This Report documents the Staff Counsel’s notes of the discussion of the Working Group on Compiling Administrative Records at its fourth meeting on February 23, 2021. 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 July 21, 2020.¹ There were no comments.

At its first three meetings, the Working Group discussed best practices for explaining to agency personnel which materials they should add to internal rulemaking records, i.e., “the full

record materials before the agency in an informal rulemaking,” including those materials which are not ordinarily made publicly available.2

At its fourth meeting, the Working Group turned to the public rulemaking docket, i.e., “the public version of the rulemaking record managed by the agency, regardless of location, such as online at Regulations.gov or an agency website or available for physical review in a docket room.”3 Specifically, the Working Group discussed best practices for explaining to agency personnel which materials they should add to or exclude from public rulemaking dockets. The Working Group will discuss the mechanics of docket compilation at its fifth meeting, including the location at which specific materials are made publicly available.

Part 1 of this Report explains the public rulemaking docket’s purpose and legal requirements. Part 2 addresses the materials agencies should add to the public rulemaking docket, as well as best practices for explaining those principles to agency personnel responsible for managing rulemaking dockets. Part 3 addresses the materials agencies may or must exclude from the public rulemaking docket, as well as best practices for explaining those principles to agency personnel responsible for managing rulemaking dockets. Part 4 identifies related topics the Working Group may wish to address in its final product.

1. **What Is the Public Rulemaking Docket?**

   Agencies use dockets to facilitate public participation in the rulemaking process by ensuring that members of the public can review and comment on significant materials related to the proposed rule. Indeed, failure to ensure public access to critical rulemaking materials during informal rulemaking may result in remand on judicial review.

   Several statutes and executive orders (EOs) define the basic contents of public rulemaking dockets. As discussed in greater detail below, these include, among others, the Administrative Procedure Act (APA), the E-Government Act, the Regulatory Flexibility Act, the Privacy Act, the Unfunded Mandates Reform Act, EO 12866, and EO 13563. Agencies have also adopted their own rules, policies, and practices. Some statutes, orders, rules, policies, and

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3 *Id.*
practices dictate which materials agency personnel should add to public rulemaking dockets; others permit or require personnel to withhold certain materials from the docket.

2. What Records Should Rulemaking Personnel Add to the Public Rulemaking Docket?

The Working Group discussed the following categories of records identified in relevant statutes, EOs, and agency materials:

(1) rulemaking notices;
(2) written submissions in response to rulemaking notices;
(3) procedural requests (e.g., requests for oral presentations, comment-period extensions) and associated materials;
(4) materials related to public meetings and hearings;
(5) materials related to ex parte communications;
(6) economic, environmental, and other regulatory assessments;
(7) other background materials (e.g., studies, reports, data, and other factual materials upon which the agency relies);
(8) inter-agency communications;
(9) draft rules and notices;
(10) rulemaking petitions and associated materials;
(11) advisory committee records, reports, and recommendations;
(12) records specific to multi-member boards and commissions; and
(13) indexes.

The following sections address each category in turn. The Working Group did not identify any additional categories during its discussion.

a. Rulemaking Notices

The APA requires agencies to publish a notice of proposed rulemaking (NPRM) in the Federal Register for each rulemaking. Agencies must also publish the final rule in the Federal Register. In addition to the NPRM and final rule, agencies may publish, among other notices:

\[4 \text{ 5 U.S.C. } \S 553(b)–(c).\]
advance NPRMs, supplemental NPRMs, and other information requests; notices withdrawing or
terminating a proposed rulemaking; and procedural notices, such as those extending the time
period for public comments or announcing a public meeting or hearing. Several agencies have
adopted rules or guidance directing rulemaking staff to add some or all of these materials to the
public rulemaking docket. ACUS has likewise recommended, and the Working Group agreed,
that agencies should generally include all “notices pertaining to the rulemaking” in the public
rulemaking docket.\(^5\)

b. Procedural Requests and Associated Materials

Members of the public sometimes make procedural requests related to a rulemaking—
asking, for example, that the agency provide an opportunity for oral presentation or extend the
public comment period. Some agencies maintain such requests in the public rulemaking docket.
Agencies may wish to explain to rulemaking personnel whether they should add such requests,
and any related agency responses, to the public rulemaking docket.

c. Written Communications Between Agency Officials and Members of the
Public

The APA requires agencies to “give interested persons an opportunity to participate in the
rule making through submission of written data, views, or arguments.”\(^6\) Agencies typically
satisfy this requirement by instructing the public, in the NPRM, to submit written comments in a
specific manner (e.g., through an online portal or by mail to a named contact) by a specific
deadline. The E-Government Act requires agencies to add properly and timely submitted
comments to the docket.\(^7\)

More complicated questions may arise with respect to relevant materials that a member
of the public submits to the agency or an agency official in an alternative manner (e.g., by email,
by phone or in person, through social media) or outside the public comment period (either before
publication of the NPRM or after the deadline for submitting comments). Additional questions

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\(^5\) Recommendation 2013-4, supra note 2, ¶ 2.
\(^6\) 5 U.S.C. § 553(c).
may arise with respect to materials, especially voluminous materials, that are attached to or
corporated by reference in public comments.

