



# **HANDBOOK ON COMPILING ADMINISTRATIVE RECORDS FOR INFORMAL RULEMAKING**

**Prepared by the  
Working Group on Compiling Administrative Records**

**Office of the Chairman  
Administrative Conference of the United States**

**January 2022**

## **ABOUT THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

The Administrative Conference of the United States (ACUS) is an independent federal agency within the executive branch whose statutory mission is to study the efficiency, adequacy, and fairness of federal administrative processes. ACUS is charged with promoting effective public participation in the rulemaking process and making improvements to the regulatory process by reducing unnecessary litigation and improving the use of science and the effectiveness of applicable laws.

ACUS has issued more than 200 recommendations to improve rulemaking, adjudication, and other administrative processes since its inception in 1968. Many have resulted in reforms by federal agencies, the President, Congress, and the Judicial Conference of the United States. Recommendations are issued by the Assembly, whose members include a Chairman appointed by the President and confirmed by the Senate; ten presidential appointees who, together with the Chairman, comprise the Council; 50 senior federal officials; and 40 academics, practitioners, and other private-sector experts.

The work of ACUS is supported by a small, full-time staff in the Office of the Chairman. In addition to supporting the consideration and adoption of recommendations, the Office of the Chairman conducts and commissions research, publishes reference guides, organizes public events and interagency roundtables, provides nonpartisan advice to agencies and Congress, and undertakes other activities to arrange for the interchange of information useful in improving administrative procedure.

## CONTENTS

<i>Foreword</i>	ii
<i>Working Group on Compiling Administrative Records</i>	iii
<i>Preface</i>	iv
<i>Acronyms</i>	vi
Chapter 1: Drafting Guidelines for Personnel	1
Chapter 2: Rulemaking Fundamentals	5
Chapter 3: Internal Rulemaking Record	14
Chapter 4: Public Rulemaking Docket	20
Chapter 5: Administrative Record for Judicial Review	33
Appendix A: Recommendation 2013-4 <i>The Administrative Record in Informal Rulemaking</i>	42
Appendix B: Selected ACUS Recommendations	52

## FOREWORD

In Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013), the Administrative Conference of the United States (ACUS) advised federal agencies to provide their employees with practical guidance on compiling and preserving the administrative record in informal (notice-and-comment) rulemakings. ACUS is pleased to offer agencies this *Handbook* to assist them in preparing such guidance. Many of its best practices are drawn from Recommendation 2013-4.

This *Handbook* was prepared by a working group of esteemed government and private lawyers (some ACUS members) whose names are listed on page iii and its reporter, Jeremy Graboyes of the ACUS staff, over many months. Their hard work, formidable expertise, and good judgment are evident on every page. It is my honor to thank them on behalf of ACUS.

Although this *Handbook* draws from Recommendation 2013-4 and other ACUS recommendations, any views it expresses not reflected in those recommendation are the working group's alone. Only formal recommendations adopted by the ACUS Assembly—that is, ACUS's members sitting together in plenary session—reflect ACUS's official views. Numerous such recommendations are cited throughout this *Handbook*. We encourage agencies to consult them.

January 25, 2022

MATTHEW LEE WIENER  
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## **PREFACE**

**Jeremy S. Graboyes**  
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In 2013, the Assembly of the Administrative Conference of the United States (ACUS) issued Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013). That Recommendation offers agencies best practices for compiling, preserving, and certifying records in informal (often called notice-and-comment) rulemaking and generally supports the judicial presumption of regularity for agency administrative records. Recommendation 2013-4 also encourages agencies that engage in informal rulemaking to issue guidance to aid personnel in implementing these best practices and make that guidance publicly available.

Several agencies have published such guidance over the years: the Department of the Interior in 2006, the Environmental Protection Agency in 2011, and the National Oceanic and Atmospheric Administration in 2012. But many others have not. Recognizing a need for additional advice to help agencies develop such guidance, in 2019, the ACUS Office of the Chairman convened a new Working Group on Compiling Administrative Records to prepare materials that agencies could use to develop the guidance called for in Recommendation 2013-4.

The ACUS Office of the Chairman invited representatives from the public and private sectors to join the new Working Group. Its members—all experts in administrative law and procedure—are listed on page iii. It was a true pleasure to work with and learn from them, and I appreciate their engagement and willingness to share their expertise.

The Working Group met on seven occasions between October 2019 and November 2021. All meetings were open to the public, and several academics, non-member agency officials, and others participated. Records of Working Group meetings are available online at [www.acus.gov/research-projects/working-group-compiling-administrative-records](http://www.acus.gov/research-projects/working-group-compiling-administrative-records).

Early in its deliberations, the Working Group determined that the most useful resource for agencies would be a handbook on compiling administrative

records for informal rulemaking. This *Handbook* is the result. It was developed through a collaborative effort based on the Working Group's discussions. Although this *Handbook* represents the work product of the Working Group collectively, its contents do not necessarily represent the views or opinions of individual members, the organizations with which they are affiliated, the federal government, or ACUS.

This *Handbook* is not intended to serve as an authoritative compendium of the many laws, judicial opinions, and executive-branch policies governing administrative recordkeeping for informal rulemaking. It was not the Working Group's mission to relitigate administrative law principles, recommend best practices, or provide substantive advice to agencies.

Instead, the *Handbook* provides practical advice that agencies can use to draft guidelines that explain applicable legal requirements, policies, and best practices to agency personnel. It will also help agencies explain these complicated requirements, policies, and practices in a manner that is clear, accessible, and directed toward the personnel charged with implementing them.

This *Handbook* is intended only to help agencies develop their own guidelines on administrative recordkeeping for informal rulemaking. Readers should not rely on it as a legal document. Agency personnel and members of the public who have questions about administrative records generally or about particular rulemakings should direct them to rulemaking agencies or the Department of Justice.

## **ACRONYMS**

<b>ACUS</b>	Administrative Conference of the United States
<b>APA</b>	Administrative Procedure Act
<b>ANPRM</b>	Advance Notice of Proposed Rulemaking
<b>AR</b>	Administrative Record
<b>DOI</b>	Department of the Interior
<b>DOJ</b>	Department of Justice
<b>EPA</b>	Environmental Protection Agency
<b>FDMS</b>	Federal Docket Management System
<b>FOIA</b>	Freedom of Information Act
<b>NOAA</b>	National Oceanic and Atmospheric Administration
<b>NPRM</b>	Notice of Proposed Rulemaking
<b>OIRA</b>	Office of Information and Regulatory Affairs
<b>OFR</b>	Office of the Federal Register
<b>RFI</b>	Request for Information

# CHAPTER 1

## DRAFTING GUIDELINES FOR AGENCY PERSONNEL

- 1.1 What guidelines should agencies develop on administrative recordkeeping for informal rulemaking?
- 1.2 Who is the audience for the Guidelines?
- 1.3 What topics should the Guidelines address?
- 1.4 How should the Guidelines be organized?
- 1.5 How should the agency disseminate the Guidelines?
- 1.6 Whom should agency personnel contact when they have questions about the Guidelines?
- 1.7 How should the agency maintain the Guidelines?

### **1.1 What guidelines should agencies develop on administrative recordkeeping for informal rulemaking?**

Agencies compile three main types of administrative records related to informal rulemaking: (1) an internal rulemaking record, (2) a public rulemaking docket, and (3) an administrative record for judicial review. Various federal laws, executive-branch policies, and agency practices govern how agency personnel manage these records. ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, also offers agencies best practices for their compilation, preservation, and public disclosure.<sup>1</sup>

Policies and procedures for compiling administrative records are usually spread across multiple sources, including statutes, executive-branch policies, and agency regulations, guidance documents, manuals, memoranda. Some procedures may be a matter of unwritten, agency custom. It can be difficult for agency personnel involved in informal rulemaking to locate all relevant policies and procedures and understand how they relate to each other.

An effective way to help personnel understand and implement applicable policies and procedures is for agencies to develop and disseminate a single document—

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<sup>1</sup> ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*.

Recommendation 2013-4 is reproduced in its entirety in Appendix A. Full citations for all ACUS recommendations referenced in this *Handbook* are available in Appendix B.

which this *Handbook* calls “the Guidelines”—that explains and synthesizes the most important policies and procedures and answers frequently asked questions. Several agencies have developed their own guidelines over the years, including the Department of the Interior (DOI),<sup>2</sup> Environmental Protection Agency (EPA),<sup>3</sup> and National Oceanic and Atmospheric Administration (NOAA).<sup>4</sup> ACUS has encouraged other agencies to develop their own publicly available guidelines.<sup>5</sup>

The ACUS Working Group on Compiling Administrative Records prepared this *Handbook* to help agencies develop and disseminate guidelines that effectively communicate their policies and practices for administrative recordkeeping to agency personnel involved in informal rulemaking. The *Handbook* identifies the key subjects that the Guidelines should address and offers tips for explaining them in non-technical language that agency personnel with different needs, functions, and levels of experience can easily understand and successfully implement.

## **1.2 Who is the audience for the Guidelines?**

The primary audience for the Guidelines is agency personnel who are involved in informal rulemaking. It is important to remember that many kinds of agency personnel can work on rulemakings, including policy specialists, scientists, economists, lawyers, rule-writers, communications and public affairs specialists, administrative staff, and others. Some may be new to informal rulemaking; others will have substantial experience. When drafting the Guidelines, agencies should be mindful of the different needs, responsibilities, and levels of experience of agency personnel involved in rulemaking. Agencies should use plain language and avoid legal and technical jargon whenever possible.

The Guidelines can also be an important resource for Department of Justice (DOJ) attorneys, courts, and the public. Well-written Guidelines can help them understand how agencies make rules and document rulemaking proceedings.

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<sup>2</sup> Memorandum from David L. Bernhardt, Deputy Solicitor, Standardized Guidance on Compiling a Decision File and an Administrative Record (June 27, 2006), <https://www.nps.gov/features/foia/Standardized-Guidance-on-Compiling-and-Administrative-Record.pdf> [hereinafter DOI Guidelines].

<sup>3</sup> EPA, EPA’S ACTION DEVELOPMENT PROCESS: ADMINISTRATIVE RECORDS GUIDANCE (Sep. 2011), <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [hereinafter EPA Guidelines].

<sup>4</sup> Memorandum from Lois J. Schiffer, Gen. Counsel, NOAA, NOAA Guidelines for Compiling an Agency Administrative Record (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 Guidelines].

<sup>5</sup> ACUS Recommendation 2013-4, ¶ 11.

