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## Federal Register 2.0: Public Participation in the Twenty-First Century

Lauren R. Dudley  
ld3137a@american.edu

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## FEDERAL REGISTER 2.0: PUBLIC PARTICIPATION IN THE TWENTY-FIRST CENTURY

LAUREN R. DUDLEY<sup>1</sup>

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### INTRODUCTION

On July 26, 2010, the Office of the Federal Register and the Government Printing Office (GPO) launched "Federal Register 2.0," a web version of the daily *Federal Register*.<sup>2</sup> As of now, the site is only a prototype; therefore, "Federal Register 2.0" is not yet an official legal edition of the *Federal Register*, and it will not become official until the Administrative Committee of the Federal Register (ACFR) issues a regulation granting "Federal Register 2.0" official legal status.<sup>3</sup> Once "Federal Register 2.0" becomes official, the website will allow the public to receive notice of proposed agency regulations, link to a separate

<sup>1</sup> J.D. Candidate 2012, American University Washington College of Law; B.A. 2009, with Honors in Government & Politics, University of Maryland, College Park. Special thanks to my parents for serving as my first law mentors and to the editors of the *Legislation & Policy Brief* for all of their work guiding me through the writing process and preparing this piece for publication.

<sup>2</sup> See OFFICE OF THE FEDERAL REGISTER, <http://www.federalregister.gov> (last visited Nov. 22, 2010). The *Federal Register* is a daily production of executive agency documents. THE OFFICE OF THE FEDERAL REGISTER, A BRIEF HISTORY COMMEMORATING THE 70<sup>TH</sup> ANNIVERSARY OF THE PUBLICATION OF THE FIRST ISSUE OF THE FEDERAL REGISTER 2 (2006) [hereinafter BRIEF HISTORY].

<sup>3</sup> See FEDERAL REGISTER 2.0 LEGAL STATUS, <http://www.federalregister.gov/legalnotice> (last visited Nov. 22, 2010).

website to submit comments on the proposed rules, and track the status of regulations online in one easy-to-access location.<sup>4</sup> The creation of “Federal Register 2.0” signifies a major change to the format and use of the *Federal Register* as the primary method of lawmaking for the executive branch. Before such a substantial change is made, requiring input and advice from all three branches of government would substantially aid the transition.

To many, the *Federal Register* may go unnoticed and even be taken for granted.<sup>5</sup> During the 111th Congress, members of Congress introduced only a few bills that would change the administrative procedure laws associated specifically with the *Federal Register*.<sup>6</sup> Also, very few cases dealing with the notice and comment requirements for agency regulations have come before the Supreme Court.<sup>7</sup> This could lead one to believe that executive branch lawmaking is straightforward and does not require the intervention of the other branches of government. In the absence of action from the legislative branch, the creation and official implementation of “Federal Register 2.0” raises a few questions. The first question is whether it is appropriate for the department that makes general policies regarding the format of submissions to the *Federal Register* to be able to submit its own proposed regulation to itself and therefore oversee the notice and comment requirements over its own regulation.<sup>8</sup> Another question is whether having the processes of the *Federal Register* in an electronic medium will lead to increased litigation in the courts. Finally, with the potential for more openness and participation in government, will “Federal Register 2.0” and the agencies be able to handle the probable increase in use, or wil-

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<sup>4</sup> *Id.* See also Office of the Federal Register, Special Features of the FederalRegister.gov Website, <http://www.federalregister.gov/policy/user-information> (last visited Nov. 22, 2010) (informing site users that “Federal Register 2.0” will allow users to press a button to “Submit a Formal Comment” on items open for comment whereby the user will be directed to the relevant page of Regulations.gov).

<sup>5</sup> See generally Colleen R. Courtrade, Annotation, *What Rules, Statements, and Interpretations Adopted by Federal Agencies Must be Published*, 77 A.L.R. FED. 552 (1986) (stating that much of the litigation actually concerns the Freedom of Information Act).

<sup>6</sup> In the 111th Congress two such bills were introduced: S. 2929, “A Bill to Temporarily Extend the Programs under the Higher Education Act of 1965,” and H.R. 3396, the “Sales Tax Fairness and Simplification Act.” However, the Administrative Procedure Act, which governs what agencies must disseminate and publish, has been amended several times, including in the 109th Congress. See Administrative Procedure Act, 5 U.S.C. §551 *et seq.* (2006); see, e.g., Freedom of Information Act, 5 U.S.C. §552 (2006).

<sup>7</sup> See generally Executive Order Integrity Act of 2009, S. 2929, 111th Cong. (2009); Congressional Responsibility and Accountability Act, H.R. 3396, 111th Cong. (2009); Courtrade, *supra* note 4 (only one Supreme Court case is cited in the Annotation).

