



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

TO: Members of the Working Group on Compiling Administrative Records
FROM: Todd Rubin, Attorney Advisor
DATE: April 12, 2021
SUBJECT: Adding Materials to Public Rulemaking Dockets

NOTE: I provide the information in this memorandum for background purposes only. It does not necessarily represent the views of ACUS, the Working Group, or its members.

INTRODUCTION

ACUS recommends that agencies prepare and publish guidance that explains to rulemaking personnel how to compile and manage the public rulemaking docket. At its last meeting, the Working Group considered how agencies have set forth, in publicly available rules and guidance, which materials rulemaking personnel should or should not include in the public rulemaking docket.

This Memorandum addresses how agencies explain processes for compiling docket materials and make them available for public inspection, specifically:

- compiling and indexing the docket;
- managing sensitive and protected information;
- handling other recurring and emerging public comment issues; and
- preserving the docket.

COMPILING AND INDEXING THE DOCKET

The E-Government Act requires that agencies maintain an electronic docket for each rulemaking.¹ Some agencies maintain the docket on their websites. Others maintain the docket on Regulations.gov.² Regulations.gov is managed by the General Services Administration's (GSA's) Office of Regulation Management. GSA manages the website and has issued some instructions for the public and agencies on its use. However, individual agencies are responsible for creating, uploading materials to, and maintaining rulemaking dockets.

Some agencies also provide reading-room access to a physical docket. This may be done when, for example, a rulemaking contains physical objects (e.g., models), records that cannot easily be made available online (e.g., large databases), or records that the agency cannot or does not wish to distribute online (e.g., copyright-protected materials).

¹ E-Government Act of 2002, Pub. L. No. 107-347, § 206(a), 116 Stat. 2899, 2915 (amending 44 U.S.C. § 3501).

² See Todd Rubin, Regulations.gov and the Federal Docket Management System (Dec. 1, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/regulationsgov-and-fdms-final-report>.

An agency establishes a docket on Regulations.gov using the site's back end, called the Federal Docket Management System (FDMS), accessible at fdms.gov. When an agency publishes a rulemaking document, such as a notice of proposed rulemaking (NPRM) or a notice of final rulemaking, in the *Federal Register*, the Office of the Federal Register sends the document to FDMS via an automatic feed, where it then enters the docket the agency created and becomes publicly viewable on Regulations.gov.

An agency can also add supporting materials to the docket by uploading them to FDMS. For any material, the agency can select an option in FDMS which will enable members of the public to submit comments on the material through Regulations.gov.

Agencies can post comments they receive to the docket, where they become publicly viewable. Although there is no specified timeframe by which agencies are required to post public comments, ACUS recommends that agencies adopt stated policies of posting public comments to the internet within a specified period after submission.³ Furthermore, OMB "expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov."⁴

Once an agency has populated its docket, it can then index the docket by, for example, entering a Regulation Identifier Number (RIN), which allows FDMS to link a rulemaking e-docket to the appropriate entry in the Unified Agenda. This enables the public to efficiently identify relevant materials. For example, if an agency has created one docket for the NPRM and then creates another docket for the final rule, entering the RIN for both dockets allows them to be linked and therefore enables greater understanding of how the agency formulated the rule.

MANAGING SENSITIVE AND PROTECTED INFORMATION

This section addresses three common types of information commonly received from members of the public that may be protected by law or policy: (1) confidential business information (CBI), (2) personally identifiable information (PII), and (3) copyrighted materials.

There are different methods agencies use to manage protected information submitted by the public. With respect to CBI, agencies often ask submitters to identify CBI in their submissions and, in some cases, to redact the information before they send it to the agency. With respect to PII, agencies generally instruct people to review their comments and to remove any piece of PII the submitter does not wish to be made public. These instructions can be found in, among other places, the *Code of Federal Regulations* (CFR), agency websites, notices within individual rulemakings, or some combination of these sources.

Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, offers agencies suggestions on how to handle sensitive personal and confidential commercial

³ Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011).

⁴ Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets (May 28, 2010).

information in public rulemaking dockets.⁵ It suggests that agencies develop notifications to the public on handling such submissions; that they publish such notices in various places where commenters are likely to read them; that they provide opportunities for commenters and other members of the public to flag CBI and PII for the agency; that agencies that screen comments for CBI and PII consider redaction, aggregation, and withholding of the sensitive matter as appropriate; and that agencies develop special procedures for handling CBI.

Although focused specifically on CBI and PII, Recommendation 2020-2's principles can be extended to other categories of submissions. Below are current agency policies under each of the categories of submission identified above.

1. Confidential Business Information (CBI)

Under the Administrative Procedure Act (APA), agencies generally must make critical material underlying a rulemaking publicly available.⁶ However, the Trade Secrets Act generally prevents agencies from disclosing CBI, absent the consent of the owner. The Trade Secrets Act provides for an exception to this prohibition, which is for materials authorized to be disclosed by statute, including the Freedom of Information Act (FOIA), or by regulation.⁷ Under a recent Supreme Court opinion, if an agency promises not to disclose CBI, the agency may rely on that promise as a defense against compelled disclosure under FOIA.⁸

For these reasons, CBI may require special handling by rulemaking personnel. Agencies have adopted different kinds of policies for identifying and handling CBI. Some specify alternative processes for submitting information claimed as CBI; others provide methods for commenters to identify CBI in comments. Some specify a physical location where agencies place comments claimed as CBI; others describe how the public can request access to materials claimed as CBI. Although these are not the only kinds of policies agencies adopt with respect to CBI, they represent the most common based on my review of agency policies.

a. Alternative Process for Submitting CBI

Although nearly all agencies encourage the public to submit comments electronically, some still require members of the public to submit paper copies of information claimed as CBI. Requiring paper submission of CBI is one way to clearly segregate CBI from other kinds of rulemaking materials. Other agencies permit CBI to be submitted through purely electronic processes, such as emails to relevant officials or secure file transfers. Below are representative agency policies with respect to paper or electronic submissions of CBI. These policies can be found in, among other places, the CFR, agency websites, notices within individual rulemakings, or some combination of these sources.

Agency	Guidance
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⁵ Admin. Conf. of the U.S., Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, 86 Fed. Reg. 6614 (Jan. 22, 2021).

⁶ See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

⁷ 18 U.S.C. § 1905.

⁸ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

eRulemaking Program (GSA)	“Do not submit information whose disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as [CBI]) to Regulations.gov. Comments submitted through Regulations.gov cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted.” ⁹
FDA	“To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission.” ¹⁰
EPA	“[CBI] . . . or other information whose disclosure is restricted by statute should never be sent to EPA electronically via Regulations.gov or e-mail.” ¹¹
NHTSA	“To facilitate social distancing due to COVID-19, NHTSA is treating electronic submission as an acceptable method for submitting confidential business information . . . to the agency . . . [s]pecifically, any CBI submissions sent via email should be sent to an attorney in the Office of Chief Counsel. Likewise, for CBI submissions via a secure file transfer application, an attorney in the Office of Chief Counsel must be set to receive a notification when files are submitted and have access to retrieve the submitted files.” ¹²
FAA	“Submissions containing CBI should be sent to [employee, address].” ¹³
PHMSA	“Submissions containing CBI should be sent to [employee, address].” ¹⁴
FCC	“In proceedings to which the electronic filing requirements set forth . . . apply, a party seeking confidential treatment of a portion of a filing must submit [it] in electronic format . . . Where a party demonstrates that even the fact of a filing must remain confidential . . . this affidavit may be filed in paper format under seal . . . comments and other materials may not be submitted by means of the Commission’s Electronic Comment Filing System . . . with a request for confidential treatment under this section.” ¹⁵

⁹ *User Notice Page*, GEN. SERVS. ADMIN., <https://www.regulations.gov/user-notice> (last visited Mar. 15, 2021)

¹⁰ Revocation of the Regulations for Human Tissue Intended for Transplantation and Human Dura Mater, 85 Fed. Reg. 82990, 82990 (Dec. 21, 2020).