The Working Group agreed that, within the bounds established by federal law and
judicial decisions regarding ex parte communications, it would be difficult to prescribe a policy
regarding the addition of such submissions to the public rulemaking docket that would make
sense for all rulemakings at all agencies. Members of the Working Group instead emphasized
that agencies should develop and adhere to clear policies regarding the treatment of such
submissions. Many have already done so, particularly through rules and policies governing the
disclosure of ex parte communications. Agencies should refer to the following ACUS
recommendations for more detailed guidance on how to develop such policies:

- Recommendation 2014-4, “Ex Parte” Communications in Informal Rulemaking;8
- Recommendation 2013-5, Social Media in Rulemaking;9 and
- Recommendation 2011-2, Rulemaking Comments.10

Agencies should also consider how they can most effectively communicate the principles
established in such policies to rulemaking personnel.

d. Oral Communications Between Agency Officials and Members of the Public

As with written communications, the Working Group agreed that, within the bounds
established by federal law and judicial decisions regarding ex parte communications, it would be
difficult to prescribe a policy regarding the addition of oral communications to the public
rulemaking docket that would make sense for all rulemakings at all agencies. Members of the
Working Group instead emphasized that agencies should develop and adhere to clear policies
regarding the treatment of such communications. Many have already done so, particularly
through rules and policies governing the recordation and disclosure of ex parte communications.

Agencies may wish to consider ACUS Recommendation 2014-4, “Ex Parte”
Communications in Informal Rulemaking, to develop such policies. Agencies should also

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consider how they can most effectively communicate the principles established in such policies to rulemaking personnel.

One member of the Working Group recommended that agencies develop a standardized form that agency officials can use to memorialize ex parte, oral communications and that rulemaking staff can easily add to the public rulemaking docket when appropriate.

e. Materials Related to Public Meetings and Hearings

Agencies sometimes organize public meetings or hearings related to ongoing rulemakings, as required by law or to provide an additional opportunity for public participation. Consistent with ACUS’s recommendations, the Working Group agreed it is typically in an agency’s interest to record and/or transcribe such an event and to make a recording or transcript publicly available during the rulemaking. Current technologies make it easy for agency officials to record public events and make them available online. One member noted that agencies cannot currently add audio or video recordings to Regulations.gov. This may counsel in favor of preparing transcripts, which agency personnel can easily upload to online dockets after events.

Agency officials may exchange written materials with members of the public at such events. Officials may also discuss rulemaking-related matters off the record with members of the public. As noted during the Working Group’s discussion, agency ex parte communications policies likely cover such materials and communications. Some agencies have nevertheless adopted rules or policies that specifically direct personnel to add such materials to the public rulemaking docket. Other agencies may wish to do so as well.

Finally, agency officials may maintain other records regarding public meetings and hearings, such as lists of speakers and attendees. At least one agency directs personnel to add such materials to the public rulemaking docket. Other agencies may wish to do so as well.

f. Economic, Environmental, and Other Regulatory Assessments

Several statutes and EOs require agencies to prepare and make publicly available assessments of a proposed rule’s economic, environmental, or other regulatory impact. They

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11 Admin. Conf. of the U.S., Recommendation 2018-7, Public Engagement in Rulemaking, ¶ 8(a)(viii)–(ix), 84 Fed. Reg. 2146 (Feb. 6, 2019); see also Recommendation 2013-4, supra note 2, ¶ 1(c).
include the Regulatory Flexibility Act, Paperwork Reduction Act, Privacy Act, National Environmental Policy Act (NEPA), and Unfunded Mandates Reform Act. EO 12866, in particular, requires agencies to make certain assessments publicly available in certain contexts.

The Office of Information and Regulatory Affairs (OIRA) has recommended that agencies include such assessments in the public rulemaking docket. Several agencies have also adopted rules directing rulemaking personnel to add them to the docket. Agencies may wish to address the inclusion of such materials in guidance to rulemaking personnel.

