband Adoption and Use in America* 24–25, 27 (Fed. Commc'ns Comm'n OBI Working Paper Series No. 1, 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296442A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf).

APA for other reasons, it does not appear that explicit inclusion of e-Rulemaking is a necessary statutory amendment. In fact, revised statutory language specifically requiring the use of certain technologies to engage the public would build rigidity into what is now a very flexible set of procedures. Regarding how to ensure consideration of organized mail campaigns, this Article encourages agencies to explore the use of software to assist staff review. If now or in the future agencies seek to require electronic commenting, a statutory change could clear up any ambiguity around whether the move would impermissibly narrow the public's opportunity to comment. But it is probably not necessary. It is also important to note that there may continue to be sound policy reasons not to require electronic comments. Overall, this Article finds that the APA, despite having been drafted well before the Internet was a communications channel between the public and government agencies, does not impede agencies from using e-Rulemaking techniques.

## II. PROCESSING PUBLIC COMMENTS

As agencies are directed to place their regulatory dockets online,<sup>43</sup> they face questions about whether and how to screen the content of public comments placed on Regulations.gov and other websites. First, this section will explore why agencies might screen comments in the first place. It will then explore what kind of information they might be required to redact and suggest how agencies can manage these requirements.

### A. *Why Process Comments?*

Members of the public might be surprised to learn that their comments are processed before they are placed in the public regulatory docket. Some measure of organizational processing is essential—after an agency receives a paper comment it must be routed to the correct agency staff, logged in, and either scanned into the electronic docket or placed into physical files. For an electronic comment received online through Regulations.gov, little organizational processing is necessary because FDMS automatically

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43. *E.g.*, Exec. Order No. 13,563, § 2(b), 76 Fed. Reg. 3,821, 3,821–22 (Jan. 21, 2011). Previous guidance clarified Office of Management and Budget's (OMB's) expectation that agencies "post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov." Memorandum from Cass R. Sunstein, Adm'r, Office of Information & Regulatory Affairs, to the President's Mgmt. Council 2 (May 28, 2010), *available at* [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket\\_final\\_5-28-2010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf).

generates and saves metadata associated with the comment (e.g., date received), even if that metadata is not displayed on Regulations.gov.<sup>44</sup> Organizational processing is generally limited to posting the comments on Regulations.gov. These practices ensure that comments are retrievable by the public, by staff preparing the final rule, and by staff preparing the regulatory record for judicial review.

Another kind of processing is more akin to screening than organizing, and it can apply equally to electronic and paper comments. Some scenarios might help illustrate the dilemmas an agency could face and why they might screen the content of comments before posting them online.

**Scenario 1:**

A Social Security beneficiary, used to writing her Social Security number (SSN) on correspondence to the Social Security Administration (SSA), might include her SSN on a letter providing comments on a proposed SSA regulation. Even if the agency included a disclaimer in its preamble alerting all commenters that comments will be posted as they are received, agency staff may be reluctant to place the unredacted comment on a public website such as Regulations.gov.

**Scenario 2:**

A teacher sends a letter to the Department of Education explaining his perspective on a proposed regulation for programs aimed at students with disabilities. The letter includes information about his professional background with detailed examples about how his approach to teaching will be different under the proposed regulations. As support, he provides a summary of the learning disabilities of particular students in his class, using their names. Although the comment might shed light on possible effects of the proposed rule, it also shares private information about individuals other than the commenter. While the commenter may be free to share his own information, it is not clear that he has permission to share information about his students, and so staff at the Department of Education may wrestle with whether to include this private information in the online, electronic docket.

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44. A feature recently added to Regulations.gov permits any website user to download a table that lists the contents of the public docket (e.g., notices, public comments, supplemental documents) for any rulemaking. This includes a column for the date a comment was received and the date a comment was posted. The difference between these two provides some insight into the length of total processing time. Although this measure does not provide insight into how much time is spent organizing comments versus screening them, it can be used by agencies to track their own performance with posting comments online.

There is no statute or government-wide manual that explicitly instructs agency staff how to handle situations like these. While all agencies take steps to organize public comments in the docket, only a subset screen the content of comments. These agencies have constructed their own approaches to screening for a variety of issues, from inappropriate disclosures (e.g., private information, information protected by intellectual property rights, illegally obtained information) to inappropriate conduct (e.g., obscenity, threatening language).

E-Rulemaking amplified but did not create the issue of whether to screen comments. Decades before the Internet was popular or agencies adopted electronic dockets, the public had access to dockets in reading rooms at agency offices.<sup>45</sup> Under this system, comments, including any inappropriate disclosures or inappropriate conduct therein, were available to the public. While technically a public resource, the arrangement provided little access as a practical matter to individuals outside of Washington.<sup>46</sup> Agencies began placing all or part of their rulemaking dockets online in the 1990s, a transition that continues today. Public comments posted online are lifted out of the “practical obscurity” of the public reading room and made more accessible.<sup>47</sup> In short, while concerns about the content of comments may always have been present to some degree, they were mitigated by the practical obscurity of the comments themselves.

So long as agencies keep the unredacted version of each comment in the docket, the APA’s legal requirement to compile the administrative record is probably fulfilled. But greater accessibility to rulemaking documents via the web brings greater urgency to whether and how to screen comments. While a letter including a commenter’s SSN might be reasonably safe in the

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45. See Brandon & Carlitz, *supra* note 1, at 1426 (noting that merely providing public access to dockets in Washington, D.C. docket rooms may unduly restrict access to individuals outside of Washington, D.C.); PERRITT REPORT, *supra* note 1, at III.F.

46. See Brandon & Carlitz, *supra* note 1, at 1426.

47. This issue is similar to issues that have faced the courts regarding how and whether to protect the privacy of the data in their electronic dockets. In paper form, court filings, which might rightly include social security numbers, bank account numbers, and other personal information, were partially shrouded by practical obscurity in the clerk’s office. E.g., Arminda Bradford Bepko, *Public Availability or Practical Obscurity: The Debate Over Public Access to Court Records on the Internet*, 49 N.Y.L. SCH. L. REV. 967, 976–78 (2005); Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. COURTS L. REV. 135, 152–61 (2009). While filings were technically available to the public, the costs of obtaining the information—particularly time spent—gave the filings, and most importantly the data therein, a measure of protection. Winn, *supra*, at 153. To address this issue, courts adopted new rules placing the onus on filers to redact certain personal information. FED. R. CIV. P. 5.2.

confines of a public reading room, placing the same letter online increases the chances that it will be seen by those who might use it for harm. In light of this reality, some agencies direct staff to identify and redact certain content before a comment is placed on a public government website. While comments placed online might be redacted, the original, unredacted versions are retained for the rulemaking record.

A key assumption is that the agency bears some responsibility—legal or otherwise—to monitor the content of Regulations.gov, even if the content was not crafted by the agency. The setup of Regulations.gov encourages this assumption because it requires agencies to affirmatively post materials, including public comments. As of this writing, agencies do not have the option to permit public comments to post automatically to Regulations.gov. Instead, staff must act to post comments on Regulations.gov.<sup>48</sup> The question is whether screening is required before comments are posted. If not, agencies should consider whether screening is worth the costs involved.

Screening, undertaken in the spirit of protecting the public, is not free. First, screening comments occupies staff time that could be directed elsewhere. For example, screening 10,000 comments for two minutes each accounts for over 333 staff hours, or \$8,200.<sup>49</sup> This excludes any time taken to redact comments. Second, screening comments before posting them online delays their posting.<sup>50</sup> This delay might range from a few hours to a few weeks, depending on the number of comments received and the level of screening taking place. But comments advance the public debate, so any delays should be scrutinized. Third, and less tangible, screening raises legal and policy questions about the appropriateness of screening under the First Amendment and the standards used to screen, and also a more general concern about why Regulations.gov does not work

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48. Comments remain in the ‘Received Comments’ section of [FDMS] until they are posted or set to the Deferred, Do Not Post or Withdrawn status. However, the comments are pending post until the Docket Manager chooses to post the Public Submissions out to the Public using the Posting function. Users can choose to post all comments as listed, or can choose to select and order the comments to be posted using the Posting Wizard. Users can also post comments directly from the Comments screen.