¹¹ *Commenting on EPA Dockets*, ENVTL. PROT. AGENCY, <https://www.epa.gov/dockets/commenting-epa-dockets> (last visited Mar. 15, 2021).

¹² *Submission of Confidential Business Information During COVID-19 Social Distancing Page*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/coronavirus/submission-confidential-business-information> (last visited Mar. 15, 2021).

¹³ Airworthiness Directives; Pratt & Whitney Canada Corp. Turboshaft Engine, 86 Fed. Reg. 11651, 11651 (Feb. 26, 2021).

¹⁴ Pipeline Safety: Midstream Facilities Frequently Asked Questions, 85 Fed. Reg. 81440, 81441 (Dec. 16, 2020).

¹⁵ 47 C.F.R. § 459.

b. How Commenters Should Delineate CBI in Their Comments

Screening comments for CBI can be a very labor-intensive process for agencies. Therefore, many agencies require submitters to flag CBI in their comments, thereby making the screening process much easier for agencies. There are many different ways agencies require people to identify CBI. Below are some of these ways.

Agency	Guidance
FAA	“Please mark each page of your submission containing CBI as ‘PROPIN.’” ¹⁶
NHTSA	“If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submissions, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above . . . [i]n addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above . . . [w]hen you send a comment containing information claimed to be [CBI], you should include a cover letter setting forth the information specified in our [CBI] regulation.” ¹⁷
PHMSA	“[Y]ou may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as ‘Confidential’; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI.” ¹⁸
FCC	“The Commission may use . . . a checkbox enabling the submitter to indicate that the record is confidential. However, upon receipt of a request for inspection of such records . . . the submitter will be notified of such request . . . and will be requested to justify the confidential treatment of the record . . . [E]ach such request shall contain a statement of the reasons for withholding the materials from inspection . . . and of the facts upon which those records are based, including: [i]dentification of the specific information for which confidential treatment is sought; [e]xplanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged; [e]xplanation of the degree to which the information concerns a service that is subject to competition; [e]xplanation of how disclosure . . . could result in substantial competitive harm; [i]dentification of any measures taken by the submitting party to prevent unauthorized disclosure . . . [i]dentification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties; [j]ustification of the period during which

¹⁶ Airworthiness Directives; Pratt & Whitney Canada Corp. Turboshaft Engine, 86 Fed. Reg. at 11651.

¹⁷ Make Inoperative Exemptions; Vehicle Modifications To Accommodate People With Disabilities, 85 Fed. Reg. 84281, 84291 (Dec. 28, 2020).

¹⁸ Pipeline Safety: Midstream Facilities Frequently Asked Questions, 85 Fed. Reg. at 81441.

the submitting party asserts that material should not be [publicly] available; and [a]ny other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.”¹⁹

EPA “If you wish to include CBI in your comment, clearly mark the part or all of the information that you claim to be CBI. In addition to one complete version of the comment that includes information claimed as CBI, a non-CBI copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you wish to include other information whose disclosure is restricted by statute in your comment, clearly mark your submission as including that information.”²⁰

c. Where Agencies Place Public Submissions Claimed as CBI

When agencies identify CBI, either on their own or through a commenter’s identification, they do not post it publicly. Rather, they hold it in a separate docket that is not available to the public. Some agencies then post a public notice stating that they have received these materials. Below are some relevant agency policies.

