This Report documents the Staff Counsel’s notes of the discussion of the Working Group on Compiling Administrative Records at its third meeting on July 21, 2020. In its current form, the Report does not represent the work product of the Working Group or any of its members. The Working Group will discuss the Report at its fourth meeting. A subsequent draft will reflect any comments by the Working Group or its members.

The Staff Counsel opened the meeting by offering an opportunity for the Working Group’s members to provide comments on the Staff Counsel Report documenting the meeting of January 15, 2020.¹ There were no comments.

At its previous meetings, the Working Group discussed best practices for explaining to agency personnel which materials they should add to the rulemaking record during the course of an informal rulemaking proceeding. At its third meeting, the Working Group discussed the actual process by which agency personnel add those materials to the rulemaking record and how they manage and preserve rulemaking records. The Working Group focused, in particular, on best practices for explaining those processes to agency personnel in publicly available guidance. Parts 1–5 of this Report address the Working Group’s discussion of those subjects. Part 6 identifies related topics the Working Group may wish to address in its final product.

1. What Is the Rulemaking Record?

Existing agency guidance typically refers to a rulemaking record by reference to its contents but without specifying its form. For example, guidance from the Department of the Interior Department refers to a “collection of documents” that should “be kept in an accessible location,” while the Internal Revenue Manual refers only to a “legal file.”

Before widespread electronic recordkeeping, agencies maintained rulemaking records as a physical folder or a “box with a bow.” Most agencies today compile rulemaking materials electronically, though agencies may “maintain elements of rulemaking records in paper and in electronic form.”

Research previously conducted for the Administrative Conference of the United States (ACUS) indicates that agencies today use a wide variety of management tools and techniques ranging “from simple file saving on a shared drive to a dedicated electronic records management system.” Some agencies use electronic management systems originally “designed for more general recordkeeping purposes and adapted for rulemaking record use.” Members of the

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2 “Informal rulemaking proceeding” means a rulemaking conducted according to the notice-and-comment provisions of 5 U.S.C. § 553.
6 Id.
7 Id.
Working Group stated that agencies frequently use off-the-shelf software programs including Microsoft Excel to index record materials and Microsoft SharePoint to store record materials. The Working Group acknowledged that there is likely no single tool that will be appropriate for all agencies and agency components in all informal rulemaking proceedings. Instead, the Working Group focused on identifying factors that agencies should consider when they select an appropriate recordkeeping tool, including:

- the availability of resources to purchase or develop a more robust recordkeeping system and the need for such a system;
- the existence of other agency electronic recordkeeping systems that the agency can modify for rulemaking purposes;
- the complexity of typical agency rulemaking proceedings;
- the degree to which typical rulemaking proceedings are centralized in a single office or dispersed across multiple offices or agencies;
- the level of security required for rulemaking records;
- the volume of materials in typical agency rulemaking proceedings;
- the format of typical rulemaking materials (e.g., paper or electronic; text-based, data files, images, maps, physical objects);
- the number of individuals who manage or need access to rulemaking records; and
- the skillset and technological capacity of individuals who manage or need access to rulemaking records.

Consistent with ACUS’s recommendation that agencies should explain in written guidance the “relevant capabilities and limitations of recordkeeping tools and technologies,” the Working Group may wish to address, in its final product, whether there are any particular software programs that agencies should, at a minimum, consider when they select an appropriate recordkeeping tool.

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2. Identifying Materials for Inclusion in the Rulemaking Record

ACUS has recommended that agencies include in the rulemaking record: (a) notices pertaining to the rulemaking; (b) comments and other materials submitted to the agency related to the rulemaking; (c) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking; (d) reports or recommendations of any relevant advisory committees; (e) other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the rulemaking; and (f) any other materials considered by the agency during the course of the rulemaking.9

At its first two meetings, the Working Group discussed which materials are “considered by the agency during the course of a rulemaking” and best practices for explaining to rulemaking personnel how to identify such materials. In theory, agencies could require rulemaking personnel to add all such materials to a designated rulemaking record during an informal rulemaking. In practice, however, many materials are already stored in other systems, including those controlled by the agency (e.g., public rulemaking dockets, shared network drives, web-based collaboration sites like Microsoft SharePoint, email, physical libraries, internal databases) and those managed by entities outside the agency (e.g., subscription databases, the internet).

Members of the Working Group noted that it may be redundant for personnel to spend time adding materials to the rulemaking record that are adequately maintained in a stable form elsewhere. Stable sources may include widely-available print publications and print or electronic materials that agencies collect elsewhere (as in a public rulemaking docket) or preserve under other federal recordkeeping policies (such as the National Archives and Records Administration’s Capstone approach for managing email). Depending on the source and the manner in which it is associated with the rulemaking, it may be sufficient to note the material in an index associated with a rulemaking record. In other scenarios, even indexing may be redundant. On the other hand, some sources, especially internet-based sources, can be more ephemeral and may warrant preservation and inclusion in a rulemaking record maintained by agency personnel.