<sup>8</sup> See FEDERAL REGISTER 2.0 LEGAL STATUS, *supra* note 2 (stating that ACFR must first enact a regulation for “Federal Register 2.0” to become official); see also 44 U.S.C. § 1501 (2000) (defining a “document” as any order issued by a federal agency).

lit become necessary for Congress to step in and reform the notice and comment rules?<sup>9</sup>

This article will try to answer these questions, and will first look at the history of the legislation that initiated and regulates the *Federal Register* and the associated methods of creating administrative law. The answers to the questions will be found both in this history as well as in the changes our own society has made in the years since the passage of the legislation that created the *Federal Register*, the Federal Register Act of 1935.<sup>10</sup>

## I. BACKGROUND/LEGISLATIVE HISTORY

### A. FEDERAL REGISTER ACT OF 1935

The *Federal Register* was not the first compilation of agency rule notification.<sup>11</sup> On April 13, 1917, President Woodrow Wilson established the Committee on Public Information in response to the lack of a national newspaper that could express the views of the nation's affairs.<sup>12</sup> Less than one month later, a publication called the *Official Bulletin of the United States* was published; it featured presidential statements, pronouncements, and addresses concerning the First World War and every order, pronouncement, and regulation issued by the departments and some of the independent agencies.<sup>13</sup> The last issue was published just two years later after a decline in readership.<sup>14</sup> Soon after, President Wilson also stopped all Committee on Public Information actions.<sup>15</sup>

The Federal Register Act (the Act) was passed on July 26, 1935 with the purpose of creating an efficient and organized publication and distribution process for executive lawmaking.<sup>16</sup> The Act was primarily a result of Roosevelt's New Deal; because of the increase in the number

<sup>9</sup> Compare GOVERNMENT PRINTING OFFICE, [www.gpoaccess.gov](http://www.gpoaccess.gov) (last visited Nov. 24, 2010) with OFFICE OF THE FEDERAL REGISTER, [www.federalregister.gov](http://www.federalregister.gov) (last visited Nov. 22, 2010) (While the latter is organized by topic and agency with highlights on the opening screen, but the former requires one to use search terms and does not feature a browse function).

<sup>10</sup> Federal Register Act of 1935, 44 U.S.C. §§ 1501-11 (2000).

<sup>11</sup> See Harold C. Relyea, Cong. Research Serv., The Federal Register: Origins, Formulation, Realization, and Heritage, Prepared Remarks Delivered at the National Archives and Records Administration for the 75th Anniversary of the Federal Register 2 (Sept. 15, 2010), available at [http://www.federalregister.gov/learn/fr\\_origins.pdf](http://www.federalregister.gov/learn/fr_origins.pdf) (acknowledging that there was a predecessor to the Federal Register called the *Official Bulletin of the United States* created under the direction of President Woodrow Wilson during the First World War).

<sup>12</sup> *Id.* at 1 (citing President Wilson's book *Constitutional Government in the United States*, in which he writes "[o]ne of the greatest disadvantages that public opinion labors under in the United States is that we have no national newspaper, no national organ of opinion").

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (stating that circulation was 60,000 in May, 1917; 115,000 in October, 1918; and 33,000 in May, 1919).

<sup>16</sup> See H.R. REP. NO. 74-280, at 2 (1935) [hereinafter Federal Register Act Report] ("[O]fttimes, these rules and regulations prescribe penalties. It is difficult at times to find out what they are . . . as to their publication and distribution, there is utter chaos."); see also Federal Register Act of 1935, 44 U.S.C. §§ 1501-11 (2000).

of agencies and the number of executive orders and regulations published, the Act was proposed.<sup>17</sup> Prior to the legislation, there were a large number of regulations that were scattered among the agencies and thus, difficult to find and enforce.<sup>18</sup> The law stood on its own until 1968 when it was revised, simplified, and codified.<sup>19</sup> Both the House and Senate versions of the Act were delegated to the committees on the Judiciary.<sup>20</sup>

#### B. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION ACT OF 1984

The National Archives and Records Administration Act of 1984 (the NARA Act) was passed to create the National Archives and Records Administration as an independent agency.<sup>21</sup> In addition to making the body an official agency, the NARA Act also gives the Archivist the authority to determine what a record is and requires public notice before a record is destroyed.<sup>22</sup> Interestingly, this piece of legislation was brought before the House Committee on Government Affairs instead of the House Committee on the Judiciary.<sup>23</sup> Therefore, at this point in time, *the Federal Register* and the National Archives and Records Administration were subject to the oversight of two different committees in the House of Representatives.

#### C. INTERPLAY OF ADDITIONAL LAWS, INCLUDING THE ADMINISTRATIVE PROCEDURE ACT

Since the passage of the Federal Register Act, there have been many related laws passed by Congress that relate to the goal of openness of

<sup>17</sup> See Federal Register Act Report, *supra* note 15, at 1 (providing the example that President Roosevelt issued 1400 pages of executive orders between March, 1933 and June, 1934); see also Relyea, *supra* note 10, at 1 (suggesting that the Federal Register was a response to those opposed to the expanding bureaucracy and increased administrative laws resulting from the New Deal).

<sup>18</sup> See Federal Register Act Report, *supra* note 15, at 2; see also *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (holding that Congress has the power to delegate its legislative powers to the executive branch but the regulations at issue in the case were invalid due to lack of notice); Erwin N. Griswold, *Government in Ignorance of the Law – A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204 (1934) (presenting data as evidence of the large volume of regulations and orders issued and recommending that there be a publication of rules and regulations to be established by statute).

<sup>19</sup> H.R. REP. NO. 90-1719, at 1 (1968) [hereinafter Federal Register Codification Report]; see 44 U.S.C. §§ 1501-11 (2000).