### **1.3 What topics should the Guidelines address?**

Agencies will need to tailor their Guidelines to account for their own policies, practices, and unique circumstances. The level of detail and precise contents will vary based on factors such as the size of typical rulemaking records, the level of institutional experience with rulemaking and recordkeeping, the need for consistency across components, and available resources. ACUS recommends, however, that all agencies aim to answer seven basic questions in their Guidelines:

- (1) What materials should agency personnel include in the internal rulemaking record, public rulemaking docket, and administrative record for judicial review?
- (2) What materials should agency personnel exclude from the internal rulemaking record, public rulemaking docket, and administrative record for judicial review?
- (3) When and how should agency personnel compile and index the internal rulemaking record, public rulemaking docket, and administrative record for judicial review?
- (4) How should agency personnel manage and segregate sensitive, protected, and privileged materials, including sensitive information submitted by public commenters?
- (5) How should agency personnel preserve the internal rulemaking record, public rulemaking docket, and administrative record for judicial review?
- (6) What process should agency personnel use to certify the administrative record for judicial review?
- (7) Are there any capabilities or limitations of recordkeeping tools and technologies of which agency personnel should be aware?<sup>6</sup>

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

## **1.4 How should the Guidelines be organized?**

Agencies should consider dividing the Guidelines into four main sections:

- (1) Introduction to Informal Rulemaking
- (2) Compiling the Internal Rulemaking Record
- (3) Compiling the Public Rulemaking Docket
- (4) Compiling the Administrative Record for Judicial Review

These sections correspond to Chapters 2–5 of this *Handbook*.

## **1.5 How should the agency disseminate the Guidelines?**

Agencies should ensure that agency personnel involved in rulemaking projects, as well as outside audiences, have easy access to the agency's Guidelines. It is a best practice for agencies to post the Guidelines in appropriate locations on their public websites and on their intranets or internal networks. Agencies should also use their Guidelines to train new personnel and provide continuing education for all agency personnel involved in rulemakings. Agencies should periodically remind agency personnel that the Guidelines exist and are a helpful resource when they have questions about administrative records related to informal rulemaking.

## **1.6 Whom should agency personnel contact when they have questions about the Guidelines?**

Although the Guidelines are a helpful way to communicate policies and key concepts about administrative recordkeeping to agency personnel, questions will undoubtedly arise. The Guidelines should specify an official or office that agency personnel should contact when they have questions about the Guidelines or are uncertain how to apply them in particular situations.

## **1.7 How should the agency maintain the Guidelines?**

Policies and practices change over time, especially as agencies adopt new technologies for administrative recordkeeping. Agencies should periodically review the Guidelines to ensure that they continue to reflect current practices. Agencies should distribute updated Guidelines to agency personnel who are involved in informal rulemaking.

## CHAPTER TWO

# RULEMAKING FUNDAMENTALS

The Guidelines should begin with a high-level overview of the informal rulemaking process. This section should explain to agency personnel:

- 2.1 What is informal rulemaking, and how does it work?
- 2.2 How do agency personnel develop a proposed rule?
- 2.3 How does the agency provide public notice of a proposed rule?
- 2.4 How does the agency obtain public input on a proposed rule?
- 2.5 How do agency personnel consider public input and develop a final rule?
- 2.6 How does the agency publish a final rule?
- 2.7 What is judicial review of informal rulemaking, and how does it work?
- 2.8 What types of materials do agency personnel handle during informal rulemaking?
- 2.9 What types of administrative records do agency personnel compile related to informal rulemaking?

### **2.1 What is informal rulemaking, and how does it work?**

The Guidelines should begin by describing what rules are, when and why agencies engage in informal rulemaking, and the steps involved in informal rulemaking. This background information can be helpful for explaining what administrative records agencies maintain during informal rulemaking, what purposes they serve, and how they relate to each other.

#### **SAMPLE LANGUAGE**

[Agency] issues rules to implement and interpret statutes, explain how they will exercise their discretion, and describe their procedures and organization. [Agency] formulates, amends, or repeals rules through a process called “rulemaking.”

Federal law sets out the processes that [Agency] must follow when it makes rules. One process for rulemaking is called “informal rulemaking” (also called “notice-and-comment rulemaking”). There are other rulemaking processes too, but these Guidelines do not address them.

The requirements for informal rulemaking are set forth in a federal law called the Administrative Procedure Act (APA) and in court decisions that interpret it.

Additional requirements are set forth in White House directives (for example, Executive Order 12866), procedural and substantive statutes (for example the Regulatory Flexibility Act and Clean Air Act), and in agency regulations.

There are five key steps to making a rule through informal rulemaking:

- (1) Develop the proposed rule.
- (2) Provide public notice of the proposed rule.
- (3) Obtain public input on the proposed rule.
- (4) Consider public input and develop the final rule.
- (5) Publish the final rule.

## **2.2 How do agency personnel develop a proposed rule?**

The informal rulemaking process begins when the agency begins to take specific action toward developing a proposed rule. It can be distinguished from less concrete agency activities, such as general information gathering on a subject of interest.

The Guidelines should explain when the informal rulemaking process begins and that the start of the rulemaking process can trigger special recordkeeping requirements. The Guidelines should also explain how agency personnel work together and, as relevant, with the Office of Information and Regulatory Affairs (OIRA) and other people outside the agency to develop a proposed rule.<sup>1</sup> Finally, the Guidelines should describe the internal process for approving a proposed rule.

### **SAMPLE LANGUAGE**

[Agency] engages in rulemaking for many reasons. Sometimes a statute directs us to develop a new rule. Sometimes we identify a need for a new rule, or we need to update, clarify, strengthen, or eliminate an existing rule. Members of the public can also petition [Agency] to issue, modify, or repeal a rule.

The rulemaking process begins when [Agency] starts to consider a concrete proposal for action and decides to move forward on a specific course of action. It can be distinguished from other activities like general information gathering. The start of a rulemaking can trigger special requirements for recordkeeping.

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<sup>1</sup> Agencies should consult the recommendations ACUS has issued on public engagement and early input during the rule development process. ACUS Recommendation 2021-3, *Early Input on Regulatory Alternatives*; ACUS Recommendation 2018-7, *Public Engagement in Rulemaking*.

If you are involved in the early stages of a rulemaking project, you will work with other agency employees to develop a proposed rule. Along with the proposed rule, you will draft an introduction, called a “preamble,” that, among other things, describes the proposed rule, the legal authority of the rule, and opportunities for public participation in the rulemaking process.

Developing a proposed rule requires a lot of research, writing, deliberation, and collaboration. You may need to work with employees who have very different responsibilities from you, such as policy specialists, scientists, economists, attorneys, regulatory specialists, and administrative staff. You may also need to work with officials in the Office of Information and Regulatory Affairs (OIRA), a part of the Executive Office of the President that serves as the government’s central authority for the review of executive branch regulations.

[Agency] may also decide to seek input from the public before proposing a rule, for example by meeting with stakeholders, convening public events, or publishing an advance notice of proposed rulemaking (ANPRM) or request for information (RFI) in the *Federal Register*. The *Federal Register* is the daily journal of the federal government published by the National Archives and Records Administration (NARA).

Agency work on a proposed rule is finished when the [agency official] signs it. Our process for developing and approving a proposed rule is available at [source].

## **2.3 How does the agency provide public notice of a proposed rule?**

After developing a proposed rule, the agency must provide public notice of the proposed rule and invite public comments unless an exception under the Administrative Procedure Act (APA) applies. The Guidelines should explain that, unless an exception applies, the agency must publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, which includes the text of the proposed rule and the preamble discussed in the preceding section.

The Guidelines should address the internal process for preparing and working with the Office of the Federal Register (OFR) to publish the NPRM. As relevant, the

Guidelines should also explain how publication of the NPRM triggers recordkeeping requirements for agency personnel and policies on ex parte communications.<sup>2</sup>

### **SAMPLE LANGUAGE**

To provide public notice that it is proposing the rule, [Agency] works with NARA’s Office of the Federal Register (OFR) to publish a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*. The NPRM includes the text of the proposed rule and the preamble. [Agency office] is responsible for finalizing the NPRM and working with OFR to publish it.

The public part of the informal rulemaking process begins with the NPRM. After this point, you may need to document the communications you have with people outside the government about the rulemaking. These conversations are called “ex parte” communications and are subject to special rules, which are available at [source]. You should use [form] to document any ex parte communications you have with people outside the government.

It may also be beneficial to let people know about the proposed rule on our website or social media, in a press release, or through a mailing list or direct outreach to stakeholders. You should work with [agency office] to coordinate publicity related to a rulemaking.

## **2.4 How does the agency obtain public input on a proposed rule?**

After providing public notice of a proposed rule, the agency must, unless an APA exception applies, provide interested persons an opportunity to comment on it. The Guidelines should explain the importance of public participation and methods for obtaining public input on proposed rules. The Guidelines should briefly address statutory requirements for public participation under the APA and E-Government Act, program- and agency-specific requirements, and requirements set forth in relevant presidential and Office of Management and Budget (OMB) directives.<sup>3</sup> The Guidelines should also address other options for public engagement.<sup>4</sup>

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<sup>2</sup> See ACUS Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*.

<sup>3</sup> Several ACUS recommendations address public comments. See, e.g., ACUS Recommendation 2011-2, *Rulemaking Comments*; ACUS Recommendation 2011-1, *Legal Considerations in e-Rulemaking*.

<sup>4</sup> See ACUS Recommendation 2018-7, *Public Engagement in Rulemaking*.

## **SAMPLE LANGUAGE**

After publishing the NPRM, the APA requires [Agency] to give the public an opportunity to submit written data, views, or arguments related to the proposed rule. These submissions are called “comments.” The NPRM explains how members of the public can submit comments and states the deadline for submitting comments, which is usually at least 30 days after the NPRM is published.

To ensure members of the public have a meaningful opportunity to comment on the proposed rule, [Agency] must maintain a public rulemaking docket online [at Regulations.gov] that includes the NPRM, public comments, and other important materials discussed in these Guidelines.

It can also be beneficial to obtain public input in other ways, including public meetings and other events. You should work with [agency office] to coordinate public events related to a rulemaking. You may need to include records associated with such events in the public rulemaking docket, as discussed below.

If you receive public input in other ways, for example during a phone call or private meeting with a member of the public, you may need to document what you talked about according to [Agency]’s rules on ex parte communications.

### **2.5 How do agency personnel consider public input and develop a final rule?**

After the public comment period closes, the agency can take steps to finalize the proposed rule. In some cases, the agency may decide to abandon or postpone the rulemaking or withdraw the NPRM. If the agency decides to issue a final rule, agency personnel must consider all public input, draft the final rule, and draft a preamble that explains the final rule and responds to any public comments that raise a significant issue. For most agency personnel, the final decisionmaker’s signature (or publication of the final rule, discussed in the next section) signals the end of their involvement in the rulemaking process.

The Guidelines should explain internal processes for reviewing public comments, preparing a final rule, coordinating with OIRA (as relevant), and securing the approval of the final decisionmaker. The Guidelines should also explain why the end of the rulemaking process is important for recordkeeping purposes.

## **SAMPLE LANGUAGE**

After the public comment period ends, agency personnel consider all of the public input received in response to the proposed rule. In some cases, the agency may decide that additional public input is required. The agency can also decide not to finalize the proposed rule.

If the agency decides to issue a final rule, agency personnel work together to develop the final text of the rule. They also draft a preamble that explains the rule's basis and purpose and responds to all significant issues raised in the comments.

Developing a final rule requires a lot of research, writing, deliberation, and collaboration. You may work with employees who have very different responsibilities from you, such as policy specialists, scientists, economists, attorneys, regulatory specialists, and administrative staff. You may also need to work with officials in OIRA. Our process for developing and approving a final rule is available at [source].

