



## **Working Group on Compiling Administrative Records**

### **Office of the Chairman**

### **Staff Counsel Report for Working Group | October 29, 2019**

**(Amended March 11, 2020)**

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Members Attending

James Barton  
Reeve Bull  
Daniel Cohen  
Peter Constantine  
Kelly Dunbar  
Andrew Emery  
Noelle Green  
Lane Nemirow  
Connor Raso  
Melissa Rifkin  
Peter Robbins  
Adina Rosenbaum  
Matthew Wiener

ACUS Staff Attending

Jeremy Graboyes (Staff Counsel)  
Todd Rubin

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This Report documents the Staff Counsel's notes of the discussion of the Working Group at its first meeting on October 29, 2019. It does not represent the work product of the Working Group or any of its members. The Working Group discussed the Report at its second meeting. One member asked that this Report reflect that the Working Group, at its first meeting, also discussed the application of the deliberative process privilege to the compilation of administrative records for judicial review. The Working Group will discuss this subject further at a subsequent meeting.

Following introductions and an overview of its purpose, scope, and objectives, the Working Group on Compiling Administrative Records discussed issues related to the time period



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(or “course”) of an informal rulemaking proceeding<sup>1</sup> and the timing of record preservation, compilation, and indexing practices by agency personnel. The intent was to identify relevant subjects agencies may wish to explain to personnel in publicly available guidance on compiling administrative records (AR). Subjects the Working Group discussed included:

- (1) Why is the time period of an informal rulemaking proceeding important?
- (2) What is the time period of an informal rulemaking proceeding?
- (3) Who determines or answers questions about the time period of an informal rulemaking proceeding?
- (4) Who coordinates or answers questions about the start and end of recordkeeping practices for an informal rulemaking proceeding?
- (5) What steps, if any, must personnel must take at the start or end of an informal rulemaking proceeding?

Parts 1-5 of this Report address the Working Group’s discussion of each of these subjects as reflected in the Staff Counsel’s notes. Part 6 provides a list of topics related to these subjects that the Working Group may wish to address in its final product.

### **1. Why Is the Time Period of an Informal Rulemaking Proceeding Important?**

There are many reasons why defining the course of an informal rulemaking proceeding may be important, including:

- (a) Personnel may need to take some action(s) with respect to materials they generate or review during the course of an informal rulemaking proceeding.<sup>2</sup>
- (b) Personnel may be responsible for procedural steps at the start and end of an informal rulemaking proceeding, such as or establishing or closing a file in a project management system or designating a lead official, records custodian, or Office of General Counsel contact.

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<sup>1</sup> “Informal rulemaking proceeding” means a rulemaking conducted according to the notice-and-comment provisions of 5 U.S.C. § 553.

<sup>2</sup> See Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ¶ 1, 78 Fed. Reg. 41,358 (July 10, 2013) (recommending that agencies include in the AR for judicial review all materials the agency considered during the “course” of an informal rulemaking).



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- (c) Personnel may be subject to heightened restrictions or recordkeeping requirements with respect to ex parte communications during the course of an informal rulemaking proceeding.<sup>3</sup>
- (d) Personnel may need to take some action during the course of an informal rulemaking proceeding, and before its end, to ensure that a rulemaking record contains sufficient documentation to support a final rule.

Agencies may wish to consider explaining in AR guidance what significance the time period of an informal rulemaking proceeding holds for both the agency and personnel involved in the rulemaking process.

### **2. What Is the Time Period of an Informal Rulemaking Proceeding?**

Given the potential significance for personnel attached to the time period of an informal rulemaking proceeding, agencies may wish to consider explaining in AR guidance what constitutes the “course” of an informal rulemaking proceeding. The course of an informal rulemaking proceeding is defined by its starting point and its endpoint. Sections (a) and (b) below address when an informal rulemaking proceeding begins and ends, respectively. Section (c) addresses two scenarios in which personnel may have difficulty determining the starting point or endpoint of an informal rulemaking proceeding.

#### **a. Starting Point of an Informal Rulemaking Proceeding**

In general, an informal rulemaking proceeding begins when an agency begins to meaningfully develop or consider developing a rule on a subject. Several members of the Working Group distinguished rulemaking from other agency activities, such as “information gathering” which may precede or follow a rulemaking but does not represent active development of a rule on a particular subject.

Existing agency AR guidance defines the starting point of an informal rulemaking proceeding in several ways. Department of the Interior (DOI) guidance defines the start of a

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<sup>3</sup> Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014).