<sup>20</sup> See Federal Register Codification Report, *supra* note 17, at 1; Federal Register Act Report, *supra* note 15, at 1.

<sup>21</sup> H.R. REP. NO. 98-707, at 1 (1984) [hereinafter NARA Act Report].

<sup>22</sup> *Id.* at 2; see ACFR Definitions, 1 C.F.R. § 1.1 (2010) (defining a document as including “[a]ny Presidential proclamation or Executive order, and any rule, regulation, order, certificate, code of fair competition, license, notice, or similar instrument issued, prescribe, or promulgated by an agency.”).

<sup>23</sup> See Federal Register Act Report, *supra* note 15, at 1 (stating that the report was submitted by the Committee on the Judiciary); Federal Register Codification Report, *supra* note 17, at 1 (stating that the bill for which the report was compiled was referred to the Committee on the Judiciary); NARA Act Report, *supra* note 19, at 1 (stating that the bill had been referred to the Committee on Government Operations).

government and to the delegation of Congress's powers. The first of these acts is the Administrative Procedure Act (APA) of 1946.<sup>24</sup> The APA was drafted to provide an outline of "minimum basic essentials" that would apply to all agencies as a whole.<sup>25</sup> One of the key provisions of the APA requires agencies to issue rules containing certain information and standard rulemaking procedures.<sup>26</sup> The APA has since undergone many revisions. One of the most visible revisions is embodied in the Freedom of Information Act, which mandates disclosure, and in certain instances publication in the *Federal Register*, of certain agency documents.<sup>27</sup> Another related law is the Congressional Review Act (CRA), which requires agencies to submit to both houses of Congress a copy of any covered rule before it becomes law.<sup>28</sup> Congress then has the power to disapprove the law, and the law does not become effective.<sup>29</sup> Other acts include the Government in the Sunshine Act and the E-Government Act of 2002.<sup>30</sup>

## II. ANALYSIS/ARGUMENT

### A. SHOULD THE BODY THAT MANAGES THE *FEDERAL REGISTER* BE PERMITTED TO DECIDE ITS NEW FORMAT?

"Federal Register 2.0" will become an official version of the *Federal Register* once the Administrative Committee of the Federal Register

<sup>24</sup> See BRIEF HISTORY, *supra* note 1, at 6 (2006) (stating that the Administrative Procedure Act established the requirements that federal agencies publish notices of proposed rules and allow for public comment); see also TOM C. CLARK, ATTORNEY GENERAL, UNITED STATES DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947) reprinted in FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 46 (William F. Funk et al, eds., 4th ed. 2008) (listing the four goals of the APA, which coincide with those of the Federal Register Act: (1)"to require agencies to keep the public currently informed if their organization, procedures, and rules," (2)"to provide for public participation in the rule making process," (3)"to prescribe uniform standards for the conduct of formal rule making . . . and adjudicatory proceedings," and (4)"to restate the law of judicial review"); cf. Administrative Procedure Act of 1946, 60 Stat. 237. (1946).

<sup>25</sup> See S. REP. No. 79-752, at 6-7 (1945).

<sup>26</sup> *Id.* at 7-9.

<sup>27</sup> See Freedom of Information Act, 5 U.S.C. § 552(a)(1) (2009); see also H.R. REP. No. 93-1380, at 12-13 (1974)(expanding the agency definition to include agencies entities falling under 5 U.S.C. § 551 and government corporations, such as the U.S. Postal Service).

<sup>28</sup> See Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies' Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907, 908 (2010); see also 5 U.S.C. §§ 801-08 (2006) (the codified version of the Congressional Review Act); MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: A BRIEF OVERVIEW AND ASSESSMENT AFTER FIVE YEARS 2 (describing the congressional review process).

<sup>29</sup> See ROSENBERG, *supra* note 27, at 2-5 (describing the various methods by which a rule may fail to become effective).

<sup>30</sup> See Government in the Sunshine Act, 5 U.S.C. § 552b (2000); E-Government Act of 2002, Pub. L. No. 107-374 (2003) (codified as amended in scattered sections of titles 5, 10, 13, 31, 40, 41, and 44 of the U.S.C.); see also COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING, A REPORT TO CONGRESS AND THE PRESIDENT <sup>26</sup> (2008) (describing the E-Government Act as a tool to aid in the initial transitions of making agency rules available in an electronic format).



(ACFR) issues a regulation granting it legal status.<sup>31</sup> Congress has given the ACFR the power to create regulations concerning the “manner and form” in which the *Federal Register* is distributed.<sup>32</sup> Congress has also required that agencies publish certain documents in the *Federal Register*, including agency rules of procedure,<sup>33</sup> substantive rules,<sup>34</sup> and any amendments, revisions, or repeals of those rules.<sup>35</sup> The adoption of “Federal Register 2.0” would likely be considered within the category of a substantive rule or an amendment, and thus the move to an electronic medium for the publication of the *Federal Register* would be within the powers delegated by Congress to the ACFR.