For most agency personnel, work on a rulemaking project is complete when the [agency official] signs the final rule. As discussed below, you may need to take steps to close administrative records and preserve them when a rulemaking project is complete. Restrictions on ex parte communications also end at this point.

### **2.6 How does the agency publish a final rule?**

After the decisionmaker approves a final rule, the agency must provide public notice of the final rule in the *Federal Register*. The notice includes the text of the final rule and the preamble discussed in the preceding section. The Guidelines should address the internal process for preparing and working with OFR to publish notice of the final rule and explain when the final rule goes into effect. The Guidelines can also address other forms of public notice about final rules (e.g., publicity on the agency's website or social media, in a press release, through a mailing list, or through direct outreach to stakeholder groups).

## SAMPLE LANGUAGE

To notify the public that the [agency head] has signed a final rule, [Agency] again works with OFR to publish a notice in the *Federal Register*. [Agency office] is responsible for preparing the notice and working with OFR to publish it. The notice includes the text of the final rule, the preamble, and the date on which the rule will go into effect. Except in special circumstances, the effective date must be at least 30 days after the agency publishes the final rule in the *Federal Register*.

It is often helpful to let the public know about the final rule in other ways, for example by providing information on our website, on social media, in a press release, through a mailing list, or through direct outreach to stakeholder groups. You should work with [agency office] to coordinate publicity related to a final rule.

## 2.7 What is judicial review of informal rulemaking, and how does it work?

After describing the steps of the informal rulemaking process, the Guidelines should explain when and how members of the public can challenge a final rule in federal court, how the reviewing court will decide the challenge, and what records the reviewing court will consider to make its decision.<sup>5</sup> The Guidelines should identify the government officials who are involved in the judicial review process, including agency attorneys and, for agencies without independent litigation authority, DOJ.

## SAMPLE LANGUAGE

After a final rule goes into effect, people who are adversely affected by the rule can usually challenge it in federal court. This process is called “judicial review.”

During judicial review, the court decides, among other things, whether the final rule was reasonable and whether the agency followed procedures required by law, such as the requirement to provide a public rulemaking docket online that gives interested persons a meaningful opportunity to comment. To make its decision, the court considers the “whole record” of the rulemaking, which consists of information that the decisionmaker considered directly or indirectly in developing the final rule. The agency provides most of these materials as part of the “administrative record for judicial review.”

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<sup>5</sup> 5 U.S.C. §§ 701–06.

Agency attorneys work with attorneys from the Department of Justice to prepare the administrative record for judicial review and defend the final rule in court. After considering the whole record of the rulemaking and arguments made by the government attorneys and the person challenging the rule, the court will decide whether to uphold the final rule, remand it (send it back to the agency) for further action, or vacate it.

## **2.8 What types of administrative records do agency personnel compile related to informal rulemaking?**

The Guidelines should provide a brief overview of the different kinds of administrative records that agency personnel compile related to informal rulemaking. ACUS Recommendation 2013-4 identifies three types of administrative records related to informal rulemaking that the Guidelines should address:

- (1) an internal rulemaking record maintained throughout the rulemaking (which can go by other names such as the “decision file” or “legal file”),
- (2) the public rulemaking docket, and
- (3) the administrative record for judicial review.<sup>6</sup>

The Guidelines should explain what each of these records is, when agency personnel compile them, and for what purpose.

### **SAMPLE LANGUAGE**

There are several requirements and best practices for recordkeeping during the informal rulemaking and judicial review processes. For example:

- The agency needs to keep track of the important materials it considers in developing the proposed rule and final rule;
- The agency needs to document its decision-making process;
- The agency needs to document ex parte communications;
- The agency needs to have a public rulemaking docket that gives interested persons a meaningful opportunity to comment on the proposed rule;
- The agency needs to prepare an administrative record for judicial review if someone challenges the final rule; and
- The agency needs to follow federal laws and rules on records management.

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<sup>6</sup> ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*.

If you are involved in informal rulemaking or judicial review, you may be asked to preserve certain materials or help compile them as part of one or more of the following administrative records:

- (1) **Internal Rulemaking Record.** The agency maintains an internal rulemaking record throughout the entire informal rulemaking process. The internal rulemaking record includes all materials that agency personnel with substantive responsibilities for the rulemaking directly or indirectly considered during the rulemaking. A good internal rulemaking record helps the [agency official] make a final decision, documents the agency's decisionmaking process, allows the agency to comply with records management requirements, and makes it easier for agency personnel to prepare the public rulemaking docket and, if needed, the administrative record for judicial review.
- (2) **Public Rulemaking Docket.** The public rulemaking docket is the public version of the internal rulemaking record managed by the agency. Federal law requires the agency to post the public rulemaking docket online so that interested persons have an opportunity to comment on the proposed rule.
- (3) **Administrative Record for Judicial Review.** The administrative record for judicial review is the version of the internal rulemaking record that the agency provides to a court as the whole record of the agency's final rule. The agency only prepares an administrative record for judicial review if someone challenges the final rule in federal court.

## CHAPTER THREE

# INTERNAL RULEMAKING RECORD

The Guidelines should include a section that addresses policies and practices for managing the internal rulemaking record in informal rulemaking. This section should explain to agency personnel:

- 3.1 What is the internal rulemaking record?
- 3.2 Why do agency personnel compile the internal rulemaking record?
- 3.3 Who establishes and manages the internal rulemaking record?
- 3.4 When is the internal rulemaking record established and managed?
- 3.5 What is the format of the internal rulemaking record?
- 3.6 How do agency personnel manage the internal rulemaking record?
- 3.7 What materials belong in the internal rulemaking record?
- 3.8 What materials do not belong in the internal rulemaking record?
- 3.9 When and how do agency personnel close and preserve the internal rulemaking record?

### **3.1 What is the internal rulemaking record?**

The Guidelines should explain that the internal rulemaking record is a compilation containing the full record of materials before the agency in an informal rulemaking. They should emphasize that the agency maintains the internal rulemaking record as an internal, non-public record of a rulemaking project. This stands in contrast with the public rulemaking docket and the administrative record for judicial review, discussed in Chapters 4 and 5, both of which *are* disclosed publicly.

### **3.2 Why do agency personnel compile the internal rulemaking record?**

The Guidelines should explain that the agency compiles the internal rulemaking record for several different reasons, including:

- To keep track of important materials that the agency considered as it developed the proposed rule and final rule,
- To document the agency's decisionmaking process for later reference,
- To provide a record for decisionmaking,
- To follow federal laws and rules on records management, and

- To make compiling and managing the public rulemaking docket and the administrative record for judicial review easier.

#### **EXAMPLE (DOI)**

[I]t is important that all Bureaus and Offices maintain organized, accurate, and thorough Decision Files that document work on their decisions. A complete Decision File ensures that the decision-maker, typically the individual signing the decision document, has access to information sufficient to render a well-reasoned decision. An agency must also protect the public's interest in government documents, and preserve its own interests, including compliance with the Federal Records Act and related requirements. Finally, if an agency decision is challenged in court, a thorough Decision File will enable the agency to compile an AR to defend the decision.<sup>1</sup>

### **3.3 Who establishes and manages the internal rulemaking record?**

At many agencies, a designated custodian or other official has primary responsibility for managing internal rulemaking records generally or the internal rulemaking record for a specific rulemaking. The Guidelines should explain which official or office has primary responsibility for establishing and managing the internal rulemaking record throughout the course of a rulemaking. The Guidelines should also explain what responsibilities other agency personnel have for managing the internal rulemaking record.

### **3.4 When is the internal rulemaking record established and managed?**

The Guidelines should encourage agency personnel to maintain a comprehensive internal rulemaking record throughout the course of a rulemaking project—from development of the proposed rule through publication of the final rule. Contemporaneous recordkeeping makes compiling and managing the public rulemaking docket and the administrative record for judicial review easier.

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<sup>1</sup> DOI Guidelines at 2. DOI Guidelines use the term “Decision File” to refer to what this *Handbook* calls the “rulemaking record.” The acronym “AR” means “administrative record for judicial review.”

### **EXAMPLE (DOI)**

Practically, the Decision File is a collection of documents maintained by a designated employee, generally the employee, the program manager, the project manager, or their staff who has access to relevant documents, that details the development of an agency decision. A Decision File should be created once consideration of a decision begins, which will vary based on the situation. The [rulemaking record] should be compiled as documents are generated or received during the decision-making process, making it a contemporaneous record of the decision. This practice will also increase agency efficiency and performance should it become necessary to create an AR.<sup>2</sup>

### **3.5 What is the format of the internal rulemaking record?**

Most agencies now compile internal rulemaking records electronically. Agencies use different software programs and electronic processes to manage internal rulemaking records, including spreadsheets, shared folders, collaborative platforms, and enterprise software. Agencies should explain in the Guidelines which software programs and electronic processes agency personnel should use to compile internal rulemaking records. As relevant, the Guidelines should also explain whether any materials are maintained separately from the internal rulemaking record, such as physical objects.

### **3.6 How do agency personnel manage the internal rulemaking record?**

Agencies have adopted different processes for managing internal rulemaking records, depending on their needs, available resources, and organization, as well as the software program or electronic process they use to compile internal rulemaking records. Each agency, in the Guidelines, should explain its processes for managing the internal rulemaking record. As relevant, the Guidelines should address:

- Where to maintain the internal rulemaking record;
- How to organize the internal rulemaking record (e.g., chronologically, by topic);
- How to add materials to the internal rulemaking record;
- How to index the internal rulemaking record;

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<sup>2</sup> *Id.* at 3.

- How to label, date, or otherwise annotate internal rulemaking record materials;
- How to preserve dynamic materials, such as webpages;
- How to handle voluminous materials and materials that are readily available elsewhere;
- How to handle non-electronic materials and materials that cannot easily be added to the internal rulemaking record;
- How to document communications with people outside the agency (sometimes called “ex parte communications”);
- How to prepare contemporaneous memoranda that document other oral communications, confusing emails, and other matters that demonstrate the agency’s decisionmaking process and belong in the internal rulemaking record; and
- How to handle materials containing protected, privileged, or otherwise sensitive information.

### **3.7 What materials belong in the internal rulemaking record?**

The Guidelines should explain that agency personnel should ordinarily include in the internal rulemaking record all materials “considered” by the agency during the course of the rulemaking.

Whether the agency “considered” a material can be a highly fact-intensive inquiry. As ACUS explained in Recommendation 2013-4:

“Considered” entails review by an individual with substantive responsibilities in connection with the rulemaking. To say that material was considered also entails some minimum degree of attention to the contents of a document. Thus, the [internal] rulemaking record need not encompass every document that rulemaking personnel encountered while rummaging through a file drawer, but it generally should include a document that an individual with substantive responsibilities reviewed in order to evaluate its possible significance for the rulemaking, unless the review disclosed that the document was not germane to the subject matter of the rulemaking.<sup>3</sup>

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<sup>3</sup> ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*.