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9 Id. ¶ 1.
As appropriate, agencies may wish to explain to rulemaking personnel: (a) which materials they should add to rulemaking records; (b) which materials they should index but not necessarily add to rulemaking records; and (c) which materials “considered by the agency during the course of a rulemaking” they do not need to add to rulemaking records or index.

3. Preparing Materials for, Adding Materials to, and Managing the Rulemaking Record

Agencies sometimes have practices for personnel to format, label, excerpt, or contextualize materials before adding them to the rulemaking record. There are also processes to redact, segregate, or otherwise protect sensitive or protected materials, as well as processes to document unrecorded oral communications. It is unclear to what extent agencies have formally memorialized these sorts of practices. Given employee turnover, members of the Working Group felt that agencies should memorialize these practices to preserve institutional knowledge.

In terms of memorializing these practices, the Working Group considered whether agencies should develop guidance specific to some or all of the different categories of materials personnel frequently encounter during informal rulemaking proceedings. Categories include: (a) print publications, which can range from single-page documents to book-length or multi-volume materials; (b) printed images, diagrams, photographs, and maps; (c) electronic text-based documents, including Microsoft Word and Portable Document Format (PDF) files; (d) digital images, photographs, and maps; (e) webpages; (f) digital data files and databases, including Microsoft Excel and comma-separated values files; (g) computer models and data analysis programs; (h) emails; (i) personal notes, which may be electronic or handwritten; (j) audiovisual materials, including audio and video recordings of oral communications; (k) memoranda to the record documenting unrecorded oral communications; (l) physical objects; and (m) internal workflow materials, including transmittals and inputs in workload management systems.

The Working Group has previously considered using memoranda to the record to document ex parte communications. Staff Counsel Report for Working Group Meeting of January 15, 2020, at 14, https://www.acus.gov/meeting-minutes/1-15-2020-meeting-staff-counsel-report-draft. A member of the Working Group suggested that agencies could generate a simple, standard form for officials to memorialize telephone calls and other conversations as needed. The availability of this form allows recordkeeping staff to set expectations for rulemaking personnel at the beginning of the rulemaking process and can serve as a helpful reminder throughout the rulemaking process to document appropriate conversations.
One member of the Working Group felt that providing too much detail on preparing and submitting digital materials could become outdated as technologies evolve and agencies update their recordkeeping practices or adopt new software programs. The Working Group may wish to address in its final report whether there are any principles for balancing the desire for relatively evergreen guidance and the need to provide sufficiently detailed instructions to help personnel accurately and efficiently compile rulemaking records.

The Working Group briefly considered how rulemaking personnel should add materials to the rulemaking record. Although the precise method for adding rulemaking materials will obviously depend on the tool an agency uses to compile rulemaking records, there was general agreement that, in a typical rulemaking, a single person should have primary responsibility for managing or coordinating the rulemaking record, for purposes of both accuracy and efficiency. ACUS has also recommended that agencies assign a custodian to manage and coordinate recordkeeping tasks and that agencies direct personnel to “deposit rulemaking record materials with the [designated] custodian(s), excepting if necessary confidential information to which access is restricted.”\(^{11}\) The responsibilities of this “record custodian” are discussed in Part 5. Other staff may assist the custodian, of course, especially in rulemakings involving a high volume of potential record materials.

The Working Group may wish to consider addressing, in its final product: (1) the process by which rulemaking personnel should deposit materials to the record custodian, (2) the process by which rulemaking personnel should ask the record custodian to add an undeposited material to the index for the rulemaking record, and (3) whether rulemaking personnel should supply any additional information or metadata about deposited or indexed materials. As suggested by members of the Working Group, such additional information or metadata could include a record’s author, date of authorship, recipient, transmittal date, etc. Other information that may be useful for organizational and retrieval purposes includes the document type or a unique identifier (e.g., Bates stamping).

4. Closing and Preserving the Rulemaking Record


DRAFT January 26, 2020
As the Working Group has previously discussed, the rulemaking record ordinarily closes once the agency has made a final decision (e.g., finalizes or withdraws a proposed rule). Steps to close the record may include, as appropriate, electronically locking an electronic file, changing permissions on a shared drive, and alerting personnel that the rulemaking record is closed. Steps to preserve the rulemaking record may include moving it to another electronic or physical location, particularly one that attorneys can access if it is later necessary to compile an administrative record for judicial review. Agencies should also consider the requirements of other applicable federal recordkeeping policies.