In addition to the general publication requirements placed on agencies, Congress has also mandated that in the absence of publication “actual and timely notice” be given to the public before an agency-made law can take effect.<sup>36</sup> The initial publication of a regulation in the *Federal Register* can serve as a notice of hearing.<sup>37</sup> For “Federal Register 2.0” to become official, ACFR and the Government Printing Office (GPO) admit that they must follow normal regulation procedures, which would include the required notice and comment period.<sup>38</sup> This can be accomplished through the current print edition of the *Federal Register*.<sup>39</sup> Problems could arise when “Federal Register 2.0” becomes an official means by which the notice and comment requirement is carried out. The portions of the United States Code that are devoted to laws governing the operation of the *Federal Register* and agencies’ publication obligation do not specifically give ACFR the authority to deter-

<sup>31</sup> Federal Register 2.0 Legal Status, *supra* note 2.

<sup>32</sup> See 44 U.S.C. § 1506(3) (2000) (“[T]he Administrative Committee of the Federal Register . . . shall prescribe, with the approval of the President, regulations for carrying out this chapter. The regulations shall provide, among other things . . . (3) the manner and form in which the Federal Register shall be printed, reprinted, compiled, indexed, bound, and distributed.”).

<sup>33</sup> See 5 U.S.C. § 552(a)(1)(C) (2000) (“Each agency shall . . . publish in the Federal Register . . . (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope or contents of all papers, reports, or examinations.”).

<sup>34</sup> See 5 U.S.C. § 552(a)(1)(D) (2000) (Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.”).

<sup>35</sup> See 5 U.S.C. § 552(a)(1)(E) (2000) (“Each amendment, revision, or repeal of the foregoing.”); see also Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 480 (2010) (stating that there are three broad categories of agency rulemaking recognized by the APA: substantive rules, interpretative rules, and procedural rules).

<sup>36</sup> See 5 U.S.C. § 552(1) (2000) (“Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.”). See generally *Morton v. Ruiz*, 415 U.S. 199 (1974) (enforcing 5 U.S.C. § 552 (a)(1)(D)).

<sup>37</sup> See 44 U.S.C. § 1508 (2000) (“[A] notice of hearing or of opportunity to be heard . . . shall be deemed to have been given . . . when the notice is published in the Federal Register . . .”).

<sup>38</sup> Federal Register 2.0 Legal Status, *supra* note 2.

<sup>39</sup> The Office of the Federal Register and NARA have gone through this process on previous occasions, and the subsequent regulations are codified in Title 1, Chapter 1 of the Code of Federal Regulations. 1 C.F.R. §§ 1-51 (2010).

mine how the notice and comment period is to be governed.<sup>40</sup> This can mean one of two things: 1) even though Congress has not explicitly included this authority in its laws, it can be implied when the sections comprising the Federal Register Act and Administrative Procedure Act/Freedom of Information Act are read together,<sup>41</sup> or 2) if Congress wished to grant authority to the ACFR, it would have codified it as such.<sup>42</sup> This outcome will be determined either when the regulation is submitted to Congress or if litigation is brought before the federal courts.

The CRA requires federal agencies to submit to Congress a copy of the rule they are creating, a statement as to whether it is considered a “major rule” under the Act, the proposed effective date, and any required analyses.<sup>43</sup> While there has been evidence of agencies not complying with the Congressional Review Act,<sup>44</sup> this Act gives Congress the opportunity to become involved in the federal agency rulemaking process. The addition of an electronic medium for the *Federal Register* would likely be considered a substantive change, and therefore the ACFR should submit a copy of the proposed regulation to Congress in accordance with the Congressional Review Act. If the ACFR complies with the Congressional Review Act and submits a copy of the proposed regulation to Congress, Congress would then be involved, and the issue of making such a substantive change to the *Federal Register*, which affects all of the federal agencies’ rulemaking processes, would become less problematic. Congress can give explicit approval through legislation or a joint resolution; it can also give tacit approval by not saying anything or not taking any actions with regard to the new medium of the *Federal Register*. Making such a submission may also raise a red flag to Congress and encourage its action.

Some argue that most of the regulations enacted by agencies should actually be enacted by Congress, and therefore, Congress’s delegation of their legislative powers to the agencies is improper.<sup>45</sup> However, as

<sup>40</sup> See 44 U.S.C. §§ 1501-11 (2000).

<sup>41</sup> See *id.*; 5 U.S.C. § 552(a) (2000).

<sup>42</sup> See generally *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (describing the process the Court will follow when defining which rules are affected by the Administrative Procedure Act), distinguished by *AT&T v. FCC*, 582 F.3d 490 (3rd Cir. 2009).

<sup>43</sup> See Croston, *supra* note 27, at 908 (describing the requirements of the Congressional Review Act); see also 5 U.S.C. §§ 801(a)(1)(A)(i)-(B)(iv).

<sup>44</sup> See Croston, *supra* note 27, at 908 (revealing that the Congressional Research Service reported that between 1998 and 2008 agencies failed to submit 1,000 substantive rules to Congress).