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rulemaking proceeding as the point at which “consideration of a decision begins, which will vary based on the situation.”<sup>4</sup> Guidance developed by the National Oceanographic and Atmospheric Administration (NOAA) explains that the “decision-making process is initiated when the agency begins to consider a concrete proposal for action.”<sup>5</sup> NOAA guidance cautions that while this point will necessarily “vary from case to case,” a proceeding is “typically initiated when the agency begins to move forward on a specific course of action.”<sup>6</sup>

In some cases, a rulemaking proceeding will have a clear starting point, such as when an agency receives an explicit directive to undertake a rulemaking or a member of the public files a petition for rulemaking.<sup>7</sup> More often, rulemaking proceedings lack a discrete starting point. In such cases, distinguishing between routine agency activities, such as information gathering, and the initial stages of a rulemaking can be highly contextual.

Some agencies define the beginning of a rulemaking proceeding by reference to a specific action by a decisionmaker. For example, Internal Revenue Service guidance specifies that a “regulation project may be opened only with the approval of the Associate Chief Counsel and Treasury.”<sup>8</sup>

More frequently, agencies will need to establish in retrospect when a rulemaking began.<sup>9</sup> The Working Group identified several indicators that a rulemaking is underway, including publication of an entry in the Unified Agenda of Regulatory and Deregulatory Actions or the publication of the first notice related to a rulemaking proceeding in the *Federal Register*. The

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<sup>4</sup> Dep’t of the Interior, Standardized Guidance on Compiling a Decision File and an Administrative Record 4 (June 27, 2006), <https://www.nps.gov/features/foia/Standardized-Guidance-on-Compiling-and-Administrative-Record.pdf> [hereinafter DOI Guidance].

<sup>5</sup> Nat’l Oceanic & Atmospheric Admin., Guidelines for Compiling an Agency Administrative Record 11 (Dec. 21, 2012), [https://www.gc.noaa.gov/documents/2012/AR\\_Guidelines\\_122112-Final.pdf](https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf) [hereinafter NOAA Guidance].

<sup>6</sup> *Id.*

<sup>7</sup> Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking 41 (May 14, 2013) (report to the Admin. Conf. of the U.S.); NOAA Guidance, *supra* note 5, at 11. [https://www.gc.noaa.gov/documents/2012/AR\\_Guidelines\\_122112-Final.pdf](https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf) [hereinafter NOAA Guidance].

<sup>8</sup> See INTERNAL REVENUE MANUAL pt. 32, <https://www.irs.gov/irm/part32> (last visited Sep. 27, 2019) [hereinafter IRS Guidance].

<sup>9</sup> Beck, *supra* note 7, at 41.



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first notice may be an NPRM, an advance NPRM, a notice of inquiry, a request for information, a notice of meeting, or some other notice related to the subject of an anticipated rule.<sup>10</sup>

Because publication in the Unified Agenda or publication of the first notice in the *Federal Register* indicates that an informal rulemaking is underway, agencies may still need to establish in retrospect when agency personnel shifted from information gathering to rulemaking. Working Group members identified the following as potentially signaling a shift from information gathering to rulemaking: a significant congressional development, a meeting during which personnel briefed a key official on the subject of the proposed rule, an agency official's public statement or testimony, or a formal or informal meeting with public stakeholders.

### **b. Endpoint of an Informal Rulemaking Proceeding**

An informal rulemaking proceeding ends when a designated decisionmaker makes a final decision. A final decision may be the signature or publication of a final rule,<sup>11</sup> or it may be a decision to abandon or postpone a rulemaking project.

With respect to proceedings that yield a final rule, existing AR guidance defines the endpoint of a rulemaking proceeding in terms of a designated official's decision (often represented by her signature) or a rule's publication. DOI guidance states: "Once the decision-maker has made a final decision, the Decision File should be closed."<sup>12</sup> NOAA guidance states that "[a]gency action ends when the decision-maker makes a final decision."<sup>13</sup> Environmental Protection Agency (EPA) guidance states that an "administrative record for a decision is complete upon signature by the decision-maker" (in the informal rulemaking process, a "final rule signed by the Administrator").<sup>14</sup> Internal Revenue Service (IRS) guidance directs personnel

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<sup>10</sup> ACUS recommended that ARs should include "materials received in response to an advance [NPRM] or a notice of inquiry, if there is one, and considered in development of the proposed rule." Recommendation 2013-4, *supra* note 2, ¶ 4, 78 Fed. Reg. 41,358 (July 10, 2013).

<sup>11</sup> Beck, *supra* note 7, at 54.

