

AMERICAN BAR ASSOCIATION

**SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION**

RECOMMENDATION

1 **RESOLVED**, that the American Bar Association urges the Administration to promote
2 best practices for federal agency websites and to facilitate the ease and predictability of citizen
3 access to desired information by supporting:

- 4 a) a centralized office to encourage and monitor best practices relating to agency Internet
5 use; and
- 6 b) modernization of computer systems used for public and internal access to government
7 information.

8 **FURTHER RESOLVED**, that Congress should support these initiatives without
9 mandating particular technologies, or use of the Internet by agencies in a specific manner.

10 **FURTHER RESOLVED**, that federal agencies should explore means to maximize the
11 availability and searchability of existing law and policy on their websites. Departments
12 comprising several agencies should work with those agencies to assure the predictability of site
13 content, and uniformity in the search mechanisms made available by:

- 14 a) including organizational charts and personnel directories to facilitate public
15 understanding and access.
- 16 b) including in their own searchable data bases their governing statutes, all agency rules
17 and regulations, and all important policies, interpretations, and other like matters on
18 which members of the public are likely to request;
- 19 c) posting materials where practicable in a form directly accessible to electronic searching
20 by the search engine they provide, and organize internal web pages and data in a way that
21 permits ready use by citizens dealing with the agency easily;
- 22 d) assuring the possibility of sophisticated as well as simple searches;
- 23 e) minimizing the need to refer out to other data-bases, for example the GPO's, and
24 providing prominent notice of any need to do so, with appropriate links and help; and

25 f) providing ready access, in downloadable format, to forms whose use is required by the
26 agency.

27 **FURTHER RESOLVED**, that federal agencies should encourage public participation in
28 rulemaking and policy formulation on the Internet by:

29 a) making the agency's periodic Unified Regulatory Agenda prominently available and
30 searchable on the agency's own site;

31 b) providing a means for interested persons to enroll for electronic notification of further
32 developments in a matter, beginning with its announcement in the Unified Regulatory
33 Agenda;

34 c) posting notices of proposed rulemaking on the agency's own site, and providing
35 opportunities for electronic comment there;

36 d) posting required analyses, public comments, and other constituent elements of a
37 rulemaking docket on the agency's web site as far as practicable in readily searchable form
38 at least in rulemakings likely to draft substantial public interest; and

39 e) posting guidance documents and other matters not requiring notice and comment
40 rulemaking procedures, and providing opportunities to seek revision or further
41 information.

42 **FURTHER RESOLVED**, that given the fluid character of the Internet and its use,
43 federal agencies should consider means by which the possibility of access to important materials
44 placed on the Internet can be preserved, once those materials are no longer posted there.

REPORT

In its recent Report for the President Elect, "Twenty-First Century Governance: Improving the Federal Administrative Process," the Council of the Section of Administrative Law and Regulatory Practice included the following recommendations:

The incoming President should encourage the use of advanced information technology to expand knowledge about, and participation in, agency decisionmaking, including notice-and-comment rulemaking. Some agencies have made significant efforts to provide information on-line.¹ Yet more can and should be done.

In particular, the new President should urge agencies aggressively to embrace information technology as a means of promoting transparency and participation.² For instance, access to supporting studies and other materials underlying rules can be expanded by including the materials in an electronic docket. Electronic means can be used to post public comments, so that others can easily read them and even respond on-line.³ Agencies should also use the Internet to publicize important, yet often hard-to-find, items such as general statements of policy and interpretive rules. Although the federal APA does not require such rules to be promulgated pursuant to notice-and-comment procedures, it does require that they be published. In addition, allowing interested parties to sign up for automatic notice of matters of concern to them would greatly facilitate public participation.

A centralized office to encourage and monitor best practices relating to agency Internet use will be particularly useful in this regard. Such an office should seek to promote a degree of uniformity among agencies, so that people could more easily find material at any agency site they visit. To be sure, innovative efforts by individual government agencies should be encouraged, and some variation in practices may be needed to accommodate the mission of a given agency. But a centralized office should encourage minimum standards in the use of advanced technology, while also helping to assure that, as agencies employ electronic means to maintain records, they will take additional steps to provide long-term public access to the information.