Agency	Guidance
FDA	(1) “For written/paper comments submitted containing confidential information, FDA will post the redacted/blacked out version of the comment including any attachments submitted by the commenter. The unredacted copy will not be posted” ²¹ (2) “Material submitted under paragraph (j)(2) of this section [listing certain kinds of CBI] is to be segregated from all other submitted material and clearly so marked.” ²²
FCC	“If the request for confidentiality is granted, the ruling will be placed in the public file in lieu of the materials withheld from public inspection . . . [o]nly in the unusual instance where the public interest so requires will the materials be made available for public inspection . . . [i]f no request for confidentiality is submitted, the Commission assumes no obligation to consider the need for non-disclosure, but, in the unusual instance, may determine on its own motion that the materials should be withheld from public inspection.” ²³
FAA	“When we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which

¹⁹ 47 C.F.R. § 459.

²⁰ *Commenting on EPA Dockets*, supra note 11.

²¹ Consumer Comments-Public Posting and Availability of Comments Submitted to Food and Drug Administration Dockets, 80 Fed. Reg. 56469 (Sept. 18, 2015).

²² 21 C.F.R. § 10.20.

²³ 47 C.F.R. § 459.

	the public does not have access, and place a note in the docket that we have received it.” ²⁴
EPA	“Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2 . . . Each EPA officer or employee who has custody or possession of business information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.” ²⁵
PHMSA	“Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under FOIA, and they will not be placed in the public docket of this notification.” ²⁶

d. Procedures Whereby the Public Can Request Access to Materials Claimed as CBI

The Freedom of Information Act (FOIA) provides the public with the right to request agency records and requires agencies to release to the requestor all responsive records that do not fall under an exemption.²⁷ One exemption is for CBI. As discussed above, when a submitter identifies CBI in his or her comment, the agency does not make that claimed CBI publicly available. However, there is still a question as to whether or not the claimed CBI is actually CBI; just because the submitter says that it is does not mean that it actually is.

Some agencies have established processes, aside from their normal FOIA process, whereby the public can request access to submissions claimed as CBI. Other agencies simply use their regular FOIA process to handle such requests. Below are some relevant policies.

Agency	Guidance
FDA	“A person who does not agree that a submission is properly subject to paragraph (j)(2) [CBI] may request a ruling from the Associate Commissioner for Public Affairs whose decision is final, subject to judicial review under section 20.48.” ²⁸
FCC	“[U]pon receipt of a request for inspection of [CBI] pursuant to [FCC’s FOIA procedures], the submitter will be notified of such request . . . and will be requested to justify the confidential treatment of the record” ²⁹
EPA	“Information marked as CBI will not be disclosed except in accordance with [EPA’s FOIA procedures.]” ³⁰

2. Personally Identifiable Information (PII)

²⁴ 14 C.F.R. § 11.35.

²⁵ *Commenting on EPA Dockets, supra* note 11.

²⁶ 49 C.F.R. § 190.343.

²⁷ 5 U.S.C. § 552 (a)(3).

²⁸ 21 C.F.R. § 10.20.

²⁹ 47 C.F.R. § 0.459.

³⁰ *Commenting on EPA Dockets, supra* note 11.

As noted above, under the APA, agencies generally must make critical material underlying a rulemaking publicly available. Under the Privacy Act, the general rule, often referred to as the “non-disclosure rule,” is that agencies may not disclose records from systems of records without the written consent of the person to whom the record pertains.³¹ A major exception to the Privacy Act’s non-disclosure rule is for information “required to be disclosed” under FOIA.³²

The Privacy Act presents no bar to disclosing a commenter’s own PII because the commenter consented to its disclosure by submitting the information on Regulations.gov (or agency websites). Regulations.gov informs the public that the information submitted will be made public. When a commenter submits PII that belongs to a third party, the question of whether the Privacy Act permits its disclosure is a highly complex one that does not have a clear answer. For example, it depends on whether there is evidence that the third party authorized the first party to submit his or her PII to the agency, among many other factors.