*Federal Docketing Management. System Agency Help Guide 19.2.2: Post Received Comments, REGULATIONS.GOV,* [http://fdms.erulemaking.net/fdms-web-agency/help/en/AgencyHelpGuide/19\\_2\\_2\\_Post\\_Received\\_Comments.htm](http://fdms.erulemaking.net/fdms-web-agency/help/en/AgencyHelpGuide/19_2_2_Post_Received_Comments.htm) (last visited Nov. 2, 2011).

49. This figure assumes staff members are paid at the level of GS-11, Step 1 in Washington, D.C. U.S. OFFICE OF PERS. MGMT., *supra* note 33.

50. As described in a 2002 article, agencies range from a twenty-four-hour delay to delays in posting until after the comment period has closed. See Brandon & Carlitz, *supra* note 1, at 1436 n.59. While this article does not explore the reasons for the delay, one contributor is likely to be agency screening policies.

like other popular websites that allow users to post comments instantly.<sup>51</sup>

### *B. Is Screening Required?*

Agencies face legal questions with regard to how, when, and whether to screen comments. Agencies are legally required to prevent the disclosure of some types of information, and must therefore establish some mechanism to prevent it from being posted online. Other information is not subject to such a requirement. This section explores an agency's legal responsibilities with regard to certain categories of information, including personal information, trade secret or confidential information, copyrighted information, illegally obtained information, and obscene or threatening content.

#### *1. Personal Information*

As highlighted above in scenarios 1 and 2, agency staff might screen comments because they are concerned that posting a commenter's personal information, or that of another individual discussed in a comment, on Regulations.gov is an unlawful disclosure or otherwise violates a policy of protecting personal information. In general, the Privacy Act protects against unauthorized disclosures of records about individuals.<sup>52</sup> FDMS is an example of a system of records subject to the Privacy Act, in part because it contains records with the names of individuals who submit public comments. The fact that FDMS is subject to the Privacy Act triggers an obligation to protect the information in the system from impermissible disclosure.

The Privacy Act allows for disclosure with the written consent of the individual to whom the record pertains. Absent written consent, the statute provides agencies with twelve additional types of permissible disclosures, one of which is an agency's "routine use."<sup>53</sup> To qualify as a routine use, a disclosure must be "appropriate and necessary for the efficient conduct of government,"<sup>54</sup> and the use must be compatible with the purpose for which

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51. The Frequently Asked Questions section on Regulations.gov addresses this: "Why can't I see a comment I submitted?" The answer: "Once your comment is received, the appropriate agency must process it before it is posted to Regulations.gov. Given the fact that certain regulations may have thousands of comments, processing may take several weeks before it may be viewed online." *Frequently Asked Questions*, REGULATIONS.GOV, <http://www.regulations.gov/#!faqs> (last visited Nov. 15, 2011).

52. 5 U.S.C. § 552a(a) (2006).

53. *Id.* § 552a(b).

54. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-108: RESPONSIBILITIES FOR THE MAINTENANCE OF RECORDS ABOUT INDIVIDUALS BY

the information was collected. To establish routine uses, an agency can publish a “systems of records notice” in the *Federal Register*. The eRulemaking PMO issued a Privacy Act system of records notice<sup>55</sup> for FDMS. This notice helps to comply with the Privacy Act and, along with the Privacy Impact Assessment,<sup>56</sup> it helps explain aspects of the system including how data is collected, accessed, and disclosed. However, as the FDMS system of records notice explains, agencies may need to publish a separate system of records notice if they disclose personal information in ways that are not described by the FDMS system of records notice.<sup>57</sup>

Regarding personal information, this Article recommends that the eRulemaking PMO consider whether these documents should be updated in light of system upgrades and other changes. This Article also recommends that agencies assess whether their use of Regulations.gov results in disclosures beyond those contemplated in the FDMS system of records notice.<sup>58</sup> If so, agencies should work with each other and the eRulemaking PMO to update the FDMS system of records notice to account for crosscutting routine uses or update agency-specific systems of records notices for agency-specific disclosures.

Beyond technical compliance with the Privacy Act, agency staff may seek to protect members of the public who inadvertently disclose personal information in comments. The concern is that members of the public may not understand that their information will be posted online, rather than just being read internally by the agency. To address this concern, Regulations.gov places the following warning on the webpage where comments are submitted:

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the Privacy and Use Notice, the Federal Register notice on which you are

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FEDERAL AGENCIES, *reprinted in* 40 Fed. Reg. 28,948, 28,953 (July 9, 1975) (“The term ‘routine use’ was introduced to recognize the practical limitations of restricting use of information to explicit and expressed purposes for which it was collected.”).

55. Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. 15,086 (Mar. 24, 2005).

56. *Privacy Impact Assessment: eRulemaking*, EPA.GOV, <http://www.epa.gov/privacy/assess/fdms.htm> (last updated Oct. 15, 2009).

57. *See* Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. at 15,086.

58. *E.g.*, Privacy Act of 1974: System of Records, 71 Fed. Reg. 586, 586 (Jan. 5, 2006).

commenting, and the Web site of the Department or Agency.<sup>59</sup>

Some agencies include similar notifications in the preambles of their proposed rules. At present, each agency independently decides whether to rely on a notification like this or to screen comments before posting them.

## 2. *Trade Secret or Confidential Information*

Agencies may need to screen comments to protect intellectual property rights. A recent case highlights the potential liabilities agencies may face if they fail to engage in such screening. A drug company recently sought \$1.5 billion in damages under the Federal Tort Claims Act, claiming that the Food and Drug Administration (FDA) misappropriated trade secrets and breached a confidential relationship by posting the drug company's information on its website.<sup>60</sup> After the district court dismissed these claims for lack of subject matter jurisdiction,<sup>61</sup> the U.S. Court of Appeals for the District of Columbia Circuit reinstated them and remanded to the district court for additional proceedings.<sup>62</sup> Notably, this case arose under a New Drug Approval proceeding before the FDA, not a rulemaking, but it highlights potential liabilities for disclosure of confidential or trade secret information. In addition to claims of damages, agency staff could theoretically face criminal sanction under 18 U.S.C. § 1905, which contains a provision that subjects federal employees to a fine, imprisonment, and removal if they disclose information obtained through official duties including trade secrets and other confidential information.<sup>63</sup>

The potential penalties for failing to protect certain information are eye opening, but it is not clear whether agencies are legally required to screen information submitted by a commenter if the commenter provides no indication that the information should be protected. Some agencies discourage commenters from providing confidential or trade secret

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59. *Submit a Comment*, REGULATIONS.GOV, <http://www.regulations.gov/#!submitComment;D=PHMSA-2009-0151-0016> (last visited Nov. 14, 2011); see also *Privacy Notice*, REGULATIONS.GOV, <http://www.regulations.gov/#!privacyNotice> (last visited Nov. 14, 2011).

60. *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1251–52 (D.C. Cir. 2005).

61. *Jerome Stevens Pharm., Inc. v. FDA*, 319 F. Supp. 2d 45, 46–47 (D.D.C. 2004).

62. *Jerome Stevens Pharm.*, 402 F.3d at 1258.