¹For a survey of what some agencies have done to promote the use of electronic media, see GENERAL ACCOUNTING OFFICE, FEDERAL RULEMAKING: AGENCIES' USE OF INFORMATION TECHNOLOGY TO FACILITATE PUBLIC PARTICIPATION, B-284527 (June 30, 2000) [hereinafter GAO REPORT]. The President's Management Council has just developed a search engine for government documents called FirstGov, at <<http://www.firstgov.gov>>. The Senate Committee on Governmental Affairs has created a new initiative for use of the Internet called e-Government: An Experiment in Interactive Legislation, at <http://gov_affairs.senate.gov/egov>.

²For general discussions of the use of information technology by government, see HENRY H. PERRITT, JR., ELECTRONIC DOCKETS: USE OF INFORMATION TECHNOLOGY IN RULEMAKING AND ADJUDICATION (ACUS, 1995); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 ADMIN. L. REV. 277 (1998).

³Steps in these directions have begun. See, e.g., GAO REPORT, *supra* note 1.

These recommendations are intended to bring these important observations to the American Bar Association House of Delegates and to make them operational.

1) The Executive Office of the President should work with agencies to assist them promoting best practices for their web pages, and facilitating the ease and predictability of citizen access to desired information. To achieve these ends, the President should

a) Support a centralized office to encourage and monitor best practices relating to agency Internet use; and

b) Support modernization of computer systems used for public as well as internal access to government information.

2) Congress should support these initiatives without mandating particular technologies, or use of the Internet by agencies in a specific manner.

The Internet is an extraordinarily plastic and quickly evolving medium, that would not take well to tight centralized control. The imagination and initiative of particular users has done much already to expose its potentialities. In many respects, the individuality and fluidity of the web are desirable qualities, permitting leadership and productive exchange of ideas that are more desirable than an imposed uniformity. Yet use of the web for government has now reached a maturity and importance warranting attention to predictable needs of citizens, including ease and predictability of access.

The last decade has witnessed explosive growth in Internet usage by government, along with business and individuals. Much of this growth has, properly, had a service orientation, with the result that citizens now have much readier access to tax forms, benefits information, and data about their cars and neighborhoods than could readily have been imagined. The FirstGov initiative undertaken by the Clinton White House has, largely, this orientation. In part in response to such measures as the Electronic Freedom of Information Act, agencies have increasingly provided information about their policies and rules. Some have created notification services providing automatic email about identified matters of interest; others have permitted, on a regular or occasional basis, electronic participation in their policymaking.

Examples of imaginative development might include: the ongoing rulemaking on standards for organic agriculture in the Department of Agriculture's Agricultural Marketing Service, extending full participation to every farmer with a computer and a modem in a rulemaking that may be of the greatest importance to him⁴; the Guide to Decisionmaking posted by the Department of the Interior's Bureau of Reclamation, educating the public as well as its own dispersed bureaucracy in the techniques of policy formation⁵; the Federal Communication Commission's

⁴<http://www.ams.usda.gov/nop/>

⁵<http://www.usbr.gov/guide/>

hyperlinked table of organization, permitting ready visualization of and access to its complex bureaucratic structure⁶; the Federal Aviation Administration's electronic library, permitting ready access to its full range of interpretive and guidance documents⁷; the Department of Transportation's electronic docket, which gives the public immediate access to all documents filed in departmental proceedings, while saving the Department considerable resources in paper moving and storage.⁸

At the same time, browsing through the electronic resources of even a single Department with citizens' and lawyers' wishes for information about regulation in mind reveals unfortunate gaps and confusing variations.⁹ Because the Government Printing Office maintains its own electronic versions of the United States Code, the Code of Federal Regulations and the Federal Register, some agencies do not maintain in their own data bases – and so may not provide ready search access to – the most fundamental information about governing laws and regulations. Not only the content of current law, but also notices of proposed rulemaking and the agency's biennial regulatory agenda, may be unavailable to visitors to an agency's site. Whether and to what extent this is so within the department may vary from one bureau to another, as may what guidance is given about finding these resources, what search engine is made available, and the like. The arrangement and “feel” of web sites may vary greatly from place. Thus, the United States Forest Service is a constituent element of the Department of Agriculture; it is responsible for a large number of national forests, administratively grouped into regions. One moving from the Department to the Service to its regions to its individual forests encounters at each stage different judgments about what information should be made available through the Internet, and in what form; whether one can find out about proposed regulatory actions and by what means simply cannot be predicted from one forest to the next, and the style of presentation, too, seems to be largely a matter of local option.