<sup>45</sup> See S. REP. NO. 79-752, at 1 (noting that administrative law is not mentioned in the Constitution). But Cf. *Kennecott Utah Copper Corp. v. United States Dept. of the Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996) (reaffirming that Congress has the power to delegate certain authorities to agencies). While *Kennecott Utah Copper Corp.* is not a Supreme Court decision, opinions issued by the D.C. Circuit with regards to federal administrative law are very important and persuasive. See generally Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2, 19 (2009) (observing that the D.C. Circuit’s decisions are the most important regarding federal administrative law).



described in the previous paragraph, Congress has explicitly granted federal agencies certain regulatory functions in the pieces of legislation it passes<sup>46</sup> and by providing an oversight function through the CRA.<sup>47</sup>

#### B. THE IMPACT OF A TRANSITION TO AN ELECTRONIC MEDIUM

In the last decade there has been a substantial shift to electronic mediums in the legal field. One of the most visible shifts is the adoption of electronic filing in federal and state courts across the United States. Any submissions to the *Federal Register* from federal agencies and departments may also be done electronically.<sup>48</sup> At this time, however, the official *Federal Register* publications are the print version and the GPO's electronic PDF format.<sup>49</sup> Until "Federal Register 2.0" becomes official, any comments to certain agencies may be submitted electronically through [www.regulations.gov](http://www.regulations.gov).<sup>50</sup> Moving the *Federal Register* into a fully functional and interactive electronic medium could do either (1) or (2) or both: 1) create complications for gathering all of the comments and merging them with those submitted in print,<sup>51</sup> 2) increase the public's awareness of and participation in agency rulemaking.<sup>52</sup>

Regulations.gov has provided the public with notice of some agency rules and the opportunity to comment on these rules.<sup>53</sup> Members of

<sup>46</sup> See 5 U.S.C. § 553(b)(2) (2000) (stating that agencies must publish a "reference to the legal authority under which the rule is proposed").

<sup>47</sup> 5 U.S.C. § 801 (2006).

<sup>48</sup> See CFR Preparation and Transmittal of Documents Generally, 1 C.F.R. §§ 18.1, 18.3 (2010) (requiring each agency to send an original and two duplicate originals, or certified copies, to the Director of the Federal Register for approval); see also Michael L. White, *Revisions to the Office of Federal Register Document Drafting Handbook*, Federal Register Bulletin, Aug. 18, 2010, available at <http://www.archives.gov/federal-register/write/newsletter/> (last visited Nov. 22, 2010) (informing agencies that the Office of the Federal Register will only accept electronic submissions in MS Word format).

<sup>49</sup> See ACFR Subscriptions, 1 C.F.R. § 11.2 (2010) (describing subscription formats).

<sup>50</sup> See generally [www.regulations.gov](http://www.regulations.gov) (last visited Nov. 22, 2010) (maintaining a website maintained by the Environmental Protection Agency whereby member agencies can post proposed regulations and receive comments from the public)[hereinafter Regulations.gov]. See also COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, *supra* note 28, at 17 (identifying the Environmental Protection Agency as a managing partner of Regulations.gov).

<sup>51</sup> See generally Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. AM. U. 451 (2010) (presenting the results of a questionnaire completed by agency rulemakers comparing the use of an electronic medium to a print medium for the collection and analysis of public comments). So far there have been few difficulties with Regulations.gov, but this could change with "Federal Register 2.0", which will affect more agencies.

<sup>52</sup> See *id.* at 453 (listing benefits of e-rulemaking as including increased opportunities for and easier information dissemination, public participation, and governmental transparency).

<sup>53</sup> See Regulations.gov, About Us, <http://www.regulations.gov/search/Regs/home.html#aboutProgram> [hereinafter Regulations.gov About Us] ("In 2003, the eRulemaking program launched the Regulations.gov Web site to enable citizens to search, view, and comment on regulations issued by the U.S. government.") [hereinafter Regulations.gov About Us]; see also Regulations.gov, Regulations: The Basics, Frequently Asked Questions, [http://www.regulations.gov/search/Regs/FactSheet\\_Regulations\\_The\\_Basics.pdf](http://www.regulations.gov/search/Regs/FactSheet_Regulations_The_Basics.pdf) (listing the actions members of the public can take on the Regulations.gov website) [hereinafter Regulations.gov The Basics].

the public can do the following on the website: 1) search for a regulation, 2) submit a comment on a regulation or on another comment, 3) submit an application, petition, or adjudication document, 4) sign up for email alerts about specific regulation, 5) quickly access certain regulations directly from the home page, and 6) subscribe to RSS feeds by agency of newly posted *Federal Register* notices.<sup>54</sup> The website was created as part of the e-Rulemaking initiative following the Bush Administration's publication of its E-Government Strategy.<sup>55</sup> The Environmental Protection Agency (EPA) initiated the website, and all executive agencies have been required to join.<sup>56</sup> Regulations.gov is not funded by Congress.<sup>57</sup>

The major difference between the Regulations.gov website and the FederalRegister.gov website will be that only the FederalRegister.gov website will be an official site containing regulations, rules, and proclamations from all of the agencies that currently publish in the print version of the *Federal Register*.<sup>58</sup> The Office of the Federal Register will likely use its authority to enforce publication and codification requirements in the new electronic version, as well.<sup>59</sup>

During a move towards an online process, opportunities for online participation will be increased. The greatest impact that the *Federal Register's* transition into an electronic medium will have is in giving broader access to the notice of agency rules, and therefore increasing participation in the rulemaking process.<sup>60</sup> One existing fear is politicization of the federal agency rulemaking process.<sup>61</sup> Instead of the rulemaking process being used to create regulations that are non-partisan and in furtherance of some delegation of Congress's power, the

<sup>54</sup> See Regulations.gov The Basics, *supra* note 51.