<sup>12</sup> DOI Guidance, *supra* note 4, at 4.

<sup>13</sup> NOAA Guidance, *supra* note 5, at 11.

<sup>14</sup> ENVTL. PROTECTION AGENCY, ADMINISTRATIVE RECORDS GUIDANCE 9-10 (Sep. 2011), <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [hereinafter EPA Guidance].



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to take specific actions to close a regulation project in its electronic project management system “[a]fter a final regulation is published.”<sup>15</sup>

Agencies sometimes abandon or postpone rulemaking initiatives, for example due to changed factual conditions, reassessment of agency priorities, resource limitations, political changes, changes in leadership, and other internal or external pressures. In some cases, the endpoint of an informal rulemaking proceeding that does not result in a final rule will be clear, such as when the agency publishes a notice in the *Federal Register* withdrawing an NPRM.<sup>16</sup> In other cases, agency officials may choose to abandon or postpone an informal rulemaking proceeding without public notice.

Because there is unlikely to be judicial review of a rulemaking that does not result in a final rule, the primary agency-internal purpose of identifying the endpoint of an abandoned or postponed rulemaking is to signal to personnel that they are no longer subject to any recordkeeping, ex parte, or other requirements specific to informal rulemaking proceedings, which may be comparatively resource-intensive. A secondary objective may be to ensure that personnel await an official announcement that the agency has abandoned or postponed a rulemaking initiative before abandoning those requirements and do not act upon rumors or their own conclusions to that effect. Agencies may wish to consider explaining in AR guidance how officials will inform personnel that they have decided to abandon or postpone a rulemaking project.

### **c. Special Situations**

***Petition for Reconsideration.*** One member of the Working Group noted that agencies may encounter challenges defining the endpoint of an informal rulemaking proceeding when it receives a petition for reconsideration of a final rule from a member of the public.

***Multiple Related Rulemaking Proceedings.*** Several members of the Working Group member noted that agencies may encounter challenges defining the starting point or endpoint of an informal rulemaking proceeding when an agency has previously undertaken a rulemaking on

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<sup>15</sup> IRS Guidance, *supra* note 8, § 32.1.9.2.

<sup>16</sup> See IRS Guidance, *supra* note 8, § 32.1.9.



the same or a substantially similar subject that did not result in a final rule. Agencies for which this is a common occurrence may wish to consider explaining their policy in AR guidance.

### **3. Who Determines or Answers Questions About the Time Period of an Informal Rulemaking Proceeding?**

Depending on the complexity of an informal rulemaking proceeding and the number of individuals or agency components involved in the project, agencies may wish to specify in AR guidance which individual or office is responsible for determining the time period of an informal rulemaking proceeding or resolving uncertainties surrounding its identification. For example, NOAA guidance directs records custodians to “consult with the NOAA General Counsel’s Office attorney to identify the point at which the decision-making process was initiated.”<sup>17</sup>

### **4. Who Coordinates or Answers Questions About the Start and End of Recordkeeping Practices for an Informal Rulemaking Proceeding?**

ACUS has recommended that agencies compile rulemaking records “no later than the date on which an agency publishes the notice of proposed rulemaking” and “continue compiling the rulemaking record as long as the rule is pending before the agency.”<sup>18</sup> This is sometimes referred to as “contemporaneous” AR creation.<sup>19</sup> As DOI guidance explains, this practice may “increase agency efficiency and performance should it become necessary to create an AR [for judicial review].” Depending on the complexity of an informal rulemaking proceeding and the number of individuals or agency components involved in the project, agencies may wish to specify in AR guidance which individual or office is responsible for coordinating the start and end of contemporaneous AR creation.

ACUS has recommended that agencies “designate one or more custodians for rulemaking recordkeeping, either on a rulemaking-by-rulemaking basis or generally” and “inform agency personnel of the custodian(s) and direct them to deposit rulemaking record materials with the

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<sup>17</sup> NOAA Guidance, *supra* note 5, at 11.

<sup>18</sup> Recommendation 2013-4, *supra* note 2, ¶ 4.