The Guidelines should encourage agency personnel to interpret the concept broadly so as to fulfill the primary purpose of the internal rulemaking record: to generate a body of materials by which the rule can be evaluated and to which the agency can refer in the future. It may be helpful to explain to agency personnel that the rulemaking record should tell the “complete story” of the rulemaking process, documenting what the agency considered, whether the agency complied with all statutory and other required procedures, and how it arrived at its decision.

To that end, it is important for agency personnel to include all materials relied on or considered by the agency in formulating its proposed or final rule, such as important factual studies and reports. The Guidelines should emphasize that the internal rulemaking record should include materials that the agency considered whether or not they support the agency’s proposed or final rule. In the event of judicial review, government attorneys may need to show that the agency adequately considered contrary evidence, opposing viewpoints, and alternative courses of action. Collecting contrary materials considered by the agency during the course of the rulemaking will make it easier for the agency to defend the final rule in court.

The Guidelines should also advise agency personnel to include materials that document the agency’s decisionmaking process, such as important drafts and documentation of substantive meetings, regardless of whether they contain protected, privileged, or other sensitive information.

Materials that ordinarily belong in the internal rulemaking record include:

- Notices associated with the rulemaking;
- Comments and other materials submitted to the agency related to the rulemaking;
- Any transcripts or recordings of oral presentations made in the course of a rulemaking;
- Reports or recommendations of any relevant advisory committees; and
- Other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the rulemaking.<sup>4</sup>

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<sup>4</sup> ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 1.

### **3.8 What materials do not belong in the internal rulemaking record?**

It would often be a waste of time, with little practical benefit, for all individuals involved in a rulemaking to take steps to add to the internal rulemaking record every minimally relevant study, report, website, or other record that they encounter in the work or have in their files. Similarly, it would be a waste of time in many cases to include email communications, drafts, personal notes, and documentation of oral communications that do not involve the agency decisionmaker or have little meaningful bearing on the ultimate form of the proposed or final rule.

The Guidelines should explain how to agency personnel should distinguish between materials that belong in the internal rulemaking record (i.e., those that reflect consideration by the agency during the rulemaking) and those that do not.

#### **EXAMPLE (DOI)**

- *Substantive* meetings that are relevant to the decision-making process should be sufficiently documented.
- Drafts *that help substantiate* the agency’s decision-making process should be included in the [rulemaking record].
- Documentation of electronic information (such as that found on websites) and communications (such as emails) should be maintained in the [rulemaking record] *only if relevant, substantive, and if they document the decision-making process.*<sup>5</sup>

### **3.9 When and how do agency personnel close and preserve the rulemaking record?**

The Guidelines should advise agency personnel to close and take steps to preserve the internal rulemaking record at the end of the informal rulemaking process (i.e., when the rule becomes final or the agency decides not to continue with the rulemaking). Processes for closing and preserving internal rulemaking records vary from agency to agency. The Guidelines should explain when and how agency personnel close the internal rulemaking record and what steps they should take to preserve it, consistent with federal recordkeeping laws and other executive-branch and agency policies.

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<sup>5</sup> DOI Guidelines at 4 (emphasis added).

## CHAPTER FOUR

# PUBLIC RULEMAKING DOCKET

The Guidelines should include a section that addresses policies and practices for managing the public rulemaking docket in informal rulemaking. This section should explain to agency personnel:

- 4.1 What is the public rulemaking docket?
- 4.2 Why do agency personnel compile the public rulemaking docket?
- 4.3 Who establishes and manages the public rulemaking docket?
- 4.4 When is the public rulemaking docket established and managed?
- 4.5 What is the format of the public rulemaking docket?
- 4.6 How do agency personnel manage the public rulemaking docket?
- 4.7 What materials belong in the public rulemaking docket?
- 4.8 What materials and information do not belong in the public rulemaking docket?
- 4.9 What special processes should agency personnel use to handle public submissions?
- 4.10 When and how do agency personnel close and preserve the public rulemaking docket?

### **4.1 What is the public rulemaking docket?**

The Guidelines should explain that the public rulemaking docket is the public version of the internal rulemaking record managed by the agency and includes all information that the agency makes available for public viewing during the rulemaking process.

### **4.2 Why do agency personnel compile the public rulemaking docket?**

The Guidelines should explain that federal law requires that the agency provide a public rulemaking docket for each rulemaking and that the failure to provide a well-managed public rulemaking docket can result in adverse legal consequences. The Guidelines should also explain that a well-managed public rulemaking docket is beneficial for the public, by ensuring that interested persons have adequate notice of and a meaningful opportunity to comment on the rule, and for the agency.

## SAMPLE LANGUAGE

Public participation is an important part of notice-and-comment rulemaking. [Agency] facilitates public participation by providing a public rulemaking docket for each rulemaking. The public rulemaking docket contains important information about the rulemaking and all records that the agency makes available for public viewing.

A well-managed docket gives members of the public a meaningful opportunity to review the agency's proposed rule and submit their comments and other important information. The agency relies on these submissions to make decisions about its proposed rule. If the agency does not provide timely public access to a complete rulemaking docket, a court can also require the agency to take additional actions before a final rule can go into effect.

### **4.3 Who establishes and manages the public rulemaking docket?**

The Guidelines should specify which agency personnel manage the online and any offline docket and when the docket(s) is established. Some agencies have a centralized office that manages most public rulemaking dockets, whereas other agencies delegate responsibility for managing the public docket to the program office with responsibility for developing a specific rule. The Guidelines should reflect whichever approach the agency has adopted.

### **4.4 When is the public rulemaking docket established and managed?**

The Guidelines should explain when the docket(s) is established (e.g., when the agency submits the NPRM for publication in the *Federal Register*) and the period during which agency personnel should continue to manage it (e.g., until the rulemaking is complete).

## SAMPLE LANGUAGE

[Agency] provides public access to the public rulemaking docket on a website called Regulations.gov. Although the online docket contains most of the materials that [Agency] makes available for public inspection, some materials cannot be posted online. [Agency office] establishes the online docket for a rulemaking when

[Agency] sends the NPRM to OFR for publication in the *Federal Register*. [Agency office] manages the online docket until the rulemaking project is complete.

[Agency] also invites members of the public to inspect the public rulemaking dockets in person in the [Agency Reading Room, 123 J Street NW, Washington, DC 20001]. The docket available in the [Agency Reading Room] includes all materials posted in the online docket and any other materials that the agency decides not to post online (see below). [Agency office] establishes the offline docket for a rulemaking when [Agency] sends the NPRM to OFR for publication in the *Federal Register*. The [Agency office] manages the offline docket until the rulemaking project is complete.

#### **4.5 What is the format of the public rulemaking docket?**

The Guidelines should explain that the agency maintains the public rulemaking docket in an electronic format, as required by federal law,<sup>1</sup> and identify where the online docket is located (e.g., on Regulations.gov or the agency's website). Agencies that invite members of the public to inspect docket materials in a physical location, such as a docket office or reading room, should specify where the offline docket is located and explain whether and how that docket differs from the online docket.

#### **4.6 How do agency personnel manage the public rulemaking docket?**

After agency personnel identify materials that belong in the public rulemaking docket and follow any special policies for handling protected or other sensitive information, they can add them to the public rulemaking docket.

The Guidelines should incorporate or direct agency personnel to consult instructions for using the online docket management system that the agency uses, either Regulations.gov (via FDMS) or its own system. Agencies that use Regulations.gov and FDMS can use instructions provided by the eRulemaking Program Management Office (PMO), which manages Regulations.gov and FDMS.

Agencies that maintain separate online and offline dockets should explain which materials go in the online docket, which go in the offline docket, and which go in

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<sup>1</sup> E-Government Act of 2002, Pub. L. No. 107-342, § 206(d), 116 Stat. 2899, 2916 (Dec. 17, 2002).

both. For example, some agencies only make copyrighted materials available for public inspection in an agency facility. Agencies that maintain an offline docket should include instructions in the Guidelines for managing the offline docket and ensuring it is consistent with the online docket.

The Guidelines should explain whether and how agency personnel should annotate the online docket to acknowledge any materials that were excluded.<sup>2</sup> ACUS recommends, for example, that agencies “should indicate in their e-dockets which, if any, types of comments were not posted and whether these comments can be accessed.”<sup>3</sup> As another example, ACUS notes that agencies may wish to post “only a single representative example of identical comments” in the online docket but should explain that it has done so and “consider providing an opportunity for interested members of the public to obtain or access all comments received.”<sup>4</sup>

The Guidelines should also address any special policies for handling non-electronic materials or electronic materials that cannot be displayed in the online docket management system. For example, federal law requires that the online docket include all public submissions “whether or not submitted electronically.”<sup>5</sup> ACUS recommends, and the Guidelines should state, that agency personnel should “scan and post all comments submitted in paper format” to the online docket.<sup>6</sup> ACUS also recommends that agencies “include in the electronic docket a descriptive entry or photograph for all physical objects received during the comment period.”<sup>7</sup>

The Guidelines should explain when agency personnel should make docket materials available for public inspection, online or otherwise. ACUS recommends that agencies “strive to ensure rulemaking comments are posted on Regulations.gov as soon as feasible”<sup>8</sup> and “adopt stated policies of posting public comments to the Internet within a specified period after submission.”<sup>9</sup>

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<sup>2</sup> ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*.

<sup>3</sup> ACUS Recommendation 2018-6, *Improving Access to Regulations.gov’s Rulemaking Dockets*, ¶ 8.

<sup>4</sup> ACUS Recommendation 2021-1, *Mass, Computer-Generated, and Falsely Attributed Comments*, ¶¶ 3–4.

<sup>5</sup> E-Government Act of 2002, Pub. L. No. 107-342, § 206(d), 116 Stat. 2899, 2916 (Dec. 17, 2002).

<sup>6</sup> ACUS Recommendation 2011-2, *Rulemaking Comments*, ¶ 3; see also OIRA, Memorandum for the President’s Mgmt. Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010).

<sup>7</sup> ACUS Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, ¶ 5.

<sup>8</sup> ACUS Recommendation 2018-6, *Improving Access to Regulations.gov’s Rulemaking Dockets*, ¶ 7.

<sup>9</sup> ACUS Recommendation 2011-2, *Rulemaking Comments*, ¶ 3.

The Guidelines should also explain whether and how agency personnel should index public rulemaking dockets. ACUS recommends agencies index their public rulemaking dockets “at an appropriate level of detail.”<sup>10</sup>

#### **4.7 What materials belong in the public rulemaking docket?**

The public rulemaking docket includes all materials from the internal rulemaking record that the agency decides to make public, either online or in an offline docket. The Guidelines should describe those materials from the internal rulemaking record that personnel should ordinarily include in the public rulemaking docket, such as:

- **Federal Register Notices.** The public rulemaking docket should include the NPRM and the final rule. Other notices related to the rulemaking may also belong in the public rulemaking docket, for example pre-NPRM notices, notices of public events, supplemental NPRMs, and corrections.<sup>11</sup>
- **Public Submissions.** Federal law requires agencies to add public comments and other submissions received in response to the NPRM to the public rulemaking docket.<sup>12</sup>
- **Other Materials Required by Law.** Statutes, presidential and OMB directives, and agency rules can require agencies to consider certain materials or add them to the public rulemaking docket (e.g., economic, environmental, and other regulatory assessments).<sup>13</sup> Even when an NPRM summarizes an assessment, OIRA urges agencies to add the full assessment to the public rulemaking docket.<sup>14</sup>
- **Important Studies and Reports.** Courts have interpreted the APA to require that agencies include in the public rulemaking docket background materials that members of the public need in order to meaningfully comment

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<sup>10</sup> ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 6.