63. Trade Secret Act, 18 U.S.C. § 1905 (2006); see Jerry Cohen, *Federal Issues in Trade Secret Law*, 2 J. HIGH TECH. L. 1, 2–3 (2003) (discussing the Trade Secrets Act's penalties for federal employees). *But see* *United States v. Wallington*, 889 F.2d 573, 575 n.2 (5th Cir. 1989) (noting that “convictions for violations of 18 U.S.C. § 1905 are very rare”); Peter J.G. Toren, *The Prosecution of Trade Secrets Thefts Under Federal Law*, 22 PEPP. L. REV. 59, 65 n.36 (1994) (explaining that § 1905 is “only very infrequently used in prosecution and is limited in scope”).

information in comments, but they also recognize that including such information sometimes may be appropriate. To handle this possibility, some agencies have adopted procedures for handling confidential or trade secret information.<sup>64</sup> These procedures differ from agency to agency. For example, the preamble to a recent joint proposed rule from the EPA and the Department of Transportation (DOT) included the following language<sup>65</sup>:

*How Do I Submit Confidential Business Information?*

Any confidential business information (CBI) submitted to one of the agencies will also be available to the other agency. However, as with all public comments, any CBI information only needs to be submitted to either one of the agencies' dockets, and it will be available to the other. Following are specific instructions for submitting CBI to either agency.

*EPA*: Do not submit CBI to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. In addition, you should submit a copy from which you have deleted the claimed confidential business information to the Docket by one of the methods set forth above.

*NHTSA*: If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under FOR FURTHER INFORMATION CONTACT. When you send a comment containing confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. In addition, you should submit a copy from which you have deleted the claimed confidential business information to the Docket by one of the methods set forth above.

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64. PERRITT REPORT, *supra* note 1, at VIII.F.2 (discussing Executive Order 12,600 on the treatment of confidential commercial information by Federal agencies); *see also* Heather E. Kilgore, Comment, *Signed, Sealed, Protected: Solutions to Agency Handling of Confidential Business Information in Informal Rulemaking*, 56 ADMIN. L. REV. 519, 526–32 (2004) (describing different agencies' procedures for handling confidential business information).

65. Revisions and Additions to Motor Vehicle Fuel Economy Label, 75 Fed. Reg. 58,078, 58,080 (proposed Sept. 23, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600 & 49 C.F.R. pt. 575) (footnotes omitted).

After a comment is submitted with a claim of confidentiality or trade secret status, agency attorneys review the claim to make a determination before placing the material in the public docket.

### 3. *Copyrighted Information*

Copyrighted material finds its way into the regulatory docket every day. This is because of how copyright protection is afforded in the United States; it is automatically granted to creative works at the moment of their creation.<sup>66</sup> Therefore, a member of the public holds the copyright on her comment, even when she sends it to the agency through Regulations.gov. It would be peculiar for a commenter to complain of a copyright violation upon seeing his or her comment posted to Regulations.gov because by submitting the comment to a public docket the commenter was on notice that the material would be shared with the public. If challenged, an agency could assert that it had an implied license to post the material, especially if the preamble or the proposed rule explained that comments would be shared online.<sup>67</sup>

A more pressing concern is presented by comments that include material apparently copyrighted by a third party. Suppose, for example, that the owner of a small business submits a copy of a voluntary industry standard or a trade journal article as part of her argument that government regulation is unnecessary. Suppose also that this individual does not hold the copyright on the voluntary standard or the article. The legal issue facing the agency is whether this material may be posted on Regulations.gov without permission from the copyright holder.

In practical terms, this issue does not appear to present significant litigation risk.<sup>68</sup> However, agency attorneys may be called upon to provide guidance to docket staff on how to handle comments that appear to contain copyrighted material. In some instances, legal uncertainty causes agencies to avoid posting material that appears to be copyrighted. The downside of this practice is that it keeps potentially useful information out of the online docket. This Article finds that if agencies limit the amount of copyrighted information posted, it is very unlikely that this would be copyright

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66. 17 U.S.C. § 302(a) (2006).

67. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[A][7] (Matthew Bender rev. ed. 2010) (explaining that an implied license can be inferred from behavior).

68. See PERRITT REPORT, *supra* note 1, at VIII.G (noting that few copyright controversies have arisen over submission to agencies containing copyright information because inclusion of third-party works to the degree necessary to harm the third party is rare).

infringement because of the doctrine of fair use.

Fair use is determined using a four-factor statutory test that explores:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>69</sup>

Fair use analysis is nuanced and fact intensive, but a good practice is to share only the pertinent portions of copyrighted material in the online docket. For example, if a commenter sends a book, the agency could merely scan and share the relevant pages or a table of contents, rather than uploading the entire volume. Some agencies are already doing this. This approach provides members of the public with enough information to locate the book if they are interested, while avoiding the costs and legal risks of adding an entire book in the online docket. If an agency is approached by someone asserting to be a copyright holder who is concerned about the amount of his or her work that is included in the docket, this Article encourages agencies to consider the copyright holder's request to display less material. This is consistent with the "notice and takedown" approach of the Digital Millennium Copyright Act, which provides a safe harbor for certain entities that "expeditiously . . . remove, or disable access" to allegedly infringing material upon notice.<sup>70</sup>

#### 4. *Illegally Obtained Information*

Agencies may also be concerned that, in posting comments online, they are legally obligated to remove information that was obtained illegally. An example of such information would be that obtained using an illegal wiretap. However, even more so than with confidential, trade secret, or copyrighted information, it is not clear how agency staff would be in a position to know that a comment contains material that was obtained illegally unless it was brought to their attention. Absent notification, it is not clear that even the most well-intentioned agency would be able to identify this material during pre-posting screening. Once notified, however, the requirements of section 18 U.S.C. § 2511 may apply, which prohibit disclosure or use of illegally obtained information. A good practice

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69. 17 U.S.C. § 107 (2006); *see also* 4 NIMMER, *supra* note 67, at § 13.05[A] (presenting a typical discussion on fair use).

70. 17 U.S.C. § 512(b)-(d).

upon receiving notice that the information was obtained illegally is therefore to investigate the material and remove it from Regulations.gov if warranted.

##### 5. *Obscene or Threatening Comments*

Comments containing language that some might deem inappropriate, such as obscene or threatening comments, pose a challenge for agencies. There are no specific statutory requirements that compel an agency to redact obscene or threatening comments posted to Regulations.gov. However, concerns about how to treat such comments in e-Rulemaking are real. In an admittedly exploratory and nonrepresentative survey, Professor Jeffrey Lubbers polled federal agency staff on their attitudes toward various issues in e-Rulemaking.<sup>71</sup> Asked whether they worry about the disclosure of docket materials that “might contain indecent or obscene language,” most respondents indicated that they were more worried about the issue in e-Rulemaking than under a paper-based comments system.<sup>72</sup> While agency staff may be concerned about posting offensive comments on Regulations.gov, they might also be sensitive to First Amendment concerns and uncertain about the standards to apply.

##### C. *An Alternative Approach*

While screening is well intentioned, it is resource intensive and causes delays between when comments are received and when they are posted. As mentioned above, comments are not automatically posted on Regulations.gov, which builds in some amount of “processing,” even if agencies do not screen for content.

An alternative approach could involve making system changes to Regulations.gov. The following two changes together would allow commenters to post on Regulations.gov much faster, while providing a feedback loop to the agencies about any inappropriate content. First, the eRulemaking PMO could explore changing Regulations.gov to autopost comments received online, with the exception of confidential or trade secret information. Second, the eRulemaking PMO can explore creating a flag for inappropriate content that can be used by those reading comments on Regulations.gov. Part of this analysis should include a consideration of how other governmental and nongovernmental websites handle issues of screening, i.e., content moderation, and whether there is good reason for Regulations.gov to differ.

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71. Lubbers, *supra* note 10, at 457–58.

72. *Id.* at 463–64.

