



Working Group on Compiling Administrative Records

Office of the Chairman

Staff Counsel Report for Working Group | October 29, 2019

Members Attending

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1 This Report documents the Staff Counsel’s notes of the discussion of the Working Group
2 at its first meeting on October 29, 2019. In its current form, the Report does not represent the
3 work product of the Working Group or any of its members. The Working Group will discuss the
4 Report at its second meeting. A subsequent draft will reflect any comments by the Working
5 Group or its members.

6 Following introductions and an overview of its purpose, scope, and objectives, the
7 Working Group on Compiling Administrative Records discussed issues related to the time period
8 (or “course”) of an informal rulemaking proceeding¹ and the timing of record preservation,

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



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9 compilation, and indexing practices by agency personnel. The intent was to identify relevant
10 subjects agencies may wish to explain to personnel in publicly available guidance on compiling
11 administrative records (AR). Subjects the Working Group discussed included:

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

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

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

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

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

² 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).



32 (c) Personnel may be subject to heightened restrictions or recordkeeping requirements
33 with respect to ex parte communications during the course of an informal rulemaking
34 proceeding.³

35 (d) Personnel may need to take some action during the course of an informal rulemaking
36 proceeding, and before its end, to ensure that a rulemaking record contains sufficient
37 documentation to support a final rule.

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

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

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

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

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

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

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

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

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

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

⁴ 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].

⁵ 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 [hereinafter NOAA Guidance].

⁶ *Id.*

⁷ 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 [hereinafter NOAA Guidance].

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

⁹ Beck, *supra* note 7, at 41.



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

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

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

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

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

¹⁰ 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).

¹¹ Beck, *supra* note 7, at 54.

¹² DOI Guidance, *supra* note 4, at 4.

¹³ NOAA Guidance, *supra* note 5, at 11.

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



97 to take specific actions to close a regulation project in its electronic project management system
98 “[a]fter a final regulation is published.”¹⁵

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

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

116 c. Special Situations

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

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

¹⁵ IRS Guidance, *supra* note 8, § 32.1.9.2.

¹⁶ See IRS Guidance, *supra* note 8, § 32.1.9.



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

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

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

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

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

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

¹⁷ NOAA Guidance, *supra* note 5, at 11.

¹⁸ Recommendation 2013-4, *supra* note 2, ¶ 4.

¹⁹ See DOI Guidance, *supra* note 4, at 3.



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

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

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

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

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

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

²⁰ Recommendation 2013-4, *supra* note 2, ¶ 5.

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

²² See EPA Guidance, *supra* note 14, at 11-12.



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

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

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

²³ 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.

²⁴ 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.

²⁵ 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.

²⁶ 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.

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

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

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

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

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

- 198 • notifying appropriate personnel;
- 199 • securing the advice or approval of appropriate personnel;
- 200 • publishing a final rule in the *Federal Register*;
- 201 • publishing a final rule or associated documents on an agency's website;
- 202 • closing a project file;²⁹
- 203 • finalizing and transmitting a rulemaking record;³⁰ and
- 204 • complying with government-wide or agency-specific records retention policies.

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

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

²⁹ 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.

³⁰ 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.

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



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

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

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

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

- 225
- 226 • Why is the time period of an informal rulemaking proceeding important?
 - 227 • Which official or office is responsible for determining when an informal rulemaking
228 proceeding begins, and what factors should the official or office consider in making
that determination?
 - 229 • Which official or office is responsible for determining when an informal rulemaking
230 proceeding ends, and how should the official or office make that determination?
 - 231 • When does an informal rulemaking proceeding that does not result in a final rule end?

³² 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.

³³ 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.*

³⁴ DOI Guidance, *supra* note 4, at 2.

³⁵ 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?