<sup>19</sup> See DOI Guidance, *supra* note 4, at 3.



custodian(s).”<sup>20</sup> The Working Group noted that some agencies rely on a centralized docket management office to coordinate AR practices,<sup>21</sup> whereas others delegate that responsibility to the program office or a custodian in the program office responsible for the rulemaking. When multiple program offices are involved, a “lead office” may need to coordinate the timing of recordkeeping practices among all offices involved in the rulemaking process.<sup>22</sup>

## **5. What Steps, If Any, Must Personnel Take at the Start or End of a Rulemaking Period?**

Personnel may be expected to take certain actions at the start or end of an informal rulemaking proceeding. Personnel may also be expected to comply with specific expectation throughout the period of an informal rulemaking proceeding, such as recordkeeping requirements or restrictions on ex parte communications. As discussed in the following sections, agencies may wish to address in AR guidance what they expect of personnel at the start and end of an informal rulemaking proceeding.

Working Group members noted that what agencies expect of personnel at the start and end of informal rulemaking proceedings will necessarily vary from agency to agency depending on an agency’s rulemaking needs, organizational structure, and technological capabilities. Some agencies centralize rulemaking record management in a specific component, for example, whereas others assign that task to the component coordinating a rule’s development. Some agencies use custom software to track aspects of the rulemaking process, whereas personnel at other agencies use off-the-shelf software such as Microsoft Excel or Microsoft SharePoint.

### **a. Actions at the Start of an Informal Rulemaking Proceeding**

Agencies may wish to explain in AR guidance what actions, if any, personnel must take at the start of a rulemaking proceeding, for example:

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<sup>20</sup> Recommendation 2013-4, *supra* note 2, ¶ 5.

<sup>21</sup> See NOAA Guidance, *supra* note 5, at 5; EPA Guidance, *supra* note 14, at 11-12; DOI Guidance, *supra* note 4, at 6.

<sup>22</sup> See EPA Guidance, *supra* note 14, at 11-12.



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- designating key individuals and components, such as a project coordinator, project contact, lead office, AR custodian, Office of General Counsel contact, etc.;<sup>23</sup>
- establishing a rulemaking record for the collection of materials;<sup>24</sup>
- opening a rulemaking record in a project management system;<sup>25</sup> and
- documenting earlier communications or collecting materials personnel previously generated, transmitted, or reviewed.<sup>26</sup>

Agency personnel may also need to adapt their behavior or take on new responsibilities once an informal rulemaking proceeding has begun to ensure a complete rulemaking record and compliance with other applicable laws and policies, such as rules on ex parte communications. Agencies may wish to explain in AR guidance what actions and behaviors personnel are expected to adopt following the start of an informal rulemaking proceeding, such as:

- preserving, indexing, or compiling materials personnel generate, transmit, or review;<sup>27</sup>
- restricting or documenting planned and unplanned external oral communications as needed to comply with agency policies on ex parte communications;<sup>28</sup>
- preparing memoranda to the record, as needed, to document internal meetings, oral communications, etc.;
- encouraging stakeholders to submit written comments in lieu of oral comments;

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<sup>23</sup> For example, IRS guidance contains detailed instructions on designating a contact for a regulation project and coordinating with other components. IRS Guidance, *supra* note 8, § 32.1.2.

<sup>24</sup> For example, IRS guidance instructs personnel to create a legal file. *Id.* DOI guidance explains that a “Decision File should be created once consideration of a decision begins” and that the Decision File “should be kept in an accessible location and should be organized in a logical manner, such as chronologically or by topic, so that documents can be added to the Decision File as they are generated or received.” DOI Guidance, *supra* note 4, at 4.

<sup>25</sup> For example, IRS guidance directs designated personnel to open a regulation project in the agency’s Technical Management Information System. IRS Guidance, *supra* note 8, § 32.1.2.

<sup>26</sup> For example, ACUS has recommended that agencies “include materials considered in preparation of the notice of proposed rulemaking,” including “materials received in response to an advance notice of proposed rulemaking or a notice of inquiry, if there is one, and considered in development of the proposed rule.” Recommendation 2013-4, *supra* note 2, ¶ 4.

<sup>27</sup> See DOI Guidance, *supra* note 4, at 11; NOAA Guidance, *supra* note 5, at 10, 15.

<sup>28</sup> See generally Recommendation 2014-4, *supra* note 3. Many agencies appear to already provide “Rules of the Road” training on these topics for agency officials. Training materials may provide model language for the Working Group’s final product.



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- advising members of the public that any written submissions they submit will be adding to the AR;
- limiting public statements by agency personnel to the four corners of an NPRM's text; and
- adding materials to the electronic public rulemaking docket and/or physical docket.

The Working Group will discuss the mechanics of these processes in subsequent meetings and may address them in its final product.