Agencies should consider whether a system of flagging could replace a policy of screening comments for illegally obtained information or obscene or threatening language. This Article finds that there is no legal requirement to screen for such information before posting comments on Regulations.gov or other websites. Perhaps a different approach could better serve agency policies in favor of protecting such information from disclosure, while also furthering the goals and purposes of e-Rulemaking. Agencies that place a premium on ensuring a civil discourse on their portion of Regulations.gov could work with the eRulemaking PMO to explore a flag for Regulations.gov users to report inappropriate content already posted. Of course, agencies would still face questions about the standards to use when deciding how to handle any flagged comments. This could perhaps be added as a discussion item for the interagency working groups that advise the eRulemaking PMO.

It may help to broaden the discussion beyond rulemaking. The issue of online content moderation is not isolated to Regulations.gov. Rather, administrators of other government websites that accept comments from the public must grapple with whether to moderate content submitted by the public. One resource to consider is the ongoing work of the U.S. General Services Administration, which operates WebContent.gov, “the online guide to managing U.S. government websites, [which] helps agency web managers share experiences, common challenges, lessons learned, successes, and new ideas about best practices, content management, as well as usability and design issues.”<sup>73</sup> Deeper collaboration between the e-Rulemaking PMO and the General Services Administration could be helpful here in sharing best practices for content moderation.

Agencies should develop procedures to handle this information appropriately.<sup>74</sup> Agencies could work with the eRulemaking PMO to develop a way to allow commenters to notify an agency that their comments contain confidential or trade-secret information. While this does not alleviate the need for agency staff to review claims of confidentiality or

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73. *WebContent.gov*, U.S. GEN. SERVS. ADMIN., <http://www.gsa.gov/portal/content/103353> (last visited Sept. 19, 2011) (“WebContent.gov is managed by the Federal Web Managers Council, an inter-agency group of about 40 web managers from every cabinet-level agency and many independent agencies. Representatives from both headquarters and field operations participate in the group.”).

74. Such procedures should probably already be in place under Executive Order 12,600, § 3(b), which states, “For confidential commercial information . . . , the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm.” 3 C.F.R. 235, 236 (1987).

trade secret status, it may help reduce confusion for commenters that submit this information to more than one agency. It may also reduce some of the processing burden by alerting the docket manager that a comment needs or is under review, and help ensure that submissions are docketed in a timely fashion. If the system permits comments to autopost to Regulations.gov, such a flag would be essential to prevent inappropriate disclosures.

When a commenter submits material that appears to be copyrighted, agencies should include only the pertinent portion of the material in the online docket. This will require some staff resources, but this tailored approach strikes an appropriate balance between protecting the copyrights of others while making the online docket as useful as possible.

### III. THE ELECTRONIC RECORD ON REVIEW

A key component of e-Rulemaking is the use of electronic docketing to compile the rulemaking record. This refers to the use of an electronic system to hold files that may be needed in court if the rulemaking is challenged. When an agency's informal rulemaking action is reviewed under the APA, "the court shall review the whole record or those parts of it cited by a party."<sup>75</sup> Therefore, agencies recognize that taking care in preparing the rulemaking record is a critical task for rule writers.<sup>76</sup> While many agencies had already begun to explore ways to use technology to

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75. 5 U.S.C. § 706 (2006). Unless an enabling statute provides a standard of review, the APA's standard of review controls. *See, e.g.*, *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 496–97 (2004) (noting that § 706 of the Administrative Procedure Act applies because "the Act itself does not specify a standard for judicial review"); *see also* 15 U.S.C. § 2618(c)(1)(B) (2006) (limiting judicial review of Toxic Substances Control Act regulations and requiring that Secretary's determinations be upheld if "supported by substantial evidence in the rulemaking record . . . taken as a whole"); 21 U.S.C. § 360g(c) (2006) (limiting judicial review of Medical Device Amendments of 1976 and requiring that orders be upheld if supported "by substantial evidence in the record taken as a whole"); 29 U.S.C. § 655(f) (2006) (limiting judicial review of Occupational Safety and Health Act regulations and requiring the Secretary's determinations be upheld "if supported by substantial evidence in the record considered as a whole"); 42 U.S.C. § 7607(d)(9) (2006) (limiting judicial review of Clean Air Act regulations and allowing reversal of the Administrator's action if found "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) without observance of procedure required by law").

76. *See, e.g.*, Memorandum from David L. Bernhardt, Deputy Solicitor, U.S. Dep't of the Interior, to Assistant Sec'y and Dir. of Bureaus and Offices, Standardized Guidance on Compiling a Decision File and an Administrative Record 1–2 (June 27, 2006), *available at* <http://www.fws.gov/policy/e1282fw5.pdf> (highlighting the importance of maintaining a complete record).

make their dockets more efficient, the E-Government Act of 2002 required regulatory agencies, to the extent practicable, to move their regulatory dockets to electronic systems.<sup>77</sup> As agencies take steps to fulfill this statutory requirement, they encounter issues regarding how well electronic docketing satisfies the legal obligations for the rulemaking record.

The APA does not specify the contents of the rulemaking record on review before a court.<sup>78</sup> Instead, the Federal Rules of Appellate Procedure (FRAP) explain that the record on review before the court “consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency.”<sup>79</sup> The FRAP also place the burden on the agency to file “(A) the original or a certified copy of the entire record or parts designated by the parties; or (B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.”<sup>80</sup> Therefore, while the APA does not explicitly require an agency to keep a rulemaking record, the FRAP essentially impose that requirement for items under judicial review. Because agencies do not always know which rules will be reviewed in court, a common practice is to compile a rulemaking record for each regulation, rather than assembling it after the fact.<sup>81</sup> This approach may also aid agency compliance with the Supreme Court’s holding in

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77. E-Government Act of 2002, Pub. L. 107-347 § 206(d), 116 Stat. 2899, 2916 (codified as amended at 44 U.S.C. § 3501 (2006)); Memorandum from Joshua B. Bolten, Dir., Office of Mgmt. & Budget, to Dep’t and Agency Heads, Implementation Guidance for the E-Government Act of 2002 (Aug. 1, 2003), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/m03-18.pdf>.

78. A helpful source on many aspects of the APA, the Attorney General’s Manual, does not explore this issue, except to cite a Senate Hearing report for the idea that “the phrase ‘whole record’ was not intended to require reviewing courts to weigh the evidence and make independent findings of fact; rather, it means that in determining whether agency action is supported by substantial evidence, the reviewing court should consider all of the evidence and not merely the evidence favoring one side.” TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 110 n.9 (1947), available at <http://www.law.fsu.edu/library/admin/1947ix.html>.

79. FED. R. APP. P. 16(a).

80. FED. R. APP. P. 17(b)(1). If an agency does not provide the entire record, it must retain the portions not submitted and provide them upon request by the court or a party. FED. R. APP. P. 17(b)(3).

81. See, e.g., U.S. FISH & WILDLIFE SERVICE, RECORDS MANAGEMENT: COMPILING A DECISION FILE AND AN ADMINISTRATIVE RECORD (2007), <http://www.fws.gov/policy/282fw5.html>. For an interesting discussion of agency procedures in compiling a rulemaking record after the fact, see William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 66–70 (1975) (discussing Environmental Protection Agency procedures and incentives for overinclusive records).

*Burlington Truck Lines, Inc. v. United States*,<sup>82</sup> which prohibits agencies from proffering post hoc rationalizations of agency decisions while rules are under judicial review.<sup>83</sup>

ACUS has explored the content of the rulemaking record in at least two recommendations.<sup>84</sup> Most recently, in 1993, ACUS recommended that an agency prepare a “rulemaking file” in advance of judicial review that includes the following:

1. [A]ll notices pertaining to the rulemaking;
2. [C]opies or an index of all written factual material, studies, and reports substantially relied on or seriously considered by agency personnel in formulating the proposed or final rule (except insofar as disclosure is prohibited by law);
3. [A]ll written comments submitted to the agency ; and
4. [A]ny other material required by statute, executive order, or agency rule to be made public in connection with the rulemaking.<sup>85</sup>

While not binding, this recommendation gives a sense of the items that agencies include in a rulemaking record. Some agencies have promulgated regulations to outline the contents of or ground rules for their rulemaking dockets to “guide all persons in their dealings with the agency.”<sup>86</sup> For a

82. 371 U.S. 156 (1962).