A recent Senate report noted that agencies, in coordination with OIRA, should develop standard protocols regarding, among other kinds of submissions, PII, and should make those protocols public to ensure commenters understand their responsibilities.³³ Below are some relevant agency policies on PII in rulemaking submissions.

Agency	Guidance
eRulemaking Program (GSA)	“For purposes of submitting comments, some agencies may require that you include personal information, such as your name and email address, on the comment form . . . [a]ny personal information included in the comment form or in an attachment will be provided to the department or agency to which your comment is directed and may be publicly disclosed in a docket or on the internet (via Regulations.gov, a federal agency website, or a third-party, non-government website with access to publicly-disclosed data on Regulations.gov) . . . Regulations.gov offers its public data in machine readable format via an [API], including comment submitter information (e.g., commenter name or address) if included in the comment submission posted by an agency on Regulations.gov. Third party organizations may use an API to build related applications for the web, desktops, and mobile devices.” ³⁴
FRA	“[D]OT posts . . . comments, without edit, to www.regulations.gov, as described in the system of records notice . . . [i]n order to facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of

³¹ 5 U.S.C. § 552a(b).

³² *Id.* § 552a(b)(2).

³³ ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, STAFF REPORT, SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS 4 (OCT. 24, 2019).

³⁴ *User Notice Page*, *supra* note 9.

	names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered.” ³⁵
PHMSA	“DOT posts . . . comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice” ³⁶
FDA	“Comments submitted electronically, including attachments, to www.regulations.gov will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number . . . [p]lease note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on . . . www.regulations.gov. If you want to submit a comment with confidential information that you do not wish to be made [publicly available], submit the comment as a written/paper submission and in the manner detailed” ³⁷
	“[T]he names and other information that would identify patients or research subjects are to be deleted from any record before it is submitted to the Division of Dockets Management in order to preclude a clearly unwarranted invasion of personal privacy.” ³⁸
SEC	“All comments will be made available to the public . . . [w]e do not edit personal identifying information from submissions; submit only information that you wish to make available publicly.” ³⁹

3. Copyrighted Materials

Agencies occasionally receive copyrighted materials, mainly articles and images, within submissions. These materials may be highly relevant to an agency’s rulemaking; nonetheless, agencies may understandably be hesitant to post them online. The holder of the copyright could potentially sue the agency for publishing it without the holder’s consent. Many agencies address this concern by not publishing copyrighted materials online but still making them available for public inspection in a physical reading room. Below are some policies with respect to copyrighted materials.

Agency	Guidance
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³⁵ Fatigue Risk Management Programs for Certain Passenger and Freight Railroads, 85 Fed. Reg. 83484, 83505 (proposed Dec. 22, 2020).

³⁶ Pipeline Safety: Midstream Facilities Frequently Asked Questions, 85 Fed. Reg. at 81441.

³⁷ Revocation of the Regulations for Human Tissue Intended for Transplantation and Human Dura Mater, 85 Fed. Reg. 82990 at 82990.

³⁸ 21 C.F.R. § 10.20.

³⁹ Rule 144 Holding Period and Form 144 Filings, 86 Fed. Reg. 5063, 5064 (proposed Jan. 29, 2021).

eRulemaking Program (GSA)	“Some agencies may impose special requirements for submitting . . . copyrighted works.” ⁴⁰
EPA	“The inclusion of any copyrighted material without accompanying proof of one’s explicit right to redistribute that material will result in the comment being blocked from online viewing at Regulations.gov . . . The EPA Docket Center Reading Room at EPA headquarters in Washington, DC, allows the public to access docket materials. This includes some materials that are unavailable on Regulations.gov, such as copyrighted materials” ⁴¹

OTHER RECURRING AND EMERGING PUBLIC COMMENT ISSUES

Aside from the category of materials identified above, there are other kinds of public submissions that can pose docket management challenges. This section briefly addresses agency policies with respect to: mass-comment campaigns, fraudulent comments, and comments containing profane, threatening, or abusive language.