<sup>11</sup> *See id.*, ¶¶ 1–2.

<sup>12</sup> E-Government Act of 2002, Pub. L. No. 107-342, § 206(d), 116 Stat. 2899, 2916 (Dec. 17, 2002).

<sup>13</sup> *See generally* ACUS Recommendation 2012-1, *Regulatory Analysis Requirements*. Sources for these requirements include the Regulatory Flexibility Act, National Environmental Policy Act, Executive Order 12866, Executive Order 13563, and agencies’ enabling statutes.

<sup>14</sup> Memorandum from Cass R. Sunstein, Administrator, OIRA, to the President’s Management Council (May 28, 2010), [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/edocket\\_final\\_5-28-2010.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf).

on a proposed rule. The D.C. Circuit calls these materials “critical factual material.” Examples of critical factual materials include important technical studies, staff reports, data, and methodologies that are not easily accessible elsewhere for members of the public.<sup>15</sup> ACUS recommends that agencies disclose “all studies and reports on which the proposal for rulemaking draws.”<sup>16</sup> Identifying critical factual material is highly dependent on context, and it can be difficult for agency personnel to consistently determine which background materials belong in the public rulemaking docket. The Guidelines should provide careful explanations of helpful factors to consider. Such factors may include whether a report is cited in the NPRM, whether public access to a report is essential for meaningful public comment, and whether the agency would need to rely on the material to justify its rule against a legal challenge. The Guidelines should also advise agency personnel to contact a knowledgeable agency attorney when they have questions.

#### **EXAMPLE (EPA)**

The documents in the rulemaking docket may include . . . Relevant technical documents and factual information (e.g., data files, studies and analyses, graphs, charts; or technical resource documents). Guidance manuals and directives. Contractors’ reports containing information relevant to the rulemaking; and/or other reports containing relevant information, such as trip reports. . . . Your docket is complete when every item cited in *Federal Register* documents associated with the rulemaking is either included or generally accessible in such a way that public notices and access are adequate (such as through widely available publications).<sup>17</sup>

The Guidelines should also describe any other materials that agency personnel should add to the public rulemaking docket, encouraging them to “manage their rulemaking dockets to achieve maximum disclosure to the public.”<sup>18</sup> Although the precise contents of public dockets will vary among agencies and rulemakings, materials commonly added to public rulemaking dockets are:

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<sup>15</sup> See *Am. Radio Relay League v. FCC*, 524 F.3d 227 (D.C. Cir. 2008); *Portland Cement Ass’n v. Ruckelshaus*, 485 F.2d 375 (D.C. Cir. 1973).

<sup>16</sup> ACUS Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, ¶ 4.

<sup>17</sup> EPA, EPA’S ACTION DEVELOPMENT PROCESS: ADMINISTRATIVE RECORDS GUIDANCE 21 (Sep. 2011), <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf>.

<sup>18</sup> ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*.

- **Public Meeting and Hearing Materials.** Agencies regularly hold meetings, hearings, listening sessions, and consultations to share information about or gain public input on proposed rules. Besides notices announcing these events, it may be advisable to add other materials to the public rulemaking docket: agendas, registration and attendance lists, handouts, slide decks, recordings, transcripts, summaries, minutes, speaker biographies, materials that agency officials receive from interested persons during events, and documentation of off-the-record oral communications between agency officials and interested persons that occur during events.<sup>19</sup>
- **Communications With Persons Outside the Agency.** Policies on what are sometimes called “ex parte communications” typically require agency personnel to document in the public rulemaking docket any informal written or oral communications regarding the substance of rulemakings between agency personnel and interested persons. For additional guidance, see ACUS Recommendation 2014-4.<sup>20</sup>
- **Interagency Communications.** Some statutes, executive orders, and rules require agency personnel to add specific interagency communications to the public rulemaking docket. Agency personnel may also solicit or receive other input on a proposed rule from White House officials, including OIRA officials, or officials at other agencies. ACUS recommends that agencies docket “communications received from the President, advisers to the President, the Executive Office of the President, and other administrative bodies which contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule.”<sup>21</sup>
- **Procedural Requests and Agency Responses.** Members of the public sometimes ask the agency to extend a public comment period or hold a public event related to a rulemaking. These materials, and any agency responses,

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<sup>19</sup> *Id.* ¶ 1(c); see also ACUS Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 9(d).

<sup>20</sup> ACUS Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*, ¶¶ 2, 5, 7. This *Handbook* uses the term “ex parte communications” because it is commonly used and widely understood in connection with informal rulemaking. However, the term “ex parte” does not entirely fit in the rulemaking context. The APA does not restrict ex parte communications in informal rulemaking. And, as ACUS has explained, informal communications between agency personnel and individual members of the public can be an important and valuable aspect of informal rulemaking.

<sup>21</sup> ACUS Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, ¶ 2.

may belong in the public rulemaking docket.

- **Rulemaking Petitions and Associated Materials.** The APA requires agencies to give interested persons “the right to petition for the issuance, amendment, or repeal of a rule,”<sup>22</sup> and some agencies establish dockets for rulemaking petitions that include the petition and associated materials. These materials may belong in the public docket for any rulemaking project that results from a petition.
- **Advisory Committee Materials.** ACUS recommends that agencies include relevant advisory committee reports and recommendations in the public rulemaking docket.<sup>23</sup>

#### **4.8 What materials and information do not belong in the public rulemaking docket?**

Although agencies should “manage their public rulemaking dockets to achieve maximum disclosure to the public,” there can be good reasons for agencies not to make certain materials available for public inspection.<sup>24</sup> Before making the materials described in Section 4.5 available for public inspection, agency personnel must determine whether it contains any information that is protected, privileged, or otherwise inappropriate for inclusion in the docket. Materials or information that agencies may need or prefer to exclude from public rulemaking dockets include:

- **Protected Materials.** Some information is protected from disclosure by statute or executive-branch policy.<sup>25</sup> Types of information that are commonly protected are protected personal information, confidential business information (CBI), classified or national security information, financial institution information, and law enforcement information. The Guidelines should explain how to identify, treat, and index protected materials in the public rulemaking docket.
- **Privileged Materials.** Agencies can withhold materials covered by the attorney-client privilege, attorney work product privilege, or pre-decisional

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<sup>22</sup> 5 U.S.C. § 553(e); *see also* ACUS Recommendation 2014-6, *Petitions for Rulemaking*.

<sup>23</sup> *See* ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 1(d).

<sup>24</sup> ACUS Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*.

<sup>25</sup> Sources for protections include FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a.

deliberative process privilege. In some circumstances, it may be beneficial to include such materials in the public rulemaking docket. Public disclosure not only supports meaningful public participation but also can help government lawyers defend final rules during the judicial review process. However, only certain personnel are authorized to make the decision to disclose privileged materials. Because many people will be unfamiliar with legal privileges, the Guidelines should clearly explain, in plain language, the kinds of materials they cover and how to identify covered materials. The Guidelines should explain how agency personnel should handle materials that may be covered by a valid claim of privilege, including consulting with an appropriate attorney to determine whether a material is covered by a privilege and, if it is, how to handle it in the public rulemaking docket. The Guidelines should emphasize that only authorized personnel can decide whether or not a privileged material belongs in the public rulemaking docket.

- **Other Materials That Do Not Belong in the Docket.** Agencies sometimes exclude materials from the docket for pragmatic or procedural reasons, for example: (1) comments that were submitted late or improperly; (2) irrelevant comments; (3) comments that contain abusive, threatening, or profane language; (4) computer-generated or falsely attributed comments;<sup>26</sup> or (5) published materials cited in the NPRM that are readily available elsewhere. The Guidelines should explain how to identify, treat, and index materials excluded for pragmatic or procedural reasons.

In addition to explaining how to identify materials that are protected, privileged, or otherwise not appropriate for disclosure, the Guidelines should explain how to treat them in the public rulemaking docket. Options include:

- Redacting information that is protected, privileged, or otherwise not appropriate for disclosure from a record before adding the record to the public rulemaking docket.
- Including a note in the online docket that the record containing information that is protected, privileged, or otherwise not appropriate for disclosure is available for public inspection in an agency facility such as a reading room or

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<sup>26</sup> See ACUS Recommendation 2021-1, *Mass, Computer-Generated, and Falsely Attributed Comments*.

docket office.

- Summarizing or aggregating for the public rulemaking docket information that is protected, privileged, or otherwise not appropriate for disclosure.
- Excluding a record from the public rulemaking docket that contains information that is protected, privileged, or otherwise not appropriate for disclosure.

For additional guidance, see ACUS Recommendation 2020-2.<sup>27</sup> The Guidelines should advise personnel to contact an appropriate attorney when they have questions about including materials described in this section in the public rulemaking docket, or about excluding materials described in the preceding section.

#### **EXAMPLE (EPA)**

Materials whose disclosure is protected by statute generally should not be included in the docket. You should consult your [Office of General Counsel] or [Office of Regional Counsel] attorney before placing such materials in the docket. Documents containing . . . materials whose disclosure is protected by statute should be listed in the index to the docket, but the protected materials should not be placed in the docket. . . . The docket generally should not include: internal documents that capture pre-decisional internal discussions that were deliberative in nature and consist of materials generated prior to the making of a decision such as day-to-day staff notes; briefing papers, action memos and other staff advice and recommendations; confidential attorney-client communications; confidential attorney work-products; draft decision documents; and internal EPA memos.<sup>28</sup>

#### **4.9 What special processes should agency personnel use to handle public submissions?**

Public submissions usually form the bulk of the public rulemaking docket. The Guidelines should explain any special policies for handling submissions with certain attributes. For example, agencies have adopted policies for treating the following types of public submissions:

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<sup>27</sup> See ACUS Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*.

<sup>28</sup> EPA Guidelines at 21.

- **Submissions Containing Protected or Sensitive Information.** Agencies have adopted different policies for handling public submissions that contain protected or sensitive information. For example, some agencies do not accept comments that include CBI. Others redact CBI or exclude comments containing CBI but include a note in the online docket that these comments have been excluded. Others have developed special processes for members of the public to submit CBI or request that CBI be excluded from the docket. ACUS Recommendation 2020-2 contains extensive recommendations for managing protected materials in the public rulemaking docket.<sup>29</sup>
- **Submissions Containing Copyrighted Materials.** Agency officials have adopted special policies for handling copyrighted materials submitted by public commenters. Some agencies have also developed processes to allow public commenters to indicate that they own the copyright to the materials they submit.
- **Identical Comments.** Some rulemakings attract a high volume of public comments, many of which may be identical. De-duplication tools can help agency personnel identify and manage identical comments. ACUS Recommendation 2021-1 offers best practices for managing large numbers of identical comments in the public rulemaking docket.<sup>30</sup>
- **Computer-Generated Comments.** Some agencies are starting to receive computer-generated comments as a result of technological advances. ACUS Recommendation 2021-1 offers best practices for managing computer-generated comments.<sup>31</sup>
- **Falsely Attributed Comments.** Commenters sometimes falsely attribute their submissions to other individuals or organizations. ACUS Recommendation 2021-1 offers best practices for managing falsely attributed comments.<sup>32</sup>
- **Submissions Containing Abusive, Threatening, or Profane Language.** Some agencies have adopted (or been encouraged to adopt) special policies for

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<sup>29</sup> ACUS Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*.