83. *Id.* at 168–69 (“The courts may not accept appellate counsel’s *post hoc* rationalizations for agency action; *Chenery* requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.”) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *see also* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

84. 3 ADMIN. CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 48; RECOMMENDATION 74-4: PREENFORCEMENT JUDICIAL REVIEW OF RULES OF GENERAL APPLICABILITY (1974) [hereinafter ACUS 74-4]; ADMIN. CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS; RECOMMENDATION 93-4: IMPROVING THE ENVIRONMENT FOR AGENCY RULEMAKING (1993) [hereinafter ACUS 93-4].

85. ACUS 93-4, *supra* note 84, at 29–30. In 1974, ACUS made the following recommendation on the contents of the record in the absence of a specific statutory requirement:

- (1) the notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) any transcripts of oral presentations made in the course of the rulemaking; (4) factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (5) reports of any advisory committees; and (6) the agency’s concise general statement or final order and any documents referred to therein.

ACUS 74-4, *supra* note 84, at 49.

This recommendation grew out of a report from current ACUS Chairman, Paul Verkuil. *See generally* Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

86. Administrative Practices and Procedures, 43 Fed. Reg. 51,966, 51,966 (proposed

complex or controversial rule that generates hundreds of thousands of public comments,<sup>87</sup> the rulemaking record can be incredibly large, time consuming to assemble, costly to maintain over time, and frustrating to courts presented with large and “unwieldy” records.<sup>88</sup> The stakes are high because an inaccurately compiled regulatory record can cause significant problems on judicial review.<sup>89</sup>

Electronic dockets can help address these concerns. As noted above, FDMS is the largest federal docket system.<sup>90</sup> It is a restricted-access website for use by agency staff to manage their internal files and the content on Regulations.gov. By using electronic dockets like FDMS, agencies may be able to lower their costs by abandoning or seriously curtailing the use of paper dockets. As agencies look to FDMS or other systems for electronic docketing, they must grapple with how requirements to preserve the rulemaking record apply to electronic items. For example, may agencies destroy a comment received by mail or fax once it is scanned into the electronic docket? How can agencies provide good faith certification for large electronic records? What should agencies do with physical objects or organized mail campaigns that are a part of the rulemaking record? Should online public collaborations always be included in the docket? Although these questions are in the weeds of day-to-day agency activities, they illustrate the kinds of questions presented to federal agency attorneys.

#### A. *Destroying Paper Comments*

Many agencies permit the public to submit comments through Regulations.gov, in addition to other means such as mail, courier, fax, or e-mail. As noted above, one of the central goals of an electronic docket is to reduce costs and improve efficiency, and this includes the integration of nonelectronic items into the electronic docket. The full benefits of

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Nov. 7, 1978) (preamble to proposed rule). The Food and Drug Administration’s (FDA’s) regulation on the contents of the administrative record is in 21 C.F.R. § 10.40(g) (2011); *see also* 49 C.F.R. § 5.7 (2010) (Department of Transportation).

87. *See generally* Shulman, *Whither Deliberation*, *supra* note 24, at 44 (discussing several rulemakings with hundreds of thousands of public comments each).

88. Pedersen, *supra* note 81, at 61, 70 & n.119 (discussing presentation of large records to courts).

89. For example, while promulgating a rulemaking on potato products, the FDA failed to make its entire factual record available to the public during the comment period in the FDA docket office. At litigation, the FDA initially certified that the record was complete, but later asserted that the record was not complete. The Third Circuit remanded the regulation to the FDA to formulate its rule based on what was actually included in the docket office. *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 125–27 (3d. Cir. 1993).

90. *See supra* note 5 and accompanying text.

electronic docketing, including costs savings estimated at \$30 million over five years,<sup>91</sup> cannot be realized if an agency keeps comments received on paper in one place and electronic items in another. However, if a comment comes in by fax, for example, does an agency face legal risks if it scans the fax, saves it in the electronic docket (e.g., FDMS), and destroys the paper copy?

One could question whether items received electronically or converted to electronic versions from paper would be admissible on judicial review. However, admissibility is not a significant concern. As noted in the Perritt Report, admissibility would only be an issue if the rulemaking were subject to *de novo* review, which would be highly unusual given the APA's provision for judicial review in an appellate proceeding.<sup>92</sup> A review of federal cases reveals no instances of *de novo* review of rulemaking under APA § 706(2)(F) or cases in which the admissibility of the rulemaking record was otherwise challenged. However, even if *de novo* review was granted, recent decisions in non-APA contexts suggest that courts do not exclude electronic evidence solely because of its electronic nature; rather, courts have admitted electronic evidence under the Federal Rules of Evidence.<sup>93</sup> In the remote instance of *de novo* review, the key issue would be reliability of the electronic docket, which agencies may be called upon to explain.<sup>94</sup> This is discussed in additional detail in the Perritt Report.<sup>95</sup>

Another concern, which appears similarly unfounded, is that electronic dockets are not reliable and might not preserve documents adequately. While some degree of risk is probably inevitable in a remote storage database, that risk is probably not greater than the risk presented by relying on paper records, which can be destroyed by water or fire, or simply misplaced.<sup>96</sup>

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91. OFFICE OF MGMT. & BUDGET, *supra* note 5, at 10.

92. PERRITT REPORT, *supra* note 1, at VIII.C.2 (absent *de novo* review, "the evidentiary issue is not whether the evidence would be admitted in federal court, but whether it was in fact admitted and became part of the record in the agency proceeding" (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971))).

93. *See, e.g.*, *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007) (explaining the rule of evidence that must be considered when determining the admissibility of electronically stored evidence). *See generally* Paul W. Grimm et al., *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 AKRON L. REV. 357 (2009). *But see* Colin Miller, *Even Better than the Real Thing: How Courts Have Been Anything But Liberal in Finding Genuine Questions Raised as to the Authenticity of Originals Under Rule 1003*, 68 MD. L. REV. 160, 162-63 (2008) (noting that courts have no specific or consistent approach to admitting electronic evidence).

94. PERRITT REPORT, *supra* note 1, at VIII.C.2.

95. *Id.*

96. *Id.* at VIII.A.

While there may be lingering reluctance to destroy paper documents that have been scanned into the electronic docket, the law does not appear to validate that reluctance. From a legal perspective, once a paper comment has been scanned and saved into the docket, this Article concludes that agencies may rely on the electronic version to preserve the rulemaking record.

*B. Recording Physical Objects and Organized Mail Campaigns  
in the Electronic Docket*

Two types of comments pose particular challenges to electronic docketing—physical objects received with comments and comments received as part of organized mail campaigns. If an agency relies on an electronic docket to compile a regulatory record for judicial review, but fails to capture these kinds of comments adequately, it may pose a risk, however slight, to the agency in certifying that the electronic record is the complete rulemaking record.<sup>97</sup>

*1. Physical Objects*

From time to time, a commenter might send a physical object, such as a large poster board display or a model, to lend support to the submission. For an agency that relies on electronic dockets, submission of physical objects may challenge the agency's ability to fulfill its obligation to include it in the docket. In reading rooms, this might be less of a concern because the object could be placed in the docket alongside other documents and made available for public review. However, when an agency relies on an electronic docket, how can an agency ensure that it does not misplace a physical object?