One participant noted that agencies frequently establish separate dockets for NEPA materials. Agencies that regularly consider or rely on such materials for rulemaking purposes may wish to explain to rulemaking personnel whether—and, if so, how—they should add them to the public docket.

g. Other Background Materials

The APA requires agencies to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” Under the prevailing judicial interpretation of this provision, agencies must make the “critical factual material” underlying proposed rules—e.g., technical studies, staff reports, data, and methodologies—available for public comment. Consistent with this principle, EO 13563 requires agencies to include “relevant scientific and technical findings” in the public rulemaking docket.

ACUS, too, has recommended that agencies include in the docket: (a) studies and reports on which the proposal relies; (b) references to the scientific literature, underlying data, models, and researching results that the agency considered, including a list of all information on which it relied and any material information it considered but on which it did not rely; (c) data underlying scientific research, including privately and federally funded research; and (d) conflict of interest disclosures for scientific research. More broadly, ACUS has recommended that agencies

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12 Memorandum from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, to the President’s Management Council (May 28, 2010).
14 Air Transp. Ass’n of Am. v. FAA, 169 F.3d 1, 7 (D.C. Cir. 1999); see also Am. Radio Relay League v. FCC, 524 F.3d 227, 236 (D.C. Cir. 2008).
include “any other materials considered by the agency during the course of the rulemaking,”
subject, of course, to “legal limitations on disclosure, any claims of privilege, or any exclusions
allowed by law that the agency chooses to invoke.”

The Working Group agreed that it is difficult to define, in broad terms, what constitutes
“critical factual material.” There is, as one member put it, “no blackletter answer.” Determining
whether a particular record falls within this category can be highly case- and fact-intensive,
turning on characteristics of the agency action, the process, and the material at issue—for
example, whether the material is cited in Federal Register documents associated with the
rulemaking. Although there is an extensive case law on this subject, it can be challenging to
definitively generalize from those opinions which materials necessarily constitute “critical
factual material.” As one member put it, what goes into the rulemaking docket is “not a legal
question . . . but does have legal implications.” Access to expert counsel can be especially
important for rulemaking personnel, especially those with less rulemaking experience.

One member of the Working Group suggested that rulemaking personnel should focus on
whether public access to specific records is necessary to ensure meaningful public participation
in the rulemaking. It may also be helpful for rulemaking personnel to build the public docket
with an eye toward a potential, future administrative record for judicial review. In other words,
rulemaking personnel should manage the public rulemaking docket to ensure the public has an
opportunity to respond to those materials upon which the agency would likely rely to
demonstrate to a reviewing court that its decision-making process was reasonable. Because
agencies often incur a greater litigation risk when they exclude background factual materials
from the public rulemaking docket, members of the Working Group noted that it may be worth
err ing on the side of overinclusion.

It is also worth noting that many background materials may be widely available
independent of the public rulemaking docket, such as studies published in scholarly journals.
Ready public access to a supporting material online or in print may obviate the need for inclusion
in the docket. Many will also be copyright-protected. Agencies may wish to explain to

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16 Recommendation 2013-4, supra note 2, ¶ 2.
rulemaking personnel when it is sufficient to include a reference or citation to materials that are sufficiently available elsewhere.

In other cases, especially for voluminous data underlying a proposed rule, it may be sufficient to reference relevant data in the preamble to a rule or instead add significant or aggregate data or a summary report to the docket rather than the entire dataset or database considered by the agency. Again, the appropriate course of action may depend on characteristics of the agency action, the process, and the data at issue. Agencies may wish to explain to rulemaking personnel how they should handle large datasets and databases in the public docket.

h. Inter-Agency Communications

Agency officials may receive solicited or unsolicited communications from officials at other federal agencies related to a rulemaking.

The most common inter-agency communications are those between the agency and OIRA. EO 12866, in particular, requires agencies to make certain inter-agency communications publicly available: “the substantive changes between the draft submitted to OIRA for review and the action subsequently announced,” “those changes in the regulatory action that were made at the suggestion or recommendation of OIRA,” and additional materials for significant regulatory agencies. Agencies may wish to explain to rulemaking personnel whether they should add these materials and other rulemaking-related communications with OIRA to the public rulemaking docket.

At some agencies, inter-agency communications are a routinized part of agency rulemaking. A Federal Communications Commission regulation governing the establishment of antenna farm areas, for example, requires the FCC to seek the advice of the Federal Aviation Administration (FAA) and add the FAA’s written response to the docket.\footnote{47 C.F.R. § 17.8(a).} One member of the Working Group noted that a specific agency’s public rulemaking dockets routinely include documentation certifying that officials at certain other agencies have reviewed the proposed rules. Agencies for whom inter-agency communications are a routinized part of agency
rulemaking may wish to explain to rulemaking personnel whether and how they should record such communications in the public rulemaking docket.

Agencies sometimes receive communications from officials at other agencies through the formal process for public commenting. That agencies submit such communications through a public-facing comment process is a strong indicator that they should be, and are intended to be, made publicly available. As the Working Group discussed, rulemaking personnel typically add such communications to the public rulemaking docket as they would any comments received in the same manner from members of the general public.

Finally, rulemaking personnel may communicate with, or receive communications from, officials at other agencies in less formal ways. The Working Group agreed that whether such a communication belongs in the public rulemaking docket can be a difficult question and depends heavily on the nature and purpose of the specific communication and its effect on agency decision making. As one member of the Working Group put it, there can be a “fine line” between including and not including specific communications.

Interagency communications that strongly affect the “quality of the rulemaking” may be more appropriate for inclusion. Communications that are clearly pre-decisional and deliberative can be withheld from public inspection under the relevant FOIA exemption. Still, even when an agency has a legal right to exclude an inter-agency communication, it may be in the agency’s interest to add the communication to the public docket for policy or practical reasons, especially if the communication strongly influences or supports the agency’s action.

Agencies may wish to consider the distinction ACUS drew in Recommendation 80-6 between communications containing “policy advice” and those containing “material factual information,” with disclosure more important for the latter than the former. Other characteristics counseling disclosure may include whether the communication reflects comments made by persons outside the government, or whether it is important to give public participants an adequate opportunity to respond “if the material presents new and important issues or creates serious conflicts of data.”  

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10 DRAFT March 19, 2021
i. Draft Rules and Notices

Unless a statute specifically directs an agency to do so, federal law does not require agencies to include draft proposed and final rules in public rulemaking dockets. (As noted above, EO 12866 separately requires that agencies disclose certain draft materials shared with or received from OIRA.) Drafts and other, similar intra-agency materials are frequently pre-decisional or deliberative records under FOIA. At least one agency’s rules permit, but do not require, officials to make draft proposed regulations and tentative final regulations available for public inspection. Agencies, if any, that regularly include draft materials in the public rulemaking docket may wish to address their inclusion in guidance to rulemaking personnel.

j. Rulemaking Petitions and Associated Materials

The APA requires that agencies give interested persons “the right to petition for the issuance, amendment, or repeal of a rule.” Although agencies have adopted different practices for rulemaking petitions, several have adopted rules directing personnel to make them available for public inspection or add them to the public docket for a related rulemaking.

ACUS has recommended that agencies use online dockets to allow the public to monitor the status of rulemaking petitions, consider inviting public comments on rulemaking petitions, and docket each decision with the petition to which it responds.

Agencies may wish to explain to rulemaking personnel whether they should add rulemaking petitions and associated materials, including agency responses and responsive public comments, to the public docket for a related rulemaking.

k. Advisory Committee Records, Reports, and Recommendations

ACUS has recommended that agencies add “report or recommendations of any relevant advisory committees” to the public docket for related rulemakings. Agencies may wish to

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20 5 U.S.C. § 5539(e).
22 Recommendation 2013-4, supra note 2, ¶ 2.
explain to rulemaking personnel which advisory committee materials, if any, they should add to
the public docket for a related rulemaking.

1. Records Specific to Multi-Member Boards and Commissions

Agencies should consider, as appropriate, whether rulemaking staff should include
materials associated with decision making by multi-member boards and commissions in the
public rulemaking docket. Relevant materials may include voting records, transcripts, minutes,
recordings, and notices required by the Government in the Sunshine Act.

m. Indexes

ACUS recommends that agencies “index public rulemaking dockets for informal
rulemaking, at an appropriate level of detail.” At least one agency, for a particular program,
explicitly requires that public dockets contain an index of their contents. Agencies may wish to
explain to rulemaking personnel whether, and if so how, they should index public dockets.

3. What Records Should Rulemaking Personnel Exclude From the Public Rulemaking
Docket?

Although ACUS has recommended that agencies “manage their public rulemaking
dockets to achieve maximum public disclosure,” it has also recognized that some rulemaking
materials may be “subject to legal limitations on disclosure, any claims of privilege, or any
exclusions allowed by law that the agency chooses to invoke.”