<sup>30</sup> ACUS Recommendation 2021-1, *Mass, Computer-Generated, and Falsely Attributed Comments*.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

handling comments that contain abusive, threatening, or profane language.<sup>33</sup> Agencies should be mindful of legal requirements, including those arising under the First Amendment, when developing such policies.

- **Anonymous Comments.** Some agencies have adopted policies that explicitly address whether they accept anonymous comments.<sup>34</sup>
- **Submissions That Are Not Relevant to the Rulemaking.** Agencies sometimes receive in response to an NPRM submissions, including spam, that are not relevant to the rulemaking. Some agencies have adopted special policies for handling these materials.
- **Submissions Received After the Public Comment Period.** ACUS recommends that agencies “adopt and publish policies on late comments,” including whether they will consider late comments and add them to the public rulemaking docket.<sup>35</sup>
- **Submissions Received Before the Public Comment Period.** In some cases, it may be beneficial to include in the public rulemaking docket any submissions received during an earlier, related rulemaking; in response to a rulemaking petition; or in response to agency information requests and public engagement efforts that preceded the NPRM.
- **Submissions Received Through Alternative Submission Methods.** The NPRM instructs members of the public how to submit comments to the agency (e.g., through an online docket system, or by email, mail, fax, or hand delivery to a specific person or office). However, agency personnel may receive comments by other means, for example at public events, through ex parte communications, or in response to social media posts. ACUS recommends that “[w]hen an agency sponsors a social media discussion in connection with notice-and-comment rulemaking, it should determine and prominently indicate to the public how the discussion will be treated under the APA (for

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<sup>33</sup> See also ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, STAFF REPORT, SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS 17 (Oct. 24, 2019).

<sup>34</sup> ACUS Recommendation 2011-2, *Rulemaking Comments*, ¶ 4.

<sup>35</sup> *Id.*, ¶ 5.

administrative record purposes).”<sup>36</sup>

- **Materials Submitted With or Incorporated by Reference in Comments.** Public commenters sometimes submit attachments to a comment letter, such as journal or newspaper articles, or incorporate them by reference in the comment letter.
- **Submissions That Are Physical Objects.** ACUS recommends that agencies “include in the electronic docket a descriptive entry or photograph for all physical objects received during the comment period.”<sup>37</sup>

#### **4.10 When and how do agency personnel close and preserve the public rulemaking docket?**

The Guidelines should include instructions for preserving public rulemaking dockets for completed rulemaking projects to comply with federal records management requirements,<sup>38</sup> and to ensure they are available to government attorneys in the event of judicial review. ACUS recommends that agencies “develop systematic protocols to enable the online storage and retrieval of materials from completed rulemakings.”<sup>39</sup>

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<sup>36</sup> ACUS Recommendation 2013-5, *Social Media in Rulemaking*, ¶ 11; see also ACUS Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, ¶ 3.

<sup>37</sup> ACUS Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, ¶ 5.

<sup>38</sup> See *id.*, ¶¶ 3, 7.

<sup>39</sup> ACUS Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, ¶ 7.

## CHAPTER FIVE

# ADMINISTRATIVE RECORD FOR JUDICIAL REVIEW

The Guidelines should include a section that addresses policies and practices for managing the administrative record for judicial review of rules developed through informal rulemaking. This section should explain to agency personnel:

- 5.1 What is the administrative record for judicial review?
- 5.2 Why do agency personnel compile the administrative record for judicial review?
- 5.3 Who compiles the administrative record for judicial review?
- 5.4 When do agency personnel compile the administrative record for judicial review?
- 5.5 What materials belong in the administrative record for judicial review?
- 5.6 How do agency personnel search for materials that belong in the administrative record for judicial review?
- 5.7 What is the format of the administrative record for judicial review?
- 5.8 How do agency personnel organize the administrative record for judicial review?
- 5.9 How does the agency certify the administrative record for judicial review?
- 5.10 How does the agency file the administrative record for judicial review?
- 5.11 How does the agency preserve the administrative record for judicial review?

### **5.1 What is the administrative record for judicial review?**

The Guidelines should explain that the administrative record for judicial review is the compilation of materials that a court uses to assess the legal adequacy of the agency's final rule during the judicial review process (described in Chapter 1).<sup>1</sup> The administrative record for judicial review consists of the "whole record" before the agency during the rulemaking process.<sup>2</sup>

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<sup>1</sup> Agencies may wish to clarify in the Guidelines that administrative records for judicial review are not unique to informal rulemaking. Agencies also prepare such records when someone challenges other agency actions such as adjudicative orders and rules developed through processes other than informal rulemaking.

<sup>2</sup> 5 U.S.C. § 706.

The Guidelines should explain that the agency is responsible for compiling the administrative record for judicial review in the first instance and providing it to the court as the record on review of the agency's final rule.

## **5.2 Why do agency personnel compile the administrative record for judicial review?**

The Guidelines should explain that the agency compiles an administrative record for judicial review to allow the court to assess the legal adequacy of a final rule during the judicial review process (described in Chapter 1).

The Guidelines should emphasize that courts usually rely solely on the administrative record for judicial review to judge the legal adequacy of the final rule. Agencies may wish to highlight the adverse consequences, for the agency and agency personnel, that can result from an inadequate administrative record for judicial review.

### **EXAMPLE (EPA)**

An inadequate record may mean that the Agency action is overturned by a reviewing court or remanded for additional explanation. That in turn can require additional staff time and resources. In addition, some courts faced with an inadequate record will allow supplementation of the record by the opposing parties or will allow discovery, which can also be very time- and resource-intensive. Compilation of a complete administrative record will help the Agency avoid these adverse consequences in litigation.<sup>3</sup>

## **5.3 Who compiles the administrative record for judicial review?**

There are many tasks associated with preparing an administrative record for judicial review, such as:

- Searching for materials that are related to the rulemaking,
- Identifying which of those materials do or do not belong in the administrative record for judicial review,
- Compiling and organizing the record,

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<sup>3</sup> EPA Guidelines at 5.

- Indexing the record,
- Reviewing the record for completeness,
- Certifying that the record is complete, and
- Filing the record with the court.

Agencies allocate these responsibilities depending on their unique circumstances. Some tasks may be performed by agency personnel in the program office that developed the final rule. Other tasks may be performed by attorneys in a general counsel's office or personnel in a records-management office. The Guidelines should explain which tasks are performed by whom and how different personnel work together to successfully provide an adequate administrative record to a reviewing court.

One common practice is to assign to a single official primary responsibility for coordinating and overseeing the preparation of an administrative record for judicial review. This official may go by names such as "custodian" or "coordinator." Depending on an agency's needs, it may be useful for the Guidelines to include general principles for selecting an official who will be effective in this role.

#### **EXAMPLE (NOAA)**

To effectively assemble an Administrative Record, either once litigation is anticipated or once NOAA is sued, the decision-maker must designate a "Custodian" who is responsible for compiling and maintaining the documents and materials that will comprise the Administrative Record.

The Custodian generally should be a program manager, project manager, or staff person with significant drafting and analytical responsibility for the action, or a person who was otherwise substantially involved in the merits of the matter. Line Offices should consider providing specific guidance for identifying the agency employee who is likely to be the most well-suited to serve as Custodian for any given decision-making process.

Importantly, the Custodian must be able to identify which documents belong in the Administrative Record and, in the event of litigation, be prepared to provide a declaration about its preparation.

As soon as the Custodian is identified, the person should get in touch with the appropriate NOAA General Counsel's Office attorney assigned to work on the matter.<sup>4</sup>

#### **5.4 When do agency personnel compile the administrative record for judicial review?**

The Guidelines should explain the agency's policies for when it begins to compile the administrative record for judicial review, for example when someone files a lawsuit in federal court challenging a final rule or it is reasonably anticipated that someone will file such a lawsuit. The Guidelines should emphasize that maintaining an internal rulemaking record throughout the rulemaking process, as described in Chapter 3, will help agency personnel accurately and efficiently compile an administrative record for judicial review in the event of litigation.

#### **5.5 What materials belong in the administrative record for judicial review?**

The Guidelines should explain that the administrative record for judicial review should contain the complete story of the decisionmaking process, from the start of the informal rulemaking process through publication of the final rule. As a general principle, materials that the final decisionmaker directly or indirectly considered during the course of the rulemaking belong in the administrative record for judicial review. This will enable a reviewing court to assess whether the agency followed all required procedures, adequately considered all information before the agency, and issued a final rule that is supported by that information.

The Guidelines can highlight specific materials that typically belong in the administrative record for judicial review, such as:

- Notices related to the rulemaking;
- Comments and other public submissions related to the rulemaking;
- Transcripts or recordings of public hearings, meetings, and other oral presentations made in the course of the rulemaking;
- Documentation of substantive communications with people outside the agency related to the rulemaking (“ex parte communications”);

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<sup>4</sup> NOAA Guidelines at 5.

- Reports or recommendations of relevant advisory committees;
- Scientific, technical, and other background materials that the agency relied on or cited in notices related to the rulemaking; and
- Other materials required by statute, executive order, or agency rule to be considered or made public in connection with the rulemaking.

The Guidelines should emphasize that materials related to the rulemaking belong in the administrative record for judicial review even if they do not support the final rule. The agency may need to demonstrate to a court that it considered opposing viewpoints, contrary facts, and regulatory alternatives that were not adopted.

Agency personnel may have questions about whether certain materials are related to the rulemaking or belong in the administrative record for judicial review. Questions can be especially common for certain kinds of materials, such as drafts, internal emails and other communications, materials from a related rulemaking, background materials that agency personnel reviewed but that the agency did not cite in a public notice, and especially voluminous materials that are publicly available elsewhere. The Guidelines should encourage agency personnel to consult with an attorney or other qualified official when they have questions.

#### **EXAMPLE (EPA)**

The development of administrative records is a highly case-specific endeavor and these recommendations do not address all questions concerning these administrative records. However, this document should provide clarity and assistance for the most often-asked questions pertaining to administrative records. Questions that are not addressed in this document should be referred to the Office of General Counsel (OGC) or Regional attorney working on a particular matter.<sup>5</sup>

The Guidelines should explain that agency attorneys or DOJ attorneys may ultimately decide not to include some materials related to the rulemaking in the final version of the administrative record for judicial review that is filed with a court. There are several reasons why an attorney may decide not to include a document or other material in the final administrative record for judicial review. Federal law may protect it from public disclosure, for example, or the material may be classified, confidential, or privileged.

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<sup>5</sup> EPA Guidelines, at 3–4.

The Guidelines should emphasize, however, that only a designated attorney or other qualified person can decide that materials related to the rulemaking do not belong in the final version of the administrative record for judicial review. Other personnel should not make their own decisions about excluding materials that are related to the rulemaking from the administrative record for judicial review.

## **5.6 How do agency personnel search for materials that belong in the administrative record for judicial review?**

In addition to explaining who coordinates the search for materials that belong in the administrative record (see Section 5.3), the Guidelines should explain how agency personnel should go about conducting that search. As described in Chapter 3, it is a best practice for agencies to maintain an internal rulemaking record throughout the rulemaking process. If agency personnel maintain a good, contemporaneous internal rulemaking record, most materials that belong in the administrative record for judicial review should be easy to find. Still, agency personnel may need to take steps to look for materials that are not maintained in the internal rulemaking record or verify that there are no other materials that belong in the administrative record for judicial review.

### **EXAMPLE (DOI)**

During the initial search phase, a designated employee (the “AR Coordinator”) should begin by examining the Decision File,<sup>6</sup> if any, because most, if not all, of the documents that go into the AR should be in a properly maintained Decision File. The AR Coordinator should also direct an additional and thorough search in order to collect other relevant documents, including all primary and supporting documents, which may not be included in the Decision File.<sup>7</sup>

In addition to conducting the search for materials that belong in the administrative record for judicial review, it is often a best practice to document the search. The agency may rely on this documentation to show that it conducted a thorough search for relevant materials and compiled a complete record. The Guidelines should provide instructions for how to document the search for materials that belong in the administrative record for judicial review.

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<sup>6</sup> DOI Guidelines uses the term “Decision File” to refer to what this *Handbook* calls the “rulemaking record.”

<sup>7</sup> DOI Guidelines at 5.

### **EXAMPLE (NOAA)**

The Custodian should keep careful track of who has been asked to submit materials, what materials the person has been asked to submit and has submitted, where the person searched for documents, who was consulted in the process and how the Administrative Record has been assembled.<sup>8</sup>

## **5.7 What is the format of the administrative record for judicial review?**

Agencies use different business processes, systems, and technologies to compile, manage, and review administrative records for judicial review. Each agency should describe in its Guidelines the specific processes, systems, and technologies that agency personnel should use.

Federal court rules determine the format of the final version of the administrative record for judicial review. The agency or DOJ will usually submit the final version as a Portable Document Format (PDF) file through the court's electronic filing system. Special handling may be required for records that are especially large or contain information that is protected from public disclosure (e.g., confidential business information, copyrighted materials).

## **5.8 How do agency personnel organize the administrative record for judicial review?**

The Guidelines should describe any requirements or general principles for organizing the administrative record for judicial review, for example:

- Omit duplicate materials;
- Compile materials in a logical order (e.g., chronologically, topically);
- Label materials with important metadata (e.g., date, sender, recipient, identifying number);
- Number pages within materials and across the administrative record for judicial review;
- Comply with any practices that court rules require or the agency agreed to follow; and

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<sup>8</sup> NOAA Guidelines at 12.

- Segregate materials that may require special handling (e.g., confidential business information, copyrighted materials).

The Guidelines should also provide instructions for preparing an index of the contents of the administrative record for judicial review as well as a privilege log, if necessary or warranted, which describes materials related to the rulemaking that agency or DOJ attorneys decide do not belong in the record (see Section 5.5). The Guidelines can include a sample index and privilege log as appendices.<sup>9</sup>

### **5.9 How does the agency certify the administrative record for judicial review?**

The administrative record for judicial review will include an affidavit, made by an agency official, attesting to the contents and accuracy of the record. The Guidelines should explain who is responsible for certifying the record.

#### **EXAMPLE (EPA)**

Unless otherwise provided for in a particular Agency program, the person who certifies the record for litigation should generally be the highest level career manager with oversight responsibility for the action for which the record is developed; at Headquarters, that would generally be the relevant office director. For Regional offices, this would generally be the relevant division director.<sup>10</sup>

The Guidelines should also explain the process for certifying the record. If there is a standard form that agency personnel should use to certify administrative records for judicial review, it can be included as an appendix to the Guidelines.<sup>11</sup>

### **5.10 How does the agency file the administrative record for judicial review?**

The Guidelines should note that the exact process for filing an administrative record for judicial review depends on the rules of the court in which the litigation takes place, and that an attorney will provide specific instructions in each case.

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<sup>9</sup> See DOI Guidelines at Appendix 1 and Appendix 2.

<sup>10</sup> EPA Guidelines at 12.

<sup>11</sup> See DOI Guidelines at Appendix 3.

**EXAMPLE (DOI)**

Different courts have different rules for filing an AR. The Office of the Solicitor will work with the Department of Justice, the court, and the opposing party and will provide specific instructions to the AR Coordinator.<sup>12</sup>

**5.11 How does the agency preserve the administrative record for judicial review?**

Like other agency records, administrative records for judicial review are subject to federal laws and policies on records management. The Guidelines should include instructions for preserving the administrative record for judicial review.

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<sup>12</sup> DOI Guidelines at 1313

## APPENDIX A

### RECOMMENDATION 2013-4: THE ADMINISTRATIVE RECORD IN INFORMAL RULEMAKING

*78 Fed. Reg. 41358 (July 10, 2013)*

The administrative record in informal rulemaking plays an essential role in informing the public of potential agency action and in improving the public’s ability to understand and participate in agency decisionmaking. As well, the administrative record can be essential to judicial review of agency decisionmaking under the Administrative Procedure Act (APA), which directs courts to “review the whole record or those parts of it cited by a party” to determine whether challenged agency action is lawful.<sup>1</sup> This statutory language was originally understood as referring to formal proceedings. However, the Supreme Court has long interpreted this APA provision as also encompassing the “administrative record” in informal agency proceedings, whether reviewable by statute or as final agency actions under 5 U.S.C. § 704.<sup>2</sup> This application to informal proceedings has given rise to uncertainty and experimentation as agencies and courts have worked to implement the administrative record concept—at times inconsistently. As a result, confusion has arisen about the compilation and uses of agency rulemaking records maintained internally, public rulemaking dockets, and administrative records for judicial review. The differences among these three types of records can be seen from their descriptions below.

The Administrative Conference therefore commissioned a study of federal agencies’ current practices in the development of rulemaking records, public rulemaking dockets, and administrative records for judicial review.<sup>3</sup> This recommendation and the supporting report address these concepts in the context of informal agency rulemaking adopted pursuant to the notice-and-comment

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<sup>1</sup> 5 U.S.C. § 706.

<sup>2</sup> *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

<sup>3</sup> Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking* (May 14, 2013) (report to the Administrative Conference of the United States) [hereinafter Beck Report].

procedures prescribed in 5 U.S.C. § 553.<sup>4</sup> The recommendation does not address the record for agency decisions made in other contexts, such as in adjudication, formal rulemaking, or guidance documents.

This recommendation builds upon earlier Administrative Conference work in the areas of rulemaking, recordkeeping, and technological developments in managing records. Administrative Conference Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, identified the administrative materials that should be available to a court that was evaluating, on preenforcement review, the factual basis for agency rules of general applicability.<sup>5</sup> That recommendation was receptive to judicial development of the concept of a “record” on review of informal agency rulemakings. In Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, the Administrative Conference advised agencies to establish and manage rulemaking files “so that maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review.”<sup>6</sup> A number of Administrative Conference recommendations also have examined the use of technology in acquiring, releasing, and managing agency records.<sup>7</sup> Most recently, the Conference examined legal considerations associated with the use of digital technologies in the development and implementation of informal rulemakings.<sup>8</sup>

This Recommendation synthesizes and updates the Conference’s prior recommendations in these areas. It is grounded in empirical research, supported by

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<sup>4</sup> 5 U.S.C. § 553(b)-(d). It may also have application to “hybrid” rulemaking statutes that require additional procedures beyond those in § 553 but less than those in formal rulemaking under 5 U.S.C. §§ 556-57.

<sup>5</sup> Administrative Conference of the United States, Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, 39 Fed. Reg. 23,044 (June 26, 1974), based on consultant’s report published as Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

<sup>6</sup> Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994), *correction published*, 59 Fed. Reg. 8507 (Feb. 22, 1994).

<sup>7</sup> Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 90-5, *Federal Agency Electronic Records Management and Archives*, 55 Fed. Reg. 53,270 (Dec. 28, 1990); Administrative Conference of the United States, Recommendation 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*, 54 Fed. Reg. 5209 (Feb. 2, 1989).

<sup>8</sup> Recommendation 2011-1, *supra* note 7.

a survey questionnaire on present agency recordkeeping practices, as well as by a review of existing agency guidance.<sup>9</sup> The Conference has identified and recommends best practices for all rulemaking agencies in the areas of record compilation, preservation, and certification. The recommendation also advises agencies to develop guidance to aid agency personnel as they compile rulemaking and administrative records and public rulemaking dockets and to increase public understanding of agency recordkeeping.

Agencies engage in informal rulemaking with differing frequencies, resources, and technological capabilities. Many agencies are in a period of transition, as they move from paper to electronic recordkeeping.<sup>10</sup> Attention to the design of information technology resources that is mindful of the principles and best practices set forth below can aid agencies in recordkeeping, as well as facilitate greater public understanding of agency decisionmaking and more effective judicial review. For the purposes of this recommendation, the rulemaking record, public rulemaking docket, and the administrative record for judicial review are defined as follows:

“*Rulemaking record*” means the full record of materials before the agency in an informal rulemaking. The Conference contemplates that, in addition to materials required by law to be included in the rulemaking record, as well as all comments and materials submitted to the agency during comment periods, any material that the agency considered should be included as part of that record.

“*Considered*” entails review by an individual with substantive responsibilities in connection with the rulemaking.<sup>11</sup> To say that material was considered also

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<sup>9</sup> *Beck Report*, *supra* note 3, at Section III.

<sup>10</sup> The Office of Management and Budget and the National Archives have directed federal agencies to manage all permanent electronic records in an electronic format to the fullest extent possible by December 31, 2019, and to develop plans to do so by December 31, 2013. Memorandum from Jeffrey D. Zients, Acting Director, Office of Management and Budget, and David S. Ferriero, Archivist of the United States, National Archives and Records Administration, to the Heads of Executive Departments and Agencies and Independent Agencies concerning “Managing Government Records Directive” M-12-18 (Aug. 24, 2012).

