This Report documents the Staff Counsel’s notes of the discussion of the Working Group on Compiling Administrative Records at its fifth meeting on April 19, 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 sixth 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 February 23, 2020. 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

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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.

At its fifth meeting, the Working Group discussed the processes by which agency
personnel add materials to the public rulemaking docket. Topics addressed were: (1) compiling
and indexing the docket, (2) managing sensitive and protected information, (3) handling other
recurring and emerging public comment issues, and (4) preserving the docket. Parts 1–4 of this
Report describe the Working Group’s discussion of these topics. Part 5 identifies related topics
the Working Group may wish to address in its final product.

1. How Should Rulemaking Personnel Compile and Index the Public Rulemaking
Docket?

The E-Government Act requires that agencies maintain an electronic docket for each
rulemaking. Some agencies maintain the electronic docket on their websites. Others maintain the
docket on Regulations.gov, a website managed by the General Services Administration (GSA).
GSA manages the website and has issued some instructions for agencies and the public on its
use. Individual agencies are responsible for creating, uploading materials to, and maintaining
their own rulemaking dockets on Regulations.gov.

Members of the Working Group believed it would be sufficient to direct agencies to
GSA’s instructions for using Regulations.gov. Those instructions also contain guidance on how
agencies can use Regulations.gov to index docket materials. Consistent with Recommendation
2011-2, Rulemaking Comments,4 agencies may also wish to include in guidance to rulemaking

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3 Id.
personnel any policy on how soon after receipt staff should post public comments to the electronic docket.

Some agencies also provide reading-room access to a physical docket, especially to facilitate public inspection of physical objects (e.g., models), records that cannot easily be made available online (e.g., large databases), or records that the agency cannot or does not wish to distribute online (e.g., copyright-protected materials, as discussed in the next section). Agencies may wish to explain in guidance to rulemaking personnel which materials, if any, they should include in a physical docket instead of, or in addition to, the electronic docket. Agencies may also wish to describe whether, and, if so, how agencies should reference in the electronic docket those items available that are only available for public inspection in the physical docket.

2. **How Should Rulemaking Personnel Manage Sensitive and Protected Information in the Public Rulemaking Docket?**

The Administrative Procedure Act generally requires agencies to make publicly available all critical material underlying a rulemaking. However, as the Working Group discussed at its fourth meeting, various federal laws and policies prohibit agencies from disclosing or allow agencies to withhold certain sensitive or protected information without the consent of its owner. Applicable laws include the Freedom of Information Act (FOIA), the Privacy Act, and the Trade Secrets Act. The following two sections address agency process for handling confidential business information (CBI) and personally identifiable information (PII) submitted by public commenters. A third section briefly addresses issues related to copyrighted materials.

a. **Confidential Business Information**

Agencies have adopted various policies to identify and, when appropriate, withhold CBI from the public rulemaking docket. Some screen comments for CBI, which can be a very labor-intensive process. Some ask or require commenters to submit information they claim to be CBI outside of Regulations.gov or the agency’s usual comment submission process, for example by email or mail or via a secure file transfer application. Some ask or require commenters to clearly delineate any information in their comments that they claim to be CBI.
Once agencies receive information they claim to be CBI, rulemaking personnel can either accept the commenter’s word or independently determine whether the information is properly CBI. (Members of the Working Group appeared to evince a strong preference for the latter.)

After deciding that a comment contains CBI, rulemaking personnel must determine how to handle the comment for purposes of the rulemaking docket. Agencies generally add comments containing CBI to a separate docket that is not available to the public. Many also post a notice in the public rulemaking docket stating that they have received a comment containing CBI or post the comment to the public rulemaking docket with all CBI redacted.

Finally, agencies must determine who should handle requests to inspect CBI and the process for doing so. Some agencies require requestors to follow the normal process for requesting records under FOIA. Others have established processes specific to CBI.

ACUS recently issued Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, which offers agencies best practices for handling these and other related issues. Members of the Working Group agreed it would be sufficient to direct agencies to Recommendation 2020-2 for guidelines on how to draft guidance explaining to rulemaking personnel how they should handle CBI received during the notice-and-comment process.

b. **Personally Identifiable Information**

Federal law generally prohibits agencies from disclosing PII contained in systems of records without the written consent of the person to whom the information pertains. Agencies frequently advise commenters that any personal information they submit will be made publicly available as part of the rulemaking docket. More difficult questions can arise when commenters submit PII that belongs to a third party.

Recommendation 2020-2 offers agencies best practices for handling these and other related issues. Members of the Working Group agreed it would be sufficient to direct agencies to Recommendation 2020-2 for guidelines on how to draft guidance explaining to rulemaking personnel how they should handle PII received during the notice-and-comment process.
c. Copyrighted Materials

Public commenters sometimes submit copyrighted materials, such as articles or images, as part of or as attachments to their comments. Although these materials can be relevant to a rulemaking, agencies are often hesitant to add them to the online docket out of fear that they may be liable for publishing or distributing them without the copyright holders’ consent. Some agencies impose specific requirements for submitting copyright-protected materials, for example by requiring proof that the submitted owns the copyright to the submitted work. Several make copyrighted materials available for public inspection in a reading room, but not as part of the online docket. Agencies may wish to explain in guidance how rulemaking personnel should handle copyrighted materials received from the public during the notice-and-comment process.

3. How Should Rulemaking Personnel Handle Other Recurring and Emerging Public Comment Issues?

It was briefly noted that mass-comment campaigns and fraudulent comments may pose docket management challenges. Because the ACUS Committee on Rulemaking is currently considering a project on Mass, Computer-Generated, and Fraudulent Comments, the Working Group agreed to postpone discussion of these topics until the conclusion of that project.

The Working Group briefly discussed the exclusion of comments containing profane, threatening, and abusive language. It was noted that the Environmental Protection Agency has a policy of rejecting “[c]omments containing threatening language or profanity.” Agencies that prohibit submission of profane, threatening, or abusive language may wish to explain to rulemaking personnel what language qualifies as profane, threatening, or abusive and what actions rulemaking personnel should take with respect to comments containing such language. One member of the Working Group also noted that agencies should be mindful of any rights commenters may have under the First Amendment to the United States Constitution.

Another member of the Working Group noted that agencies that accept comments by email may receive junk email in response to Federal Register notices that clearly does not relate

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to the rulemaking. Agencies that accept comments by email may wish to explain to rulemaking personnel how they should handle such messages.

4. How Should Rulemaking Personnel Preserve the Public Rulemaking Docket?

Agencies must preserve and dispose of their rulemaking records in accordance with records retention schedules established by individual agencies. Agencies may wish to explain those policies to rulemaking personnel as part of their guidance on compiling rulemaking records. (As of April 2020, there is no longer a General Records Schedule from the National Archives and Records Administration (NARA) that governs rulemaking records.7)

5. 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 ordinary process for creating an electronic docket and adding materials to the electronic docket throughout the rulemaking process?
- As applicable, what is the ordinary process for creating a physical docket and adding materials to the physical docket throughout the rulemaking process?
- How should rulemaking personnel manage sensitive and protected information—including CBI, PII, and copyrighted materials—that the agency receives during the notice-and-comment process?
- Are there any special processes for handling profane, threatening, or abusive language submitted during the notice-and-comment process?
- Are there any special processes for handling spam or other materials received during the notice-and-comment process that clearly do not relate to the rulemaking?
- What actions should rulemaking personnel take to preserve the public rulemaking docket after the rulemaking has ended?

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