### **b. Actions at the End of an Informal Rulemaking Proceeding**

Agencies may wish to explain in AR guidance what actions, if any, personnel must take at the end of a rulemaking proceeding, for example:

- notifying appropriate personnel;
- securing the advice or approval of appropriate personnel;
- publishing a final rule in the *Federal Register*;
- publishing a final rule or associated documents on an agency's website;
- closing a project file;<sup>29</sup>
- finalizing and transmitting a rulemaking record;<sup>30</sup> and
- complying with government-wide or agency-specific records retention policies.

The Working Group will discuss the mechanics of these processes in subsequent meetings and may address them in its final product.

Because the endpoint of an informal rulemaking proceeding that results in a final rule largely determines the “whole record” a court will consider on judicial review,<sup>31</sup> several agencies also explain in their AR guidance what steps personnel must have completed before the agency issues a final rule to ensure the AR contains sufficient documentary support for the rule. For

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<sup>29</sup> IRS guidance, for example, explains the steps personnel should take to close a regulation project in the agency's project management system. IRS Guidance, *supra* note 8, § 32.1.9.2.

<sup>30</sup> DOI guidance similarly instructs personal to close the Decision File “[o]nce the decision-maker has made a final decision.” DOI Guidance, *supra* note 4, at 4.

<sup>31</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971).



example, NOAA guidance emphasizes the importance of “assur[ing] that the Administrative Record includes sufficient material to support the decision” and “show[s] the complete history of the agency decision-making process.”<sup>32</sup> EPA guidance states: “Documents generated or altered after signature are not part of the administrative record for that decision.”<sup>33</sup> DOI guidance states that an AR must contain “the complete ‘story’ of the agency decision-making process.”<sup>34</sup>

One member of the Working Group noted that confusion may arise with respect to materials that agency personnel prepare after the end of a rulemaking proceeding to characterize or summarize information that was legitimately considered prior to a final rule’s adoption. She said it can sometimes be difficult to distinguish such materials from materials that supplement an existing AR with new information or provide a post hoc rationalization.<sup>35</sup>

## **6. Topics the Working Group May Wish to Consider in its Final Product Related to the Temporal Aspects of Informal Rulemaking Proceedings**

Based on this Report, the Working Group may wish to address some or all of the following topics in its final product:

- Why is the time period of an informal rulemaking proceeding important?
- Which official or office is responsible for determining when an informal rulemaking proceeding begins, and what factors should the official or office consider in making that determination?
- Which official or office is responsible for determining when an informal rulemaking proceeding ends, and how should the official or office make that determination?
- When does an informal rulemaking proceeding that does not result in a final rule end?

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<sup>32</sup> NOAA Guidance, *supra* note 5, at 6, 11. The agency’s AR guidance explains: “A deficient record cannot generally be cured by creating new supporting documents after the decision-maker has signed the decision. In short, any documents created after the decision-maker has made a final decision will generally be excluded from the Administrative Record.” *Id.* at 11.

<sup>33</sup> EPA Guidance, *supra* note 14, at 5. The agency’s AR guidance explains: “[I]t is very important to have an adequate administrative record because the lack of an adequate record may result in an adverse court decision overturning the EPA decision or ordering supplementation of the record through, for example, written discovery or depositions of Agency employees.” *Id.*

<sup>34</sup> DOI Guidance, *supra* note 4, at 2.

<sup>35</sup> See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971).



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- How does a petition for reconsideration affect the period of an informal rulemaking proceeding?
- What is the time period of an informal rulemaking proceeding when the agency has undertaken multiple rulemaking proceedings on the same or a substantially similar subject?
- What steps, if any, must personnel take at the beginning of an informal rulemaking proceeding to establish an AR, especially in agencies that engage in contemporaneous AR creation?
- What steps, if any, must personnel take at the beginning of an informal rulemaking proceeding to establish a project file?
- What steps, if any, must personnel take once it is clear an informal rulemaking proceeding has begun to collect materials previously considered or document earlier oral communications?
- Which official or office should assign personnel to fill key roles in the rulemaking process, such as project coordinator(s), project contact(s), lead office(s), AR custodian(s), Office of General Counsel contact(s), etc.?
- What additional requirements, such as recordkeeping or ex parte policies, must personnel comply with following the start of an informal rulemaking proceeding and extending through the end of the proceeding?
- What tasks must personnel have accomplished before the end of an informal rulemaking proceeding?
- What restrictions does an agency impose on preparing materials related to an informal rulemaking after an agency finalizes a rule?
- What steps, if any, must personnel take at the end of an informal rulemaking proceeding to compile an AR?
- What steps, if any, must personnel take at the end of an informal rulemaking proceeding to close a project file?