<sup>11</sup> The Conference first recommended inclusion of materials “considered” by the agency in the administrative record for judicial review in Recommendation 74-4, *supra* note 5. Courts have also relied on the concept of consideration in defining the administrative record. *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (citations omitted); *see also Nat’l Ass’n of Chain Drug Stores v. U.S. Dep’t of Health & Human Servs.*, 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Recommendation 74-4 in defining the administrative record); *cf. Sierra*

entails some minimum degree of attention to the contents of a document. Thus, the rulemaking record need not encompass every document that rulemaking personnel encountered while rummaging through a file drawer, but it generally should include a document that an individual with substantive responsibilities reviewed in order to evaluate its possible significance for the rulemaking, unless the review disclosed that the document was not germane to the subject matter of the rulemaking. A document should not be excluded from the rulemaking record on the basis that the reviewer disagreed with the factual or other analysis in the document, or because the agency did not or will not rely on it. Although the concept resists precise definition, the term considered as used in this recommendation should be interpreted so as to fulfill its purpose of generating a body of materials by which the rule can be evaluated and to which the agency and others may refer in the future.

*“Public rulemaking docket”* means 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. The public rulemaking docket includes all information that the agency has made available for public viewing. The Conference also urges agencies to manage their public rulemaking dockets to achieve maximum disclosure to the public. However, the Conference recognizes that prudential concerns may limit agencies from displaying some information, such as certain copyrighted or indecent materials, online. It is a best practice for agencies to describe and note online those materials that are not displayed but are available for physical inspection. Another agency best practice is to include in the public rulemaking docket materials generated and considered by the agency after the close of the comment period but prior to issuance of the final rule.<sup>12</sup>

*“Administrative record for judicial review”* means the materials tendered by the agency and certified to a court as the record on review of the agency’s regulatory action. The administrative record provided to the court will include an affidavit, made by a certifying official, attesting to the contents and accuracy of the record

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Club v. Costle, 657 F.2d 298, 394 n. 469 (D.C. Cir. 1981) (discussing Recommendation 74-4 as an approach to defining the administrative record).

<sup>12</sup> The present recommendation is not limited to disclosures that the APA, as construed in widely followed case law, may require. See Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984) (“[A]t least the most critical factual material that is used to support the agency’s position on review must have been made public in the proceeding . . .”). However, this case law gives agencies an additional reason to provide public disclosure of factual material in some circumstances.

being certified.<sup>13</sup> It should also include an index itemizing the contents.<sup>14</sup> Parties often rely on this index in designating portions of the administrative record for judicial review, such as for inclusion in a joint appendix that will be presented to the court. The designated portions of the administrative record then typically serve as the basis for the court's review, as provided in the Administrative Procedure Act and as appropriate under the rules of the reviewing court.<sup>15</sup>

Some materials in an agency's rulemaking record may be protected from public disclosure by law or withheld from the public on the basis of agency privilege. For example, protected materials might include classified information, confidential supervisory or business information, or trade secrets. Other materials might be withheld on the basis of privilege, including attorney-client privilege, the attorney work product privilege, and the pre-decisional deliberative process privilege. Agency practices regarding the identification or inclusion of protected or privileged materials in administrative records and their accompanying indices vary.<sup>16</sup> Some agencies do not include or identify deliberative or privileged materials in administrative records for judicial review.<sup>17</sup> Other agencies identify non-disclosed materials specifically in a privilege log provided with the index of the administrative record for judicial review. Agencies have also noted redactions of protected materials in the administrative record for judicial review and moved the court to permit filing of protected materials, or a summary thereof, under seal. Many agencies do not have a policy on inclusion of protected or privileged materials in an administrative record for judicial review and manage such materials on a case-by-case basis. Case-by-case consideration may occasionally be necessary, such as when privileged materials are referenced as the basis of the agency's decision. Nonetheless, the Conference recommends that agencies develop a written policy for treatment of protected or privileged materials, including indexing, in public

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<sup>13</sup> *Beck Report*, *supra* note 3, at Section IV.A.

<sup>14</sup> *Id.*

<sup>15</sup> 5 U.S.C. § 706 (“... the court shall review the whole record or those parts of it cited by a party. . .”).

<sup>16</sup> The variety of agency practices is described at length in the *Beck Report*, *supra* note 3, at Section IV.A.

<sup>17</sup> Absent a showing of bad faith or improper behavior, the agency practice of excluding pre-decisional materials from the administrative record on judicial review enjoys substantial judicial support. *See In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279 (D.C. Cir. 1998); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D. C. Cir. 1986) (en banc).

rulemaking dockets and in certification of the administrative record for judicial review, and that agencies make this policy publicly available.

Compilation and preparation of the administrative record for judicial review is properly within the province of the agency and this process should be accorded a presumption of regularity by the reviewing court.<sup>18</sup> Completion or supplementation of the administrative record for judicial review may be appropriate where a strong showing has been made to overcome the presumption of regularity in compilation. For example, courts have permitted limited discovery on the basis of a “strong showing of bad faith or improper behavior” on the part of the agency decisionmaker.<sup>19</sup> Courts may also inquire into allegations that the agency omitted information from the administrative record for judicial review that should have been included.<sup>20</sup>

Completion or supplementation of the administrative record for judicial review may also be appropriate in other circumstances not addressed in this recommendation. In a previous recommendation, the Conference has recognized that the reviewing court should not invariably be confined to the record on review in evaluating the factual basis of a generally applicable rule on preenforcement review.<sup>21</sup> The Conference has also acknowledged that, on direct review by courts of appeals, the record on review “can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.”<sup>22</sup>

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<sup>18</sup> See *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1097 (10<sup>th</sup> Cir. 1985) (“... designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity.”) (citation omitted); *Amfac Resorts, LLC v. U.S. Dep’t of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001); see also *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (“The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

<sup>19</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>20</sup> See, e.g., *Cape Cod Hospital v. Sebelius*, 630 F.3d 203, 211-12 (D.C. Cir. 2011); *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 139-40 (D.D.C. 2002).

<sup>21</sup> Recommendation 74-4, *supra* note 5.

<sup>22</sup> Administrative Conference of the United States, Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action* ¶ 5(a), 40 Fed. Reg. 27,926 (July 2, 1975).

## RECOMMENDATION

### Record Contents

1. *The Rulemaking Record.* In the absence of a specific statutory requirement to the contrary, the agency rulemaking record in an informal rulemaking proceeding should include:
  - (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.
2. *The Public Rulemaking Docket.* Agencies should manage their public rulemaking dockets to achieve maximum public disclosure. Insofar as feasible, the public rulemaking docket should include all materials in the rulemaking record, subject to legal limitations on disclosure, any claims of privilege, or any exclusions allowed by law that the agency chooses to invoke. In addition, it may be prudent not to include some sensitive information online and to note instead that this material is available for physical review in a reading room.
3. *The Administrative Record for Judicial Review.* The administrative record provided to the court on judicial review of informal rulemaking should contain all of the materials in the rulemaking record as set forth in paragraph 1, except that agencies need not include materials protected from disclosure by law nor materials that the agency has determined are subject to withholding based on appropriate legal standards, including privilege.

### **Rulemaking Recordkeeping**

4. Agencies should begin compiling rulemaking records no later than the date on which an agency publishes the notice of proposed rulemaking. Agencies should include materials considered in preparation of the notice of proposed rulemaking. For example, agencies should include 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. The agency should continue compiling the rulemaking record as long as the rule is pending before the agency.
5. Agencies should designate one or more custodians for rulemaking recordkeeping, either on a rulemaking-by-rulemaking basis or generally. Agencies should inform agency personnel of the custodian(s) and direct them to deposit rulemaking record materials with the custodian(s), excepting if necessary confidential information to which access is restricted. The custodian(s) should document the record compilation process.

### **Public Rulemaking Dockets**

6. To the extent practicable, agencies should index public rulemaking dockets for informal rulemaking, at an appropriate level of detail.

### **Record Preservation**

7. The National Archives and Records Administration (NARA) should amend its agency guidance to address the official status and legal value of records relating to informal rulemaking, particularly administrative records for judicial review.
8. Agencies using electronic records management systems to manage rulemaking records, such as the Federal Document Management System or agency specific systems, should work with NARA to ensure the adequacy of such systems for recordkeeping purposes and the transfer to the National Archives of permanent records. Agencies should review their records schedules in light of developments in electronic records management.

## **Certification of Administrative Records for Judicial Review**

9. Agencies should develop procedures for designating appropriate individuals, who may or may not be record custodians, to certify administrative records to the court in case of judicial review of agency action. Agency certifications should include an index of contents of the administrative record for judicial review.

## **Agency Record Policies and Guidance**

10. Agencies should develop a general policy regarding treatment of protected or privileged materials, including indexing, in public rulemaking dockets and in certification of the administrative record for judicial review. Agencies should make this policy available to the public and should provide it to the Department of Justice, if the Department represents the agency in litigation.
11. Agencies that engage in informal rulemaking should issue guidance to aid personnel in implementing the above best practices. Agencies should make their guidance on informal rulemaking and administrative recordkeeping available to the public and should provide it to the Department of Justice, if the Department represents the agency in litigation. The level of detail and contents of such guidance will vary based on factors such as: the size of typical agency rulemaking records; institutional experience, or the lack thereof, with record compilation and informal rulemaking litigation; the need for consistency across agency components in the development and maintenance of rulemaking records; and agency resources. However, agencies should ensure that guidance addresses at least the following:
  - (a) essential components of the rulemaking record, public rulemaking docket, and the administrative record for judicial review;
  - (b) appropriate exclusions from the rulemaking record, including guidance on whether and when to exclude materials such as personal notes or draft documents;
  - (c) timing of compilation and indexing practices;
  - (d) management and segregation of privileged materials, e.g., attorney work product or pre-decisional deliberative materials;

- (e) management and segregation of sensitive or protected materials, e.g., copyrighted, classified, protected personal, or confidential supervisory or business information;
- (f) policies and procedures, if any, for the protection of sensitive information submitted by the public during the process of rulemaking or otherwise contained in the rulemaking record;
- (g) preservation of rulemaking and administrative records and public rulemaking dockets;
- (h) certification of the administrative record for judicial review, including the process for identifying the appropriate certifying official; and
- (i) relevant capabilities and limitations of recordkeeping tools and technologies.

### **Judicial Review**

12. A reviewing court should afford the administrative record for judicial review a presumption of regularity.
13. In appropriate circumstances, a reviewing court should permit or require supplementation or completion of the record on review. Supplementation or completion may be appropriate when the presumption of regularity has been rebutted, such as in cases where there is a strong showing that an agency has acted improperly or in bad faith or there are credible allegations that the administrative record for judicial review is incomplete.

## APPENDIX B

# SELECTED ACUS RECOMMENDATIONS

*Readers will find all ACUS recommendations cited in this Handbook in the Federal Register at the citations listed below. All ACUS recommendations, along with the research reports that informed them, are also available on ACUS's website at [www.acus.gov/recommendations](http://www.acus.gov/recommendations).*

Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36082 (July 8, 2021).

Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, 86 Fed. Reg. 36075 (July 8, 2021).

Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, 86 Fed. Reg. 6614 (Jan. 22, 2021).

Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2143 (Feb. 6, 2019).

Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014).

Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35993 (July 10, 2013).

Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269 (Dec. 17, 2013).

Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013).

Recommendation 2013-3, *Science in the Administrative Process*, 78 Fed. Reg. 41357 (July 10, 2013).

Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47801 (Aug. 10, 2012).

Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012).

Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011).

Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48789 (Aug. 9, 2011).

Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86407 (Dec. 31, 1980).