<sup>55</sup> See COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, *supra* note 28, at 3 (stating that the E-Government Strategy included the creation of an "online rulemaking management system").

<sup>56</sup> See *id.* at 3 (stating that more than 170 rulemaking entities in 15 Cabinet Departments and some regulatory commissions use the electronic databases created as a result of the E-Government Strategy); see also 5 U.S.C. § 105 (2006) (defining an executive agency for purposes of Title 5 as meaning "an Executive department, a Government corporation, and an independent establishment").

<sup>57</sup> See COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, *supra* note 28, at 3 (stating that the initiative is funded by the participating agencies); see also 5 U.S.C. § 105 (2006).

<sup>58</sup> See [www.federalregister.gov](http://www.federalregister.gov), *supra* note 1.

<sup>59</sup> See *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1204 (D.C. Cir. 1996) (determining whether the Federal Register Act required the publication of the regulation at issue and holding that the Act did require its publication and that the Office of the Federal Register has the authority to create requirements for publication and codification in the Federal Register).

<sup>60</sup> See Lubbers, *supra* note 50, at 454 (stating that there are two purposes of e-rulemaking: (1) informational purpose, and (2) participatory purpose).

<sup>61</sup> See *id.* at 456 (presenting a theory proposed by Professor Michael Herz that public comments may begin to resemble those currently sent to members of Congress and could be treated by federal agencies in a similar way as they are by congressional staff members, which would amount to the comments being classified as "for" or "against" rather than the content of the comment being incorporated into the final rule). But Cf. Michael Herz, *Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2002–2003 at 129, 148–49 (Jeffrey S. Lubbers ed., 2004) (presenting the "congressional treatment" theory).

rulemaking process could become more influenced by outside groups that may oppose regulations for solely partisan reasons, or other self-interested reasons, and not for their specific content or feasibility.<sup>62</sup> It may also lead to the use of “form-letter” comments, whereby members of the public submit a letter drafted by an outside organization rather than specifically drafted by themselves.<sup>63</sup> An increased number of comments may lead to the imposition of a tally system, whereby comments are categorized as “for” or “against” a regulation rather than read and incorporated for substance, in agency offices, or to the hiring of new staff.<sup>64</sup> If the agencies decide to engage in a tally system, then the rulemaking process may more resemble the legislative process in Congress.<sup>65</sup> If agencies decide that they need to hire more staff to analyze the comments, then the involvement of Congress may be required to fund these additional positions.<sup>66</sup>

#### C. FEDERAL REGISTER 2.0’S CONTRIBUTION TO OPENNESS IN GOVERNMENT, AND HOW CONGRESS CAN ENHANCE THIS OPENNESS

Since the passage of the Federal Register Act of 1935, Congress has passed a variety of laws meant to increase the public’s access to the federal government and the laws it creates and enforces.<sup>67</sup> As discussed,

<sup>62</sup> See Lubbers, *supra* note 50, at 456.

<sup>63</sup> See Elizabeth Garrett, *Political Intermediaries and the Internet “Revolution”*, 34 LOY. L.A. L. REV. 1055, 1064-65 (2001) (describing mass mailing directed at congressional offices, whereby members of Congress will receive thousands of post cards or form letters from constituents and, in return, the constituent will often receive a form letter signed by autopen or an intern; and noting that the initial letter is often seen as “artificial” because the sender would not have sent a letter “in the absence of a prod” from an interest group). In congressional offices, several letters, emails, and faxes are in this format. On a given day the office will receive several letters, which are the same, but the only difference between them is the name and address of the sender.

<sup>64</sup> *Id.* at 1064 (explaining that the “form letters” received in congressional offices are counted and the tallies are reported to the member of Congress). As an intern in a congressional office, I witnessed the necessity for taking tallies on legislation that received a lot of comments from constituents because of the high volume of calls, letters, faxes, and emails that would come into the office and the limited staff inherent in a congressional office.

<sup>65</sup> See Criddle, *supra* note 34, at 478 (suggesting that federal regulators should share a fiduciary relationship with the population in a similar fashion to that between members of Congress and their constituents, which requires “a thorough investigation of regulatory problems, obligating regulators to gather relevant information, consider advice and criticism from interested parties, solicit input from experts, and rationally assess the merits of alternative policies”); see also Garrett, *supra* note 62, at 1065 (proposing that mass e-mails are treated the same way as other form letters, and rarely make it to the member of Congress; however e-mail has allowed for easier and more personal communication at the same time and these messages are given more weight by lawmakers than other mass mailings).

<sup>66</sup> Because funding for agencies is appropriated by Congress, the hiring of more staff may require an agency to request more money to do so, and this would likely be granted by Congress in an appropriations bill. See, e.g., ACFR Services to Federal Agencies: Reproduction and Certification of Copies of Acts and Documents, 1 C.F.R. § 15.4 (stating that the Director of the Federal Register will furnish copies of original acts and documents filed with the Office at cost “unless funds are appropriated for that purpose”).