Members of the Working Group emphasized the difference between two types of
exclusions. First, there is information that agencies must not disclose in the public rulemaking
docket or otherwise, at least not without the consent of the information’s owner or the individual
or entity to whom the information pertains. Second, there is information that agencies may
choose not to disclose but are not prohibited from doing so and indeed may find it useful to
disclose in the public rulemaking docket.

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23 Recommendation 2013-4, supra note 2, ¶ 6.
24 40 C.F.R. § 155.32(b)(1), (c).
Information in the first category includes personal information,26 confidential commercial information,27 national security and other classified information, law enforcement records or information, and other, similar records enumerated in FOIA, the Privacy Act, the Trade Secrets Act, the Sunshine Act, and other statutes. These sorts of information may appear in documents generated or identified by agency officials, or they may appear in submissions received from members of the public. Some information, including personal information and confidential commercial information, can be disclosed with the consent of the information’s owner or the individual or entity to whom the information pertains. Agencies have adopted different methods to screen for protected materials or obtain consent to disclose them in the public docket—a subject the Working Group will consider in greater detail at its next meeting.

In some cases, it may be the form of the disclosure that is problematic. For example, while disclosing certain materials in the online docket may raise copyright concerns, it may be acceptable for an agency to provide limited access to the materials in its docket office. The Working Group will consider this subject at its next meeting as well.

Information in the second category includes materials subject to the deliberative-process, attorney-work-product, and attorney-client privileges recognized in civil litigation and FOIA section (b)(5). Although agencies may choose not to disclose such materials in the public rulemaking docket, they are not obligated to withhold them.

Members of the Working Group emphasized that although agencies may choose not to add privileged materials to the public rulemaking docket, it is often in their interest to do so, in order to improve public participation in the rulemaking process and potentially as a defensive posture in case of future litigation. Agencies may wish to emphasize to rulemaking personnel that they should not universally exclude privileged materials from the public docket; they should instead consider the nature of specific information and its significance to the rulemaking. The Working Group also noted that rulemaking personnel should not blindly accept that documents

26 In this context, personal information means “information about an individual including his or her education, financial transactions, medical history, criminal or employment history, or similarly sensitive information, and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual.” See Admin. Conf. of the U.S., Recommendation 2020-2, Protected Materials in Public Rulemaking Dockets, 86 Fed. Reg. 6614 (Jan. 22, 2021).
27 Confidential commercial information means “commercial information that is customarily kept private, or at least closely held, by the person or business providing it.” See id.
marked “privileged” or “confidential” should be excluded from the docket. They should instead consider the source of and purpose for the designation, and, as appropriate, independently consider whether the document should be included in the docket.

Agencies sometimes also exclude materials from the docket for procedural or pragmatic purposes. Some agencies, for example, exclude irrelevant and improperly submitted comments from the docket. As noted above, at least one agency allows rulemaking staff to exclude from the docket those documents associated with the rulemaking that are “generally accessible to the public in such a way that public notice and access are adequate (such as through widely available publications).”

Some members of the Working Group asked whether it would be appropriate to exclude from the docket or redact content that is threatening, abusive, obscene, or profane. One member noted that Congress has paid some attention to the issue. The Senate Homeland Security Permanent Subcommittee on Investigations issued a staff report in October 2019 finding that agencies lack consistent policies regarding the screening and posting of comments containing profanity. Other docket management issues identified by the Subcommittee include publication of comments including copyrighted information, massive amounts of data irrelevant to the topic at hand, or executable files which may contain virus; publication of “thousands of duplicate or near-duplicate comments that make a docket difficult or impossible for the public to review the docket for substantive information;” and publication of comments submitted under false identities. ACUS is also currently considering a project on best practices for handling mass, computer-generated, and fraudulent comments in rulemakings.

The Working Group may wish to consider these issues in greater depth at its next meeting or in its final product.

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4. 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 is the public rulemaking docket and what is its purpose?
- What materials should agency personnel add to the public rulemaking docket? Is there a general standard agency personnel should use to determine whether to add a material to the public rulemaking docket?
- What specific types of materials should agency personnel generally add or consider adding to the public rulemaking docket? Are there any specific types of materials for which agencies should provide special or more detailed guidance?
- What materials should agency personnel exclude from the public rulemaking docket? Is there a general standard agency personnel should use to determine whether to exclude a material from the public rulemaking docket?
- What specific types of materials should agency personnel generally exclude or consider excluding from the public rulemaking docket? Are there any specific types of materials for which agencies should provide special or more detailed guidance?
- How should agency personnel handle questions about whether or not to include specific records in the public rulemaking docket?