ACUS is currently undertaking a project on *Mass, Computer-Generated, and Fraudulent Comments*, which will address the first two categories and hopefully result in a recommendation in June 2021.⁴² More detailed information about mass-comment campaigns and fraudulent comments, as well as issues related to computer-generated comments, can be found in the accompanying consultant report.⁴³ The Working Group may wish to await the completion of that project before deciding how to address those topics in its final product.

1. Mass-Comment Campaigns

Occasionally, agencies receive multiple, sometimes thousands, of identical or near-identical comments. Organizations create comment forms that allow their members or supporters to sign their name and generate an individual comment to be sent to the agency. The aforementioned Senate report noted that recent high-profile rulemakings “have even been disrupted by commenters submitting voluminous materials with the seeming intention of overloading the system and disrupting the comment period.”⁴⁴ Indeed, it noted that the investigation underlying the report was conducted because one agency “received nearly 24 million comments in the course of just one rulemaking proceeding in 2017 and its website crashed due to the volume of comments submitted simultaneously.”⁴⁵

⁴⁰ *User Notice Page*, *supra* note 9.

⁴¹ *Commenting on EPA Dockets*, *supra* note 11.

⁴² *Mass, Computer-Generated, and Fraudulent Comments*, Admin. Conf. of the U.S., <https://www.acus.gov/research-projects/mass-computer-generated-and-fraudulent-comments>.

⁴³ Steve Balla, Reeve Bull, Bridget Dooling, Emily Hammond, Michael Livermore & Beth Simone Noveck, *Mass, Computer-Generated, and Fraudulent Comments* 25–30 (Apr. 2, 2021) (draft report to the Admin. Conf. of the U.S.).

⁴⁴ ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, STAFF REPORT, SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS 1 (OCT. 24, 2019).

⁴⁵ *Id.*

The Senate report concluded that agencies, in coordination with OIRA, should develop standard protocols regarding, among other kinds of submissions, duplicate comments, and should make those protocols public to ensure commenters understand their responsibilities. The Senate report also suggested that the eRulemaking Program Executive Steering Committee and several other agencies develop uniform and appropriate limits on duplicative comments and technological means to reduce the number of duplicate comments in their dockets. It noted that these agencies should require commenters to submit individual comments directly through their platforms and develop policies to encourage organizations to collect signatures on one comment, rather than submitting thousands of individual identical comments.

Agencies have developed a variety of procedures to deal with this phenomenon, which is by no means a new one and indeed predates the internet age. Below are some of those policies.

Agency	Guidance
eRulemaking Program (GSA)	“Organizations including industry associations, labor unions, and conservation groups sometimes use form letters to voice their opposition or support of a proposed rulemaking. Many in the public mistakenly believe that their submitted form letter constitutes a ‘vote’ regarding the issues concerning them. Although public support or opposition may help guide important public policies, agencies make determinations for a proposed action based on sound reasoning and scientific evidence rather than a majority of votes. A single, well-supported comment may carry more weight than a thousand form letters.” ⁴⁶
EPA	“In instances where individual submissions are deemed to be duplicate or near duplicate copies as part of a mass mail campaign, EPA will post to Regulations.gov one representative sample comment along with the total comment count for that campaign . . . In instances where submissions are bundled together (submitted as a single document or packaged together), EPA will post to Regulations.gov all comments along with the total comment count for that campaign. This includes hardcopy - handwritten bundled campaigns which are scanned into PDF document attachments and posted on Regulations.gov along with the total comment count for that campaign.” ⁴⁷
SEC	“When multiple comments are submitted with identical or near-identical content, only the first copy of the comment received will be posted publicly along with a running total number of that comment received.” ⁴⁸

2. Comments Submitted Under Another Person’s Identity

The Senate report noted that recent high-profile agency dockets have hosted comments submitted falsely under another person’s identity. Some have asserted that it may be a federal crime for individuals to submit a comment to an agency purporting to be another person without

⁴⁶ *Commenter’s Checklist*, GEN. SERVS. ADMIN. (last visited Mar. 15, 2021).