<sup>67</sup> See CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 31 (2008) (listing subsequent legislation including the Administrative Procedure Act and the Paperwork Reduction Act).

one reason Congress passed the Federal Register Act was to organize and make available the regulations the public was expected to follow.<sup>68</sup> By placing the *Federal Register* in an electronic, online medium, the public may become more inclined to participate in the rulemaking process. For the general public, the print version of the *Federal Register* is not very accessible because the document is not as available as a commercial newspaper, but rather is primarily only available at congressional offices, federal executive agency offices, law offices, and libraries.<sup>69</sup> Moreover, the official online version of [gpoaccess.gov](http://gpoaccess.gov), provided by the GPO, can sometimes be difficult to navigate if the searcher does not know the official title of the regulation or the exact date on which the regulation was published in the print version of the *Federal Register*.

Compared to what is currently in official use, “Federal Register 2.0” is easier to use for those with computer access. From the main page of the website, one can see how many rules have been proposed on a particular date and can look at recent proposed rules sorted by agency or by type of regulation.<sup>70</sup> This will allow more people to be put on notice of the regulations and will make them more likely to become involved in the rulemaking process. For example, if a member of the public is looking at one rule, he or she may happen upon another rule and feel inclined to comment. “Federal Register 2.0” also resembles [Regulations.gov](http://Regulations.gov) in its layout and accessibility, allowing for an easy transition.<sup>71</sup> Therefore, the goals of the original Federal Register Act will be furthered.<sup>72</sup>

“Federal Register 2.0” may be less prone to litigation if Congress passes some legislation that shows its approval of the program. The courts have already accepted the ability of Congress to delegate its power to legislate to the agencies and departments it has created, and the creation of the *Federal Register* was one such delegation.<sup>73</sup> However, because federal agencies and departments are required to use the *Federal Register* to publish regulations, it would appear that actions taken by the ACFR and the Office of the Federal Register affect more

<sup>68</sup> See Federal Register Act Report, *supra* note 15, at 2.

<sup>69</sup> See ACFR Subscription by the Public, 1 C.F.R. § 11.1 (stating that the *Federal Register* and *Code of Federal Regulations* are not available for free distribution to the public).

<sup>70</sup> Office of the Federal Register, [www.federalregister.gov](http://www.federalregister.gov) (last visited Nov. 22, 2010).

<sup>71</sup> Compare <http://www.Regulations.gov> (last visited Nov. 22, 2010), with Office of the Federal Register, [www.federalregister.gov](http://www.federalregister.gov) (last visited Nov. 22, 2010) (each featuring proposed and final rules organized by topic and agency along with guides to the use of the website).

<sup>72</sup> See Federal Register Act Report, *supra* note 15, at 2 (citing the alleviation of chaos and the creation of an orderly regulatory process as goals of the Federal Register Act).

<sup>73</sup> See 4 U.S.C. § 1506 (granting the Administrative Committee of the Federal Register the authority to prescribe regulations concerning the manner of certification of copies submitted to the *Federal Register*, documents to be published in the *Federal Register*, how the *Federal Register* will be printed and distributed, number of copies of the *Federal Register* available, and the prices of the *Federal Register*); see also 1 C.F.R. § 1 (citing 44 U.S.C. § 1506 (1972) as authority for the rules and regulations issued by the Office of the Federal Register and NARA through the Administrative Committee of the Federal Register).

than one agency, and, thus, Congress should become more involved in its operation and provide more oversight.<sup>74</sup> Two ways Congress could do this would be by either amending the *Federal Register* printing requirements in Sections 1501 to 1511 of Title 44 of the U.S. Code or by amending the mandatory notice requirements in Section 552(a) of Title 5 of the U.S.C.<sup>75</sup>

One of the main purposes of legislation to amend either of these titles would be to bring attention to “Federal Register 2.0” and to allow for more direct input from lawmakers on its implementation. Portions of the U.S.C. are often referenced by their popular name. By giving a popular name to any amendment, the public and the agencies are more cognizant of it. “Federal Register 2.0” could, therefore, have a more recognizable impact.

### III. RECOMMENDATIONS

#### A. CONGRESSIONAL ACTIONS

Congress should take the action necessary to make “Federal Register 2.0” an official version of the *Federal Register*. There are a variety of actions that it can take to achieve this. In his speech celebrating the seventy-fifth anniversary of the *Federal Register*, Harold Relyea of the Congressional Research Service noted that the precursor to the Office of the Federal Register, the Committee on Public Information, was not mandated by congressional legislation and only lasted for less than two years.<sup>76</sup> On the other hand, Congress passed the Federal Register Act, which created an agency and a publication that has lasted seventy-five years. This would suggest that congressional action has a longer impact.<sup>77</sup>

Another option for Congress would be passage of a joint resolution stating its recognition and its approval of the *Federal Register* in an official electronic format. A joint resolution would show explicit approval by Congress. In turn, this would add legitimacy to “Federal Register 2.0” and exemplify Congress’s commitment to openness in government.

Even if Congress does not pass relevant legislation, having members of Congress provide greater oversight of the publication process

<sup>74</sup> See, e.g., Agency Representatives, 1 CFR § 16.1 (2010) (directing all agencies to designate a liaison officer, certifying officer, authorizing officer, and an alternate for each position and informing executive agencies of the duties of each of these individuals).

<sup>75</sup> See generally 44 U.S.C. §§ 1501–1511 (2000) (codified version of the Federal Register Act); 5 U.S.C. § 552(a) (2000) (codified version of the Administrative Procedure Act and its amendments).