Partly evidence of the individual initiative and imagination that have built the Internet, phenomena like these may also signal resource deficiencies – difficulties, for example, that the Forest Service encounters in receiving appropriations sufficient to modernize its electronic capacities – and management inattention. Increasingly, the latter of these problems, at least, is drawing attention. Agency “chief information officers,” who exist but complain of their uncertain authority and resources, are organized into a Chief Information Officers Council under the aegis of the White House.¹⁰ Formalizing that council, perhaps providing at its head a Chief Information Officer for the government as a whole, is one of the legislative issues currently being

⁶<http://www.fcc.gov/sitemap.pdf>

⁷<http://AFS600.faa.gov>

⁸<http://dms.dot.gov>

⁹Similar patterns were revealed by the GAO study referenced in note 1, above.

¹⁰<http://www.cio.gov>

explored by the Senate Government Operations Committee's e-government initiative.¹¹

3) Agencies should maximize the ease and predictability of their web sites, in particular the availability and searchability of existing law and policy. To this end, they should

a) Include organizational charts and personnel directories facilitating public understanding and access.

b) Include in their own searchable data bases their governing statutes, all agency rules and regulations, and all important policies, interpretations, and other like matters on which members of the public are likely to wish to rely;

c) Post materials in a form directly accessible to electronic searching by the search engine they provide, and organize internal web pages and data in a way that permits citizens dealing with the agency easily to learn its idiosyncracies;

d) Provide search mechanisms uniform within the agency or Department;

e) Assure the possibility of sophisticated as well as simple searches;

f) Minimize the need to refer out to other data-bases, for example the GPO's, and provide prominent notice of any need to do so, with appropriate links and help; and

g) Provide ready access, in downloadable form, to forms whose use is required by the agency.

Under the Electronic Freedom of Information Act, agencies have an obligation to make available on the Internet, in an electronic library, all those sources of agency policy and interpretation that are not required to be published in the Federal Register, and yet are required to be published because of their potential impact on the public – the materials referred to in 5 U.S.C. §552(a)(2). These include manual provisions, regulatory guidance, technical directives, interpretive documents, and many other similar materials that both constrain agency staff and inform the regulated public about day-to-day administrative matters. The most profound implications of the Internet for transparency may concern materials such as these, whose previous circulation was invariably limited by its production in few copies, that tended to be maintained in government offices: manuals, interpretations and guidance documents.¹² The interpretation letters of a General Counsel may be freely available at her office, or at a particular public records office. But profound disincentives to using that information lie in the necessities of going to such a place and making a visual inspection unaided by the full concordance an electronic data base creates. In practical terms, having it on line and searchable may mean having it available for the first time.

¹¹http://gov_affairs.senate.gov/egov/description.cfm

¹²Similar availability considerations, if not the same concern about “secret law,” characterize data collected in the course of policy-making; and rulemaking comments filed by the public.

While neither quite the same “secret law” nor the same legal obligation extends to the agencies’ statutory authority, regulations, or other matters 5 U.S.C. §552(a)(1) requires to be published in the Federal Register, it seems obvious that the accuracy and efficiency of agency work would be enhanced if these related data bases were associated with each other electronically, so that all could be searched, as it were, from the same seat, and linkages back and forth could be readily made. Having this ready access would increase public knowledge, as well, and in this way tend to subdue the development of secret law. Not just publication “somewhere,” but publication in a manner that promotes access, understanding and regularity is the evident goal of both §552 and e-FOIA.

The following paragraphs continue with a discussion of what one might find in (some of) the web pages of the United States Department of Agriculture (a department chosen arbitrarily from among the cabinet level departments), and five of its more important regulators: the Agricultural Marketing Service (AMS), the Animal and Plant Health Inspection Service (APHIS), the Food Safety and Inspection Service (FSIS), the Forest Service (FS), and the Grain Inspection, Packers and Stockyards Administration (GIPSA). Of course there is potential distortion in focusing on a single Department, or only a fraction of its constituent units; this report does not intend to hold it out as a particularly bad or backward example. In several respects the Department has been a pioneer, and its weaknesses are doubtless compounded by budgetary stresses and the inevitable difficulties of transition in times of rapid change. The impression of this report’s author, after guiding his students through two springs’ exploration of federal agencies generally, is that the problems discussed here are in fact common throughout the federal government. The purpose here is to present a manageable amount of information, to make an example of the Department in the neutral, not punitive sense. It would be an error to think its problems unique, or its achievements behind the curve.