There are several solutions for coping with this challenge. One potential solution is to place an entry in the electronic docket with a summary of where to find the physical object. FDMS already permits this type of entry. When agency staff add a paper comment into FDMS, they can classify the "document type" of the comment as "Public Submissions." Staff can also indicate that a comment has attachments. Working within this framework, agency staff could add an entry into FDMS for the comment, with an attachment that includes a description of an accompanying physical item and an explanation of where the item is located in the agency's office building. The eRulemaking PMO could also consider adding "physical

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97. Although this case did not involve electronic docketing, it highlights the risks of storing parts of the record in different, undocumented locations. *See Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 126 (3d. Cir. 1993).

item” or something similar as a document subtype as part of its Best Practices work.<sup>98</sup> On the item itself, the agency could label the physical object with the docket number and a warning that the object should not be thrown away or moved without an agency attorney’s consent, as a way to demonstrate the object’s importance for any well-intentioned de-clutterers. An alternative to retaining the physical object might be to take photos of it or describe it in writing, but either practice may raise concerns upon judicial review if the agency is viewed as altering the public comment or failing to properly consider the submission.

## 2. *Organized Mail Campaigns*

A more common problem agencies face is how to docket duplicative items, such as those sent in as part of an organized letter, e-mail, or postcard campaign. An agency can receive tens of thousands of these in a matter of days, which can be costly to process. A high-speed scanner could seriously shorten this amount of time, but not all agencies have immediate access to one. If an agency only occasionally receives the proceeds of organized letter campaigns, it might be better to have an informal partnership with another agency to handle processing.

FDMS provides a useful feature that permits agencies to scan and save batches of letters into one file, note how many times the form letter was received, and upload them together.<sup>99</sup> This cuts down on staff hours needed to scan and provide metadata for comments that are almost completely identical, but it does not entirely eliminate the administrative burden. At the moment, this appears to be the best option. Another option is to scan one letter and save it into FDMS, noting how many times it was received.<sup>100</sup> However, this raises the legal issue of how to handle docketing the letters that were not scanned, which might differ in minor ways such as their signature block. For completeness of the record, agencies might retain copies of the unscanned letters in physical form, partially defeating the purpose of electronic docketing. To fully rely on the electronic docket, the better practice is probably to upload all letters into the electronic docket.

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98. See generally ERULEMAKING PROGRAM MGMT. OFFICE, *supra* note 8.

99. The Department of Education took this approach in a recent regulation. See *Huntington-500 Letters*, REGULATIONS.GOV <http://www.regulations.gov/#!documentDetail;D=ED-2010-OPE-0012-14265.1> (last visited Nov. 14, 2011).

100. The Environmental Protection Agency took this approach in a recent regulation. See, e.g., *Support Wildlife and Ban Predator Poisons*, REGULATIONS.GOV, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2010-0753-0094> (last visited Nov. 14, 2011).

These two examples show that, despite some initial puzzlement, agencies can leverage electronic dockets to record physical objects and organized mail campaigns. A work-around solution for physical objects falls short of the full promise of electronic docketing, because it requires agencies to retain physical objects. As agencies move or reorganize offices, it may become difficult to use the location descriptions in the electronic docket to ensure that these physical items remain connected to the rulemaking record. However, at least by logging the items into the electronic docket the agency has a chance to pass some clues on to those who need to assemble a rulemaking record down the road. In handling organized mail campaigns, agencies that frequently receive these may find it cost-beneficial to invest in a high-speed scanner to help process these items into the docket. Agencies that only infrequently encounter these campaigns might seek out partner agencies to help shoulder the burden of processing these comments.

### C. *Docketing Online, Public Collaborations*

Another challenge in e-Rulemaking arises when members of the public convene in an open, online forum to discuss their reactions to a proposed rule. In one sense, this collection of views could be considered a public comment on the proposed rule, whether or not the comments are formally submitted to the agency, because they are publicly available on the Internet. Agency staff might wonder whether they have obligations to collect and preserve these discussions for the record, or if they can rely on interested parties to submit comments to the record.

In these or similar situations, the APA does not require agency staff to seek out public comments and capture them in the rulemaking record. The APA provides: “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making *through submission* of written data, views, or arguments with or without opportunity for oral presentation.”<sup>101</sup> The word *submission* connotes that members of the public must elect to send their comments to the rulemaking docket before they are subject to agency consideration. This textual argument is supported by policy considerations. First, members of the public might use online fora to discuss preliminary ideas leading to a decision about whether to file a comment or about the content of that comment. It is not clear why federal agencies should be required to capture these iterative discussions in their dockets. Second, it may not be wise to expend limited agency resources to scour the Internet for ongoing dialogues when the public comment process is already open to receive the public’s views if they choose

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101. 5 U.S.C. § 553(c) (2006) (emphasis added).

to send them.

Agencies are, however, taking action to explore the benefits of online collaboration. In a recent experiment, the DOT joined with Cornell University e-Rulemaking Initiative (CeRI) to engage the public in regulatory development using Web 2.0 technologies.<sup>102</sup> In this pilot project, CeRI opened a blog on RegulationRoom.org that focused entirely on the DOT's proposed rule on distracted driving. As comments flowed in from the public to RegulationRoom.org, Cornell law students and researchers moderated the comments and "attempted to summarize the diverse, often impassioned, and not always substantive comments for the department's benefit."<sup>103</sup> CeRI submitted this summary, without attribution to specific public participants, to the DOT docket through Regulations.gov.<sup>104</sup> Submission of the comments to the DOT by CeRI was a critical step because in the preamble of the proposed rule, the DOT explained that "Regulation Room is not an official DOT Web site, and so participating in discussion on that site is not the same as commenting in the rulemaking docket."<sup>105</sup> The preamble invited members of the public to submit individual comments to the DOT docket through Regulations.gov. This nuanced approach folded innovative use of technology into the DOT's existing docket regulations, which provide that "comments *received* in response to [proposed rules]" are included in the regulatory docket.<sup>106</sup>

This approach is echoed by other agency uses of the web. The Department of Education (DOE), for example, maintains a blog to promote current events and usually permits website users to post comments in response to agency blog posts.<sup>107</sup> This type of forum provides one way for agencies to interact with members of the public. The DOE recently used

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102. Press Release, Cornell Univ. Law Sch., Cornell e-Rulemaking Initiative (CeRI) Partners with U.S. Department of Transportation for Open Government (Apr. 1, 2010), available at [http://www.lawschool.cornell.edu/news-center/press-kits/regulation-room/upload/Regulation\\_Room\\_DOT\\_Press\\_Release.pdf](http://www.lawschool.cornell.edu/news-center/press-kits/regulation-room/upload/Regulation_Room_DOT_Press_Release.pdf); Aliya Sternstein, *Law School Tries to Get the Public Hooked on Rule-Making*, NEXTGOV (Apr. 1, 2010), [http://www.nextgov.com/nextgov/ng\\_20100401\\_9153.php](http://www.nextgov.com/nextgov/ng_20100401_9153.php).

103. Charles Clark, *E-rule-making Has Potential, but Kinks Must Be Ironed Out, Expert Says*, NEXTGOV (Dec. 1, 2010), [http://www.nextgov.com/nextgov/ng\\_20101201\\_6557.php](http://www.nextgov.com/nextgov/ng_20101201_6557.php) (based on remarks of Cynthia Farina at the National Archives).

104. Comments of Cornell e-Rulemaking Initiative (CeRI), Summary of Discussion on RegulationRoom.org: Enhancing Airline Passenger Protections at 1 (Sept. 22, 2010), <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2010-0140-1510>.

105. Limiting the Use of Wireless Communications Devices, 75 Fed. Reg. 16,391, 16,391-92 (proposed Apr. 1, 2010) (to be codified at 49 C.F.R. pts. 383, 384, 390, 391, & 392).

106. 49 C.F.R. § 5.7(a) (2010) (emphasis added).