5. Assigning Responsibilities to Appropriate Rulemaking Personnel

The Working Group considered how agencies should divide tasks related to managing rulemaking records among its personnel. Relevant tasks may include: (a) creating the rulemaking record; (b) identifying which documents belong in the rulemaking record; (c) compiling and organizing the rulemaking record; (d) labeling, tagging, or adding metadata to rulemaking record materials; (e) indexing the rulemaking record; (f) digitizing non-electronic materials; (g) storing and safeguarding physical objects; (h) handling and safeguarding classified or other protected information; (i) managing access to the rulemaking record, including sensitive materials; (j) documenting the recordkeeping process; (k) managing or working with other personnel to manage the public rulemaking docket during the rulemaking process; (l) ensuring that the rulemaking record is preserved after the rulemaking process has ended; and (m) working with agency or Department of Justice attorneys to compile an administrative record for judicial review in the event of litigation.

As noted above, the Working Group felt that a single person should have primary responsibility for maintaining and indexing each rulemaking record. (Of course, other staff may assist the custodian as a matter of practice.) Agencies should consider explaining in public guidance the role of these “record custodians,” the specific tasks assigned to record custodians, the responsibilities of other rulemaking personnel, and the relationship between record custodians and other rulemaking personnel. For example, written guidance could explain that rulemaking personnel should direct questions about the rulemaking record to the custodian and/or that the custodian serves as a point of contact for agency attorneys. One member of the Working Group suggested that agencies may wish to use written guidance to assign custodians.
responsibility for more proactive tasks such as affirmatively seeking out records from
rulemaking personnel, training personnel on rulemaking recordkeeping requirements, notifying
relevant personnel of their recordkeeping obligations at the outset of a proceeding, and
periodically reminding rulemaking personnel of their rulemaking recordkeeping obligations.

To the extent agencies list custodial responsibilities in their published policies on
compiling administrative records agencies, they will need to take into account their own specific
needs and circumstances. Relevant factors may include an agencies’ size and organizational
structure, and the characteristics of typical rulemaking proceedings. Indeed, the optimal division
of labor between a custodian(s) and other rulemaking personnel could depend on any number of
factors such as the frequency and complexity of rulemakings, the number of staff involved in
typical rulemakings, the relative experience of personnel, the quantity of materials maintained in
typical rulemaking records, and differences among program offices within a single agency.

Agencies may also wish to explain in written guidance how custodians are selected. Here,
too, the precise guidance will necessarily depend on the factors listed in the previous paragraph.
Agencies can assign custodial duties to a centralized office responsible for managing dockets or
rulemaking procedures or to an individual in the program office with primary responsibility for
substantively developing a rule. The Working Group generally agreed that, where recordkeeping
responsibility rests with a program office, the head of that office should select an appropriate
custodian. A record custodian should be someone who possesses the skills and access necessary
to perform his or her assigned tasks assigned to him or her. Depending on an agency’s needs, this
could be someone who has (a) access to relevant records, potentially including classified or other
sensitive materials; (b) substantial involvement in the rulemaking; (c) the ability to identify
which documents belong in a rulemaking record; and/or (c) the ability to effectively coordinate
with rulemaking personnel and officials, especially attorneys, in other components. More
complicated questions may arise when multiple components share responsibility for developing a
rule or when multiple agencies jointly develop a rule.

6. **Topics the Working Group May Wish to Address in its Final Product**

Based on this Report, the Working Group may wish to address some or all of the
following topics in its final product:
• What principles should agencies consider when selecting tools and technologies to manage rulemaking records?

• Are there any commonly used or widely available tools and technologies that agencies should consider using to manage rulemaking records?

• Of those materials “considered by the agency during the course of a rulemaking,” which materials should rulemaking personnel index and/or add to the actual rulemaking record?

• What steps should rulemaking personnel to prepare materials for inclusion in the rulemaking record (e.g., formatting, labeling, excerpting, redacting, contextualizing, etc.)?

• What steps should rulemaking personnel take to memorialize unrecorded oral communications for inclusion in the rulemaking record?

• What steps should rulemaking personnel take to add materials to the rulemaking record and/or ensure they are indexed?

• How should rulemaking personnel index and organize the rulemaking record?

• Should agencies specify in written guidance the processes for preparing particular formats of materials (e.g., print materials, webpages, emails, etc.) and adding them to the rulemaking record? If so, are there any principles for balancing the desire for relatively evergreen guidance and the need to provide sufficiently detailed instructions to help personnel compile rulemaking records?

• What metadata should be associated with rulemaking record materials and how should it be associated?

• What steps should rulemaking personnel take to close the rulemaking record, preserve and provide access to the rulemaking record during the period when litigation is likeliest, and preserve and provide access in the longer term?

• What are the responsibilities of the record custodian, and what are the responsibilities of other rulemaking personnel?

• Who serves as the record custodian, and how is the record custodian selected?