A visitor to the Department of Agriculture’s home page,¹³ most recently in early December of 2000, finds both the promise and the difficulty. The principal web page is devoted principally to the news seeker – “Today’s Features,” “Secretary Glicksman’s Activities,” “Audio-Video Highlights,” Top Stories,” “National News Releases,” “Issues.” Some of the issues links promise much: “Biotechnology,” for example, reveals an effort to coordinate with two other agencies, FDA and EPA, with which the USDA shares regulatory responsibility over biotechnology.¹⁴ Further links from “Biotechnology” include one to “Laws & Regs,” which purports to give access to regulatory materials of all three agencies. Yet the links provided are often to external locations and so not searchable within the site; nor is any search engine provided. Also in “Issues” is a link to the National Organic Program, where one can find an extraordinary range of information about the still-pending proposed rule on Organic Standards,¹⁵ and an evident commitment to openness. Here, a search engine *is* provided (though it is, strikingly, a *different*

¹³<http://www.usda.gov>

¹⁴<http://www.usda.gov/agencies/biotech/index.html>

¹⁵<http://www.ams.usda.gov/nop/>

search engine than is accessible from the Department's home page); a link on the NOP home page to "search comments on repropose rule" – a link whose very availability is a praiseworthy signal of the administrators' commitments and the new possibilities the Internet is opening – brings one to what appears to be yet a third search engine. It will perhaps not be surprising, yet indicative of challenges yet to be met, that using the same obscure phrase in each of the three engines¹⁶ produced different results: the NOP site produced three documents, the "search comments" site only one, that had not appeared in the NOP report, and the Departmental site produced 20 documents, only one of which was from the NOP site within the Agriculture and Marketing Service; that is, it found nineteen instances in Forest Service documents, and missed two of the three "hits" the NOP engine produced.

Weaknesses become immediately apparent when one searches for regulatory materials. There is, on the Department's initial web page, no obvious place even to go for such materials, but the two most probable candidates (given E-FOIA) are "Agency Services & Programs" and "FOIA." The "FOIA" link contains the now required "Electronic Reading Room," and in that place one finds the promising statement that, pursuant to the Act, it is "the online repository of all USDA Departmental Manuals, Regulations, Notices and Memoranda."¹⁷ What appears to be yet another search engine is provided here, and one quickly finds, for example in a search using the word "forest," returning only 64 items,¹⁸ that *this* collection of manuals, regulations, notices and memoranda is limited to housekeeping matters proceeding directly from the Secretary's office. Regulatory materials are housed in each responsible agency and bureau, via the "Agency Services & Programs" link. The Department does maintain a page with links to all of its agencies' Electronic Reading Rooms,¹⁹ but – mysteriously – no evident link to this page is to be found in the Department's FOIA pages. It does not maintain for itself any readily evident location where the Department's statutes, regulations, proposed regulations, or Unified Regulatory Agenda can be found or searched.²⁰

Agriculture is a large department, and "Agency Services & Programs," leads to more than a full screen of further links, divided along lines reflecting the Department's organization. Each of our five agencies, FSIS, FS, AMS, APHIS, and GIPSA, is linked there. Viewing their presentations from the perspective of E-FOIA – whether they provide in electronic reading rooms

¹⁶"Foliar nutrient," a phrase chosen both for its presence early in the reproposal and for its likely infrequency of appearance in the Department's data base generally.

¹⁷<http://www.usd.gov/news/foia/reading.htm>

¹⁸On December 4, 2000, the same search returned 16,339 items from the Department as a whole, and 3387 in the Directives of the Forest Service.

¹⁹<http://www.usd.gov/news/foia/room.htm>

²⁰Links to external compilations of statutes (Cornell's LII) and regulations (the GPO) appear as sidebars to the "Welcome to USDA" page available at the bottom of the Department's home page, if one can guess to look there. The latter would provide access as well to notices of proposed rulemaking and to the Unified Regulatory Agenda. As the texts are off site, however, they are not searched by any departmental search utility.

or elsewhere the regulatory materials that failed to appear in the Department's reading room – the results are at best mixed.

AMS, the Agricultural Marketing Service, which supervises marketing regulations for a wide range of crops, commendably subdivides the materials on its home page programmatically, so that poultry farmers, say, could quickly find the data most likely to be of significance to them; and proposals of importance to these groups – say, a proposal to revise US grade standards for shell eggs²¹ – are linked to these pages. AMS offers interested persons the opportunity to subscribe by e-mail to all its notices, but permits them to do so only an undifferentiated way.²² There is no direct link to a FOIA or E-FOIA page from the AMS home page, but a “newsroom” button produces a page where that link – and also one to “Compilation of Statutes” can be found.²³ That page, the same one as is invoked from the Department's page of links to E-FOIA reading rooms, shows that AMS intends to make Final Agency Opinions, Policy Statements, and Administrative Staff Manuals available on line, but has not yet done so. Although in other respects – notably its practices respecting rulemaking – the AMS site is a leader in the Department, it does not yet appear to make other policy statements available.

The home page of APHIS, the Animal and Plant Health Inspection Service, is for the moment precisely the same as the page invoked from the Department's page of links to E-FOIA reading rooms.²⁴ That page contains an “E-FOIA” link to a page²⁵ that contains both an E-FOIA search engine²⁶ and a further link to an electronic reading room²⁷, where a wide range of manuals and like materials are available (they must be searched from the preceding page, however). Regulations are not in this area, but a “Regulations” link on the APHIS home page takes one to a collection of recently published APHIS rules and notices, with a search engine for “the entire Federal Register.”²⁸ This page permits persons to sign up for e-mailed notifications limited to regulatory actions containing particular keywords identified by the subscriber, an extremely useful utility that seems not to exist elsewhere in the Department (or on many other governmental sites). Additional regulatory materials, including a link to the whole Department's

²¹See <http://www.ams.usda.gov/poultry/regulations/rulemaking/index.htm>

²²<http://www.ams.usda.gov/news/newsrel.htm>. The service might be more attractive if it were possible to limit the subscription to matters of particular interest – say, poultry.

²³The compilation, also available on CD-ROM, is current only to 1997. It does not appear to be searchable from within AMS.

²⁴Compare <http://www.aphis.usda.gov> with <http://foia.aphis.usda.gov>, both visited December 3, 2000.

²⁵<https://www.aphis.usda.gov/>

²⁶This search engine, dysfunctional on December 3, 2000, is apparently different from the search engine provided on the APHIS home page and the departmental search engine.

²⁷https://www.aphis.usda.gov/read_room

²⁸<http://www.aphis.usda.gov/ppd/rad/webrepor.html>

entry in the most recent Unified Agenda, appear on the home page of its Policy and Program Development office of Regulatory Analysis and Development.²⁹

The FSIS maintains a business-like home page,³⁰ with full descriptions of available materials, and what is (from appearances) yet another search engine – this one with the very desirable capacity to include materials in PDF files in its searches. Its clearly marked electronic reading room contains policies, manuals, and, under the somewhat misleading heading “Final Agency Opinions,” links to “Recent Federal Register Notices” that turn out to connect to regulations, final and proposed, to the Regulatory Agenda, and to a variety of other useful materials; it is on the FSIS “Final Agency Opinions” page (only, among all the pages scanned for this report) that the link to other agency reading rooms is revealed.

Much more like the Department’s home page, the Forest Service’s home page³¹ is largely given over to recent news. Two obscure places lead to some regulatory information. First, a drop-down menu initially labeled Administration reveals a “manuals” link which brings one to a list of directory materials apparently housed within a “Library,” and not including statutes or regulatory materials³²; that “Library” has no other apparently relevant links. Second, the FOIA link at the bottom of the FS home page connects to a page that seems to be *only* about FOIA; this is the page to which one is brought by the Department’s page linking all E-FOIA reading rooms. It is not such a room, but an “Electronic Freedom of Information Act” link on that page, followed by an “E-FOIA Reading Room” link, brings one, finally, to a page also linking to the manuals³³ and opinions.³⁴ The manuals, but not the opinions, may be searched from their index page, using a different search engine than appears on the Service’s home page; the opinions index page links as well to the regions’ separate collections of appeal decisions. The same page links to the text of NEPA and the National Forest Management Act of 1976; and the Service’s home page links to its planning rule under the latter act. If the Forest Service maintains other pages on relevant statutes, or final or proposed regulations, or on its contributions to the Unified Regulatory Agenda, they are not readily apparent.

The GIPSA, Grain Inspection, Packers and Stockyards Administration, homepage³⁵ features a column of links to Laws & Regulations, Rulemaking, and The Newsroom, that commendably remains in place as one links to most other pages in the site – a feature not

²⁹<http://www.aphis.usda.gov/ppd/rad>

³⁰<http://www.fsis.usda.gov>

³¹<http://www.fs.fed.us>

³²<http://www.fs.fed.us/links/manuals.shtml>

³³<http://www.fs.fed.us/im/directives>

³⁴<http://www.fs.fed.us/forests>

³⁵<http://www.usda.gov/gipsa>

characteristic of other agencies in the Department. Laws & Regulations contains relevant statutes and final regulations developed under them; Rulemaking, a chronological list of Federal Register Publications, by title only; and The Newsroom, a “Freedom of Information Act” link that is in fact the link to the Electronic Reading Room also called by the departmental page.³⁶ It offers Final Opinions and Orders, by chronology, and at least some Administrative Staff Manuals. A bit confusingly, the GIPSA home page also has a link to a Federal Grain Inspection Service “Reference Library” that contains a variety of handbooks, directives, and standards that appear not to be present in the Electronic Reading Room.³⁷ GIPSA’s only “search” facility calls the Department’s search function, for search that is (therefore) Department wide, and apparently cannot be limited to this one administrative unit.

These variations can perhaps be made more dramatic by the following table:

| | USDA | AMS | APHIS | FSIS | FS | GIPSA |
|----------------------|--------------------------------------|---|--|---|--------------------------------------|-----------------------------|
| Statutes | Link to Cornell LII, U.S.-C. Title 7 | Own database (statutes only through 1997) | Links to statutes relevant to rulemaking (e.g., APA, NEPA) | Statutes related to rulemaking and those authorizing programs | NEPA and NFMA only, obscurely placed | Own statutes |
| Final Regulations | Link to GPO | Recent rules program by program | Recent rules and GPO links | Recent rules and link to Federal Register | No general link apparent | Own database of regulations |
| Proposed Regulations | Link to GPO | Recent rules program by program | Recent notices and GPO links | Chronological listing | No general link or list apparent | Chronological listing |
| Unified Agenda | Link to GPO | Not provided | Obscure link valid for all of USDA | PDF copy of Federal Register, all USDA | No link apparent | Not provided |
| E-FOIA Publication | Departmental only | Promised | Wide range | Wide range, PDF searchable | Service-wide manuals | In two separate places |

³⁶<http://www.usda.gov/gipsa/newsrooom/e-foia/foia.htm>

³⁷<http://www.usda.gov/gipsa/reference-library/library.htm>

| | | | | | | |
|--------------------------|--------------|---|---|--------------|---------------------|--------------|
| Rules | | | | | and directives only | |
| Electronic notice option | Not provided | All AMS program announcements and news releases | “Page Watch” for keywords on rules and notices page | Not provided | Not provided | Not provided |

As is evident from the preceding, searching is another issue of considerable variation. What materials can be searched, with what degree of sophistication, and using what particular “technology” for the search varies widely. The Department, for example, uses “Netscape Compass 3.01A” for its full site searches, as does GIPSA, which does not offer GIPSA-limited searches; but the Department uses a different search apparatus in its Electronic Reading Room. APHIS, and the Forest Service use “Netscape Compass 3.01B.” These have apparently just been taken off the shelf, so that their help facility is quite general. FSIS, on the other hand, uses a Microsoft-supplied search engine; and the general search facility provided by AMS (another appears in connection with comments to the National Organic Program rulemaking) is unidentified but has a different appearance and feel from any of these; its “help” area, in particular, has been written with attention to what a searcher of AMS files might be expected to want to find, and one is permitted to choose among a wide number of document areas to be searched. Perhaps more important variations concern the depth of search possible, and the kinds of documents searched. The Department and its agencies post documents in three different formats – as simple text files, as .html files (web-active), and as .pdf files (graphics-oriented files particularly suited to longer documents). Often documents are posted in more than one format, but that is not always the case. The Microsoft searcher FSIS uses appeared to be able to find text in .pdf as well as .htm files; with the Netscape searcher .pdf files of a press release character were found but not, apparently, others; and with the AMS searcher, not at all. Searches, moreover, sometimes appeared to be limited to keyword collections or summaries associated with rules or rulemaking proposals, and not the texts of the rules or proposals themselves; the Departmental, APHIS and AMS searchers repeatedly failed to find simple text phrases (“Barrel cheese prices”, “double-deck trailers”) occurring in rules or rulemaking proposals ostensibly subject to search. If one is looking for the kind of text likely to appear only in the body of a rule or a proposal, any such limitation is unfortunate.

| | USDA | AMS | APHIS | FSIS | FS | GIPSA |
|-------------------------|------------------------|--------------|------------------------|-----------|------------------------|------------------|
| Principal Search engine | Netscape Compass 3.01A | Unidentified | Netscape Compass 3.01B | Microsoft | Netscape Compass 3.01B | Full USDA search |

| | USDA | AMS | APHIS | FSIS | FS | GIPSA |
|--|--------------------------------|----------------------------|--|---------|---------------|---------|
| Help | General | Oriented to AMS issues | General | General | General | General |
| Secondary search engine(s) | USDA departmental directives | Comments in NOP rulemaking | E-FOIA search engine; Federal Register search | | FS Directives | |
| Returns .pdf files? | variable | no | variable | yes | no | mostly |
| Search full text of rules or proposed rules? | not on site | variable | no, but Federal Register searchable | yes | not on site | no |
| Search directives manuals, etc.? | Yes – separate search facility | N/A | E-FOIA search not functional; general search, no | yes | yes | no |

4) Agencies should encourage public participation in rulemaking and policy formulation on the Internet. In particular, they should

- a) Make the agency's periodic Unified Regulatory Agenda prominently available and searchable on the agency's own site;**
- b) Provide a means for interested persons to enroll for electronic notification of further developments in a matter, beginning with its announcement in the Unified Regulatory Agenda;**
- c) Post notices of proposed rulemaking on the agency's own site, and provide opportunities for electronic comment there;**
- d) At least in rulemakings likely to draw substantial public interest, also post required analyses, public comments, and other constituent elements of a rulemaking docket on the agency's web site in readily searchable form; and**

e) In posting guidance documents and other matters not requiring notice and comment rulemaking procedures, provide opportunities for seeking revision or further information.

An important recent study by the General Accounting Office explored federal agency use of information technology in rulemaking, drawing examples from five different agencies or departments (including the Department of Agriculture), reporting results and making recommendations similar to those contained herein.³⁸

Beyond transparency is a function that might be described as “warning,” activity that puts the public on notice that something of possible interest to them is under consideration. The considerable variations here have already been captured in the table on publication practice, at page 11 above, but it is perhaps worth an additional word here specifically addressed to this characteristic. Initially requiring only a simple notice of proposed rulemaking published in the Federal Register with an indication where and when comments may be filed, rulemaking procedures now embrace additional notice obligations. One of particular importance is the requirement to identify a contact person at the agency, with telephone and/or e-mail address, as early as the publication of the first agency entry into the Unified Agenda of Federal Regulations – a publication intended to occur as soon as the need for the rule is identified by the agency, and well before any formal proposal has been drafted and bureaucratically approved. As a matter of good practice, agencies propagating news of proposed rulemakings use not only the Federal Register, but also trade associations, mailing lists, and other available means of reaching those most likely to be affected and/or interested. One could argue that the impulse behind the Unified Agenda demands such a step. It is surprising, then, to find how relatively undeveloped is use of the Internet’s possibilities for delivering notice. Notices of proposed rulemaking are rarely tied to a separate, easily found listing where they can periodically be scanned. Their text is often not searched by agency search engines, because those engines search the agency site, and agencies often rely on GPO electronic Federal Register entries for matters sent to the Register for publication. The Unified Agenda is posted by only two of the six entities being compared here, and not as helpfully as might be in either case. The FSIS posting is a PDF reproduction of the Federal Register pages for the department; while the FSIS search engine searches PDF files, it returns the whole document, which one must then research internally. The APHIS link³⁹ is to an out-of-agency location,⁴⁰ so that a search using the APHIS search engine – pointed only at the APHIS site – does not include that material.⁴¹ Nor is the possibility of “signing up” for electronic (e-

³⁸GAO Report, n. 1 above.

³⁹<http://www.aphis.usda.gov/ppd/rad/published/underdev.html>

⁴⁰<http://ciir.cs.umass.edu/ua/October2000/tables/table-1.html>

⁴¹The Agenda referred to included APHIS work on a “Karnal Bunt” proposed rule; an APHIS search for words likely to be unique to that rule produced 0 results, as did a search for the proposed rule’s title. The same search can, of course, be done at GPO, where it quickly finds these items. It does not, however, seem like effective service to be referred from the responsible regulator to another’s window, even electronically. The search pages at the Department do not even post the (embarrassing) advice that if one wants to search through present or prospective regulatory activity, that must be done at the GPO. And if one could be expected to want to find *all* regulatory matter

mail) notice of matters of possible interest well developed. Among the agencies reviewed, little provision for a person to enroll for e-mail notification. AMS permits enrollment to receive *all* its press releases. It recognizes the diverse (and limited) interests of its different communities by dividing its home page among a variety of programs (Cotton, Fruit and Vegetables, etc.); a similar sensitivity in regards to notice enrollment would doubtless be welcome. APHIS uses the “Mind-it” utility to permits enrollment to receive all APHIS Rules and Notices whose description on that page includes identified keywords; this seems a very useful measure, although the limitation to words appearing on the page (in titles, etc.) may return fewer notices than would a someone registering would hope for. At the least, making the semi-annual departmental submission to the Unified Agenda – for that matter, all important Federal Register notices – searchable at the departmental or agency level would greatly improve the usefulness of the sites.

Beyond questions of transparency, too, are issues of participation. The Internet promises to enrich, some might say complicate, participation in rulemaking in a variety of ways. The simplest is by providing another means for registering a comment – relatively costless, spontaneous, and informal, commenting by e-mail or (what is essentially the same thing) by filling in a form posted at the site where a rulemaking proposal is found. That step could be expected to engender commenting by persons who in previous years would not have found out about the rulemaking and/or would not have indicated their views about it. Possibly one could see this as adding to the politicization of rulemaking, if one believes that people with technical data or detailed views to supply would have been likely to participate in any event. Yet rulemaking is not simply a technocratic exercise; moreover, in a democracy, an effective means for expanding the consulted base past the power elite is not to be scoffed at. If an agency were to go further, and make comments and other matters in the rulemaking docket available on the Internet as they are filed, the process might be further transformed. Now the rulemaker would have grounds to assume that the public would be broadly aware of what it knows and has been advised about; and commenters – even those who might previously have filed their comments conventionally – will find it much easier to make *responsive* comments. Here, too, one could imagine added cost or inconvenience; rulemaking-on-the-record and some hybrid rulemaking have acquired a poor reputation from the massiveness of the records they can generate, and the degree to which they transfer control over the rule making from agency to outsider. Yet we are not here talking about any of the characteristics of oral hearing – rights to present or to cross-examine witnesses; participants may be able to comment more fully, or more intelligently, but control, and the informality of the decision process, remain in the agency.

The AMS, among the Department of Agriculture agencies we have been considering, has been the most active (but not alone) in enlarging participation. Its practice appears to be highly variable. Thus, its proposed rulemaking to develop standards for organic produce has used the Internet fully, exposing underlying data, hearing transcripts and comments as well as proposals, generating hundreds of thousands of responses, and resulting in substantial movement from the

on Karnal Bunt, say, at the Department of Agriculture, it is an imposition to have to make (at least) two searches – one of them, away from that Department.

original proposal.⁴² AMS's dairy program appears to be conducting rulemakings in a somewhat less engaged, but still quite open fashion; comments are to be filed in paper form, but scanned files are then associated with the notice on its rulemaking page, so that the public can see them.⁴³ The fruit and vegetable program also makes comments available electronically; its notices of proposed rulemaking include hyperlinked e-mail addresses to which comments may be submitted. All of the AMS programs appear to follow one or the other pattern. APHIS, whose web-site states that it is in the course of developing more initiatives, occasionally permits electronic commenting on its rules and, when it does so, those comments (but not others) are available for inspection; APHIS also posts electronically a full list of commenters on rules, so that their identity, if not the views they expressed, is readily accessed.⁴⁴ FSIS, FS and GIPSA appear not yet to have put their feet in these waters.

5) Given the fluid character of the Internet and its use, agencies should consider means by which the possibility of access to important materials placed on the Internet can be preserved, once those materials are no longer posted there.

Impermanence is a hallmark of the Internet. Doubtless a number of the links referred to in this report will have disappeared, or their contents will have changed greatly, between the time it was written and the point at which a reader attempts to explore them. This fluidity of content is a strength of the Internet, but for people dealing with government it can also be a weakness or source of frustration. Preserving important Internet content in some form, electronic or paper, is an element essential to building citizen and governmental reliance upon it.

Respectfully Submitted,

Ronald M. Levin, Chair

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⁴²<http://www.ams.usda.gov/nop/> takes one to the current home page of the National Organic Program, largely concerned with matters involved in the second stage of the rulemaking. A brief account of the first stage used to be at <http://www.govexec.com/tech/award/98awards.htm>; but cannot be accessed any more; the same is true of the initial body of comments – 101,885 individual comments and 173,718 form letters and postcards – at <http://www.ams.usda.gov/nop/view.htm>.

⁴³See <http://www.ams.usda.gov/dairy/dockets.htm>.

⁴⁴<http://www.aphis.usda.gov/ppd/rad/comrearm.htm>