<sup>76</sup> See Relyea, *supra* note 10, at 2 (stating that the Committee on Public Information was mandated by a presidential order, was not directly funded by Congress, and was resistant to congressional interference).

<sup>77</sup> See Griswold, *supra* note 17, at 204 (emphasizing the importance of a publication being established by statute and not executive order). See generally *Panama Ref. Co. v. Amazon Petroleum Corp.*, 293 U.S. 388 (1935).



would be beneficial. One could argue that such oversight would constitute approval of the *Federal Register* in an electronic format.

#### B. OFFICE OF THE FEDERAL REGISTER AND THE ADMINISTRATIVE COMMITTEE OF THE FEDERAL REGISTER ACTIONS

The Office of the Federal Register has already announced that “Federal Register 2.0” will not be official until the ACFR issues a regulation granting “Federal Register 2.0” its official legal status.<sup>78</sup> This means that the Administrative Committee of the Federal Register will, and should, follow the policies and rules it has set forth for publication of the proposed rule, maintenance of the comment period, and publication of the final rule.<sup>79</sup> While this has not yet happened, it has been indicated that this is the route that will be undertaken by the Committee.<sup>80</sup> This would be the quickest and most efficient way to make “Federal Register 2.0” official.

The ACFR and the President of the United States should also make specific requests for funding for “Federal Register 2.0” in their budget requests to Congress. If it is in the President’s proposed budget, then Congress will need to make a decision as to whether it should receive funding. A vote to fund “Federal Register 2.0” would show congressional approval of the electronic publication of the *Federal Register*.

#### C. ACTIONS UNDERTAKEN BY MEMBERS OF THE PUBLIC

Members of the public can take a variety of actions both before and after “Federal Register 2.0” becomes official for an assortment of purposes and with a range of results. The most direct thing a member of the public can do, whether he or she supports or opposes the granting of “official status” to “Federal Register 2.0,” is to contact members of Congress and inform them of their position. Informing their representatives will put the issue on the radar of Members of Congress and their staffs, who are busy making decisions and taking action on a multitude of issues at any given time. This could encourage a member of Congress to introduce a piece of legislation granting or supporting the publication of the *Federal Register* in an electronic medium, to hold a hearing on the subject of agency rulemaking in general, or to contact the ACFR, Office of the Federal Register, and GPO to find out how the process is being carried out. This contact would essentially force Congress to make some type of evaluation of the issue and even reeval-

<sup>78</sup> See Federal Register 2.0 Legal Status, *supra* note 2.

<sup>79</sup> See generally Robert W. Hahn, *How Changes in the Federal Register Can Help Improve Regulatory Accountability*, 52 ADMIN. L. REV. 927 (2000) (giving an overview of the rulemaking process and suggesting that additional information that should be added into the text of a notice, summary, and final rule).

<sup>80</sup> See Federal Register 2.0 Legal Notice, *supra* note 2.



uation of the powers it has granted to the executive branch in terms of agency rulemaking.<sup>81</sup>

Another option would be for a member of the public to bring a cause of action, after “Federal Register 2.0” has become official, against a federal agency or the National Archives and Records Administration asking that the court make a determination as to the validity of the website. A few initial problems may arise as to standing; but, if this hurdle is passed, the likely result would be that a federal court would find that NARA was acting within the authority granted to it by Congress and would likely cite *Kennecott Utah Copper Corp. v. U.S. Department of Interior*.<sup>82</sup>

#### CONCLUSION

Placing the *Federal Register* in an electronic format on www.FederalRegister.gov will have many beneficial effects including easier access to information and increased public participation. It will also allow furtherance of the goals embodied in the Federal Register Act of 1935, Administrative Procedure Act, and Freedom of Information Act: notice to the public of federal executive agency rules, regulations, procedures, and adjudications; public participation in the rulemaking process; and access to the rulemaking process.<sup>83</sup> This transition, which has not yet been made official, allows for the involvement of all three branches of government.

Congress has the opportunity to take action and become a part of the transition of the *Federal Register* into an electronic medium. “Federal Register 2.0” marks a substantial change to the format of the *Federal Register*, which has been the official statement of federal regulation for seventy-five years.<sup>84</sup> While it is not necessary that Congress act, a new law created by the legislative branch would add more legitimacy to “Federal Register 2.0.” It would also be beneficial to the legal community for the Supreme Court to offer some guidance as to the status of electronic documents in general, and in particular to federal rulemaking.<sup>85</sup> Any of these actions could make the transition to the new format of the *Federal Register* easier and enhance the type of stability that has accompanied the *Federal Register* since 1935.

<sup>81</sup> See Federal Register Act, 5 U.S.C. § 552; Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (providing mechanisms and guidelines for agency rulemaking).

<sup>82</sup> See *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996) (stating that Congress has the power to delegate certain authorities to agencies and that the Office of the Federal Register has the power to determine policies relating to publication and codification of agency rules).

<sup>83</sup> See discussion, *supra* section II.A, II.B, & II.C.

<sup>84</sup> See BRIEF HISTORY, *supra* note 2, at 2.

<sup>85</sup> See generally *Info. Handling Serv., Inc. v. Def. Automated Printing Serv.*, 338 F.3d 1024 (D.C. Cir. 2003) (considering an electronic database for the release of records).