107. See ED.GOV BLOG, <http://www.ed.gov/blog/> (last visited Nov. 14, 2010).

its blog to encourage the public to comment on a proposal published in the *Federal Register*.<sup>108</sup> Rather than permit website users to post comments in response to this blog entry, however, the DOE disabled the commenting function. Instead, the blog entry explained how the public could comment through Regulations.gov or by using offline means. This approach to rerouting potential commenters is one way to ensure that public comments are sent to the docket for agency consideration, rather than unincorporated on other portions of an agency's website.

#### D. *Certifying the Electronic Docket*

As discussed above, rulemaking records, electronic or nonelectronic, can be very lengthy, up to hundreds of thousands of pages. Upon judicial review, a copy of this record, or selections of it along with a joint appendix, must be presented to the court. An agency must certify that the copy is the same as the original.<sup>109</sup> One legal question is whether use of an electronic docket presents any challenges to making this certification. In that unlikely instance, the original record might be files saved on FDMS or other agency servers. To submit the record, agency staff could either print paper copies or provide a copy of the electronic files to the court.

The decision about whether to provide paper or electronic files—or both—can be a negotiation between the parties and the judge. If the agency provides paper copies of the rulemaking record, this can be costly (e.g., labor, printing costs, courier costs) and can take up a significant amount of physical space. This Article finds that the better approach is to default to providing the rulemaking record (i.e., the entire record or just the parts designated by the parties) electronically, overriding the default if there is a very compelling reason to provide paper. The D.C. Circuit allows for electronic filing with a rule that requires parties to use the court's case management and electronic case filing system, rather than provide paper service.<sup>110</sup> One caveat is that motions, briefs, pleadings, memoranda, and some other documents must be provided in paper even if they are filed electronically.<sup>111</sup> This may be due to the court's limited resources for printing these documents. Another caveat is that items that exceed 500

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108. J. Johnson, *Investing in Innovation Webinar*, ED.GOV BLOG (Oct. 9, 2009) <http://www.ed.gov/blog/2009/10/investing-in-innovation-webinar/>.

109. FED. R. APP. P. 17(b)(1).

110. See Administrative Order Regarding Electronic Case Filing, ECF-1 (D.C. Cir., May 15, 2009), available at [http://www.cadc.uscourts.gov/internet/home.nsf/Content/Administrative%20Order%20Regarding%20Electronic%20Case%20FilingEffective%20June%202009/\\$FILE/Admin%20Order%20ECF%20May%202009.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/Content/Administrative%20Order%20Regarding%20Electronic%20Case%20FilingEffective%20June%202009/$FILE/Admin%20Order%20ECF%20May%202009.pdf).

111. *Id.* at ECF-6.

pages or 1,500 kilobytes may not be filed electronically.<sup>112</sup> If an agency has a lengthy rulemaking record it needs to provide, one practice is to save the files onto a CD-ROM and provide it to the court. As of this Article, the website of the Judicial Conference of the United States shows that eleven of the twelve U.S. Courts of Appeals accept electronic filing.<sup>113</sup> This Article encourages the work of the Judicial Conference of the United States and the U.S. Courts of Appeals in taking steps to embrace electronic filing. While it may be a cost-sharing step to require paper copies, this Article finds that agencies would benefit from a filing system that does not require paper submission.

Whether the docket is paper or electronic, the next step is for the agency to submit the docket along with a certification affidavit that looks something like the following<sup>114</sup>:

#### **Declaration of [Certifying Official]**

I, [name of certifying official], declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the [certifying official's title].
2. In this capacity, I have participated, in connection with the above-captioned lawsuit, in the compilation and preparation of the administrative record related to [description of subject matter of the administrative record].
3. This Declaration is part of [agency]'s certification of the contents and completeness of the administrative record for its final agency decision in [description of final agency decision]. [Agency] is not filing the administrative record with the Court because of the volume of the records involved.
4. Attached and incorporated by reference as if fully set forth herein is an index itemizing the contents of the administrative record for [agency]'s final agency decision in [description of final agency decision].
5. I certify that the documents listed in the attached indices comprise the complete administrative record for [agency]'s final agency decision in [description of final agency action], and are official records of [agency].

[Date]

[Signature & Signature Block]

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112. *Id.* at ECF-8(C).

113. Judicial Conference of the United States, *Courts Accepting Electronic Filing*, USCOURTS.GOV, <http://www.uscourts.gov/FederalCourts/CMECF/Courts.aspx> (last visited Nov. 14, 2011).

114. Adapted by the Author from a sample certification provided by staff at FDA. *See also* Bernhard, *supra* note 76, at Appendix 3.

As such, a staff member at the agency certifies that the copy reflects the record as reviewed by the agency; nothing more. If the validity of a certification were challenged, that challenge might focus on the reliability of the electronic docket. In that instance, an agency might need to demonstrate that the electronic docket itself is a reliable storage and retrieval system. While this issue does not appear to have presented itself yet, the Perritt Report explored these issues in some depth, concluding that electronic copies of paper files do not present significant authentication issues so long as they can be shown to be reliable.<sup>115</sup> This Article finds no reason to disturb that conclusion or the suggestions for how to demonstrate reliability.<sup>116</sup> If an electronic docket is maintained and audited well, it may, in fact, be easier to demonstrate the reliability of an electronic system than the reliability of a paper recordkeeping system.<sup>117</sup> As the Perritt Report states, “The more inflexible the routine, and the less human intervention in the details of the computer’s management of the database, the better the evidence.”<sup>118</sup> Overall, the use of electronic dockets does not appear to present any greater risk than a paper docket, and may in fact provide greater protection. To the extent that courts can fully support electronic filing of the rulemaking record, this will help federal agencies.

In summary, from a legal perspective, electronic dockets do not present significant legal issues that would discourage their use, and they may in fact provide additional benefits. Agencies may rely on the electronic version to preserve the rulemaking record, which allows them to destroy the paper copies of submissions that are captured in the electronic docket. With some creativity, agencies can also use electronic dockets to record physical objects and organized mail campaigns. While agencies are exploring different methods for online collaboration with the public, the APA does not require them to capture online discussions in the record unless they are submitted. Finally, while the courts have taken steps to embrace electronic filing, they could consider additional steps like not also requiring paper copies of certain documents.

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115. PERRITT REPORT, *supra* note 1, at VIII.C.3.

116. *Id.* at VIII.C.4.

117. As noted by one author, the U.S. Court of Appeals for the Fifth Circuit appears to have accepted that electronic records can be more reliable than paper records when they are “not even touched by the hand of man.” Leah Voigt Romano, Comment, *Electronic Evidence and the Federal Rules*, 38 LOY. L.A. L. REV. 1745, 1750–51 n.33 (2005) (quoting *United States v. Vela*, 673 F.2d 86, 90 (5th Cir. 1982)).

118. PERRITT REPORT, *supra* note 1, at VIII.C.4.

## IV. RECORDKEEPING REQUIREMENTS

Another set of “records” issues present themselves in the course of e-Rulemaking, apart from questions about how to preserve the e-Rulemaking items into the “rulemaking record” for litigation purposes (discussed above in Part II). How do the requirements of the Federal Records Act intersect with e-Rulemaking activities? For example, might an agency official’s tweet about a rulemaking, or a public comment submitted on a blog entry about the rule, trigger the requirements of the Federal Records Act?

The Federal Records Act of 1950 requires the head of each federal agency to preserve records to document the “policies, decisions, [and] procedures” of the agency.<sup>119</sup> A key concept is whether an item is a federal record—the statutory definition includes “all books, papers, . . . or other *documentary materials*, regardless of physical form or characteristics, *made or received* by an agency of the United States Government . . . or *appropriate for preservation* . . . as evidence of the . . . policies, decisions, procedures, operations, or other activities . . . or because of the informational value of data in them.”<sup>120</sup>

Records schedules, which set out an agency’s disposition instructions for records, must be approved by the National Archives and Records Administration (NARA).<sup>121</sup> NARA also maintains General Records Schedules (GRS) for the items common to federal agencies, such as records on personnel, accounting, and procurement, and NARA estimates that these schedules cover approximately one third of agency records.<sup>122</sup> Notably, and although rulemaking is a common function of most federal agencies, the GRS do not include records developed or received during the rulemaking process.

In the course of rulemaking, an agency might prepare or receive several different types of documentary materials. This includes, for example, comments received from the public or agency guidance documents regarding the rule. These are likely to be federal records because they are documentary materials “made or received” by an agency, depending on their evidentiary or informational value.<sup>123</sup> NARA guidance indicates that

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119. 44 U.S.C. § 3101 (2006).

120. *Id.* § 3301 (emphases added).

121. *See* 36 C.F.R. §§ 1220.18, 1228.16 (2010); 44 U.S.C. § 3303.

122. Nat’l Archives and Records Admin., *Introduction to the General Records Schedules*, NATIONAL ARCHIVES (Apr. 2010), <http://www.archives.gov/records-mgmt/grs/intro.html>.

123. 44 U.S.C. § 3101. For example, several agencies have approved records schedules for public comments collected during rulemaking. The Department of Commerce has an approved records schedule for public comments collected in the course of changes to its Export Administration Regulations. Request for Records Disposition Authority from U.S.

files related to the “development, clearance, and processing of proposed and final rules for publication in the Federal Register . . . may be, but are not necessarily, permanent,” and notes that they “must be scheduled individually by each agency so NARA can conduct an analysis and appraisal to determine their appropriate disposition.”<sup>124</sup>

Turning to e-Rulemaking, agency officials might make statements through social media to drum up interest in the rulemaking or encourage the public to comment. These statements and resulting public comments present a novel question for records management—are they federal records? To determine the answer, agencies may consult NARA’s October 2010 Guidance that explores the intersection between Web 2.0 technologies and federal records management requirements.<sup>125</sup> First, the Guidance states that the medium of the content (i.e., online) does not determine its status as a record, so the issue of whether online content is “documentary material” does not appear to be open. Second, the Guidance sets out five questions to consider when determining whether content is a Federal record:

- Is the information unique and not available anywhere else?
- Does it contain evidence of an agency’s policies, business, mission, etc.?
- Is this tool being used in relation to the agency’s work?
- Is use of the tool authorized by the agency?
- Is there a business need for the information?<sup>126</sup>

The Guidance explains that answering “yes” to any of these questions suggests that an item is likely to be a federal record. However, the guidance provides an escape hatch—agencies may consider duplicate content to be nonrecords, citing the example of reposting public affairs content through social media platforms.<sup>127</sup>

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Dep’t of Commerce Bureau of Export Admin. to Nat’l Archives & Records Serv. (Oct. 29, 1992), *available at* [http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-commerce/rg-0476/n1-476-93-001\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-commerce/rg-0476/n1-476-93-001_sf115.pdf); *see also* Request for Records Disposition Authority from U.S. Dep’t of Educ. to Nat’l Archives & Records Admin. (Feb. 5, 2009), *available at* [http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-education/rg-0441/n1-441-09-004\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-education/rg-0441/n1-441-09-004_sf115.pdf).

124. Nat’l Archives and Records Admin., *supra* note 122.

125. Bulletin from Nat’l Archives and Records Admin. to Heads of Fed. Agencies, on Guidance on Managing Records in Web 2.0/Social Media Platforms (Oct. 20, 2010), *available at* <http://www.archives.gov/records-mgmt/bulletins/2011/2011-02.html>.

126. *Id.*

127. *Id.*

### A. Agency Statements

An agency might use blogs or other social media to drum up interest in the rulemaking. Based on the NARA' Guidance, these efforts are not federal records if they simply duplicate existing content (e.g., *Federal Register* notice, fact sheet designed to explain a regulation, press release) or post a link to that content. For example, consider the FDA's recent twitter post on a new investigational new drug rule:

IND Safety Reporting rule and guidance. <http://bit.ly/INDsafety>  
11:06 AM Sep 28th via web

Note that it includes a link to the FDA's website.<sup>128</sup> Applying the NARA Guidance, this is not a federal record because it simply directs followers to other FDA website content.<sup>129</sup> In contrast, a statement issued by an agency official through social media that presents previously unavailable information—such as a statement that explains a fresh perspective on the rationale or benefits of the rule—may be a federal record because of its uniqueness.

Limiting the use of social media to duplicative content is one way to minimize the applicability of Federal Records Act requirements. Agencies may choose to develop internal policies along these lines. However, some have questioned this limitation as holding the government back from a fully collaborative web presence.<sup>130</sup> Instead, agencies could consider refreshing their records schedules to account for uses of social media in e-Rulemaking. Some agencies have already begun this process, including the Department of Justice,<sup>131</sup> which has an approved records schedule for the content it places on social media websites. Even before NARA approves the records schedule, this can serve as a way to convene internal conversations with program staff, communications or public affairs staff, records management staff, and counsel about how the agency plans to use these tools to communicate with the public about rulemakings. Agencies might also consider confirming that they have adequate rulemaking records schedules

128. Food & Drug Admin., posting to *@FDA\_Drug\_Info*, TWITTER (Sept. 28, 2010), [http://twitter.com/FDA\\_Drug\\_Info](http://twitter.com/FDA_Drug_Info).

129. Note, however, that the website content may itself be a federal record that may be subject to the Federal Records Act. *See supra* note 119 and accompanying text.

130. *See, e.g.*, Alice Lipowicz, *Is Every Tweet and Facebook Post Worth Archiving?*, FED. COMPUTER WK. (Nov. 17, 2010), <http://fcw.com/articles/2010/11/29/home-page-nara-social-media-records.aspx>.

131. Request for Records Disposition Authority from Dep't of Justice to Nat'l Archives & Records Admin. (Oct. 13, 2009), *available at* [http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/n1-060-10-002\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/n1-060-10-002_sf115.pdf).

in place, with an eye to synching records retention policies with the length of time agencies hold these records for judicial review.

*B. Public Comments in Agency Fora*

Agencies might use social media to encourage public participation in a rulemaking while the comment period is open. As discussed in Part III.C, an agency might post an entry on its blog alerting readers that the agency has published a new proposed rule. Sometimes agencies open the blog entry to receive comments from the public. One question is whether any comments received on the blog entry are federal records. Applying the NARA Guidance, if the comment is unique to the blog (i.e., not otherwise a part of the rulemaking docket) and provides evidentiary or informational value, the answer is probably yes. However, the question of evidentiary or informational value may turn on whether these comments will become part of the rulemaking record where they will be considered by agency staff. In Part III.C., this Article encouraged agencies to signal on their blogs whether they intend to treat comments received there as public comments for the rulemaking record. If an agency incorporates blog comments into the rulemaking record, they are subject to recordkeeping provisions just like other items in the rulemaking record. In this scenario, however, there would be no need to preserve the blog comments as separate federal records, because they would already be swept into the recordkeeping provisions for the rulemaking record. If, on the other hand, an agency does not incorporate blog comments into the rulemaking record, this diminishes the evidentiary or informational value of the comments, which also reduces the likelihood that they are federal records.

In sum, agencies should be aware that e-Rulemaking activities, just like other activities, might carry Federal Records Act requirements. As agencies explore new technologies, they should ensure they continue to consider Federal Records Act implications of fresh approaches to the regulatory process.

CONCLUSION

This Article has shown that the legal issues that present themselves in e-Rulemaking are varied but surmountable. With the analysis and recommendations above, this Article aims to address legal issues that have been raised by e-Rulemaking since its inception. As federal rule writers explore new ways to engage the public and solicit their views for the record, new legal issues may arise. Overall, agency staff have found and continue to find creative ways to satisfy their legal obligations while exploring the possibilities of e-Rulemaking.