⁴⁷ *Commenting on EPA Dockets*, *supra* note 9.

⁴⁸ *How to Submit Comments*, SECS. & EXCH. COMM’N (last visited Mar. 15, 2021).

that person’s authorization.⁴⁹ According to the Senate report, one agency refers such comments to the FBI.⁵⁰ The Senate report concludes that agencies, in coordination with OIRA, should develop standard protocols regarding, among other kinds of submissions, comments submitted under false identities, and should make those protocols public to ensure commenters understand their responsibilities. The Senate report also suggested that the eRulemaking Program Executive Steering Committee, FCC, and SEC consider using technology like CAPTCHA to cut down on fraudulent comments submitted by a computer.

In general, agencies have yet to establish published policies about this kind of submission. GSA’s eRulemaking Program recently redesigned Regulations.gov to now include a “CAPTCHA” feature in an attempt to prevent at least those fraudulent comments submitted by a computer. The eRulemaking Program notes that “it is a violation of federal law to knowingly and willfully make a materially false, fictitious, or fraudulent statement or representation including false statements about your identity or your authority to submit a comment on someone else’s behalf, in relation to the development of such federal regulations, including through comments submitted on Regulations.gov. *See* 18 U.S.C. § 1001.”⁵¹

3. Comments Containing Profane, Threatening, and Abusive language

The Senate report noted that the publication of comments containing profane, threatening, and abusive language is a “key problem” with the current operation of the notice-and-comment process. It states that: “Like many popular news and social media websites, the federal government’s commenting systems have at times become fora for profane, threatening, and abusive commentary.”⁵² It cited as a specific example from one agency 165,804 instances of publication of comments containing profanity.

Among other suggestions, it advises that Congress amend the E-Government Act to clarify that agencies should not accept or post “abusive, profane, or threatening comments” and that such comments should not otherwise be made available for public viewing. It also states that agencies, in coordination with OIRA, should develop standard protocols regarding, among other kinds of submissions, threats and abusive language and should make those protocols public to ensure commenters understand their responsibilities. Below are some examples of agency policies with respect to these kinds of submissions.

Agency	Guidance
FDA	“Defamatory, scurrilous, or intemperate matter is to be deleted from a record before it is submitted to the Division of Dockets Management.” ⁵³
eRulemaking Program (GSA)	“After submission, your comment will be processed by the agency and posted to Regulations.gov. At times, an agency may choose not to post a

⁴⁹ Balla et al., *supra* note 43, at 25–30.

⁵⁰ ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, STAFF REPORT, SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS 17 (OCT. 24, 2019).

⁵¹ *User Notice Page*, *supra* note 11.

⁵² ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, *supra* note 47, at 1.

⁵³ 21 C.F.R. § 10.20.

	submitted comment. Reasons for not posting the comment can include . . . [t]he comment contains profanity or other inappropriate language.” ⁵⁴
EPA	“Comments containing threatening language or profanity will be rejected without notice from the EPA.” ⁵⁵

PRESERVING THE DOCKET

Aside from transparency requirements, there are a number of federal record-retention requirements of which agencies should be aware.⁵⁶ In general, agencies must preserve and dispose of their rulemaking records in accordance with records retention schedules established by the National Archives and Records Administration (NARA).

Beyond these basic requirements, there are a number of practices that ACUS has recommended that agencies adopt to preserve their dockets in a way that enables the public to easily find relevant rulemaking materials. For example, ACUS has recommended that agencies “use one e-docket for each rulemaking proceeding to the maximum extent possible . . . [i]n instances in which agencies must use more than one e-docket for a single rulemaking, they should link the related e-dockets by using relevant identifiers and mak[e] clear to users in each of the related e-dockets that the e-dockets are linked.”⁵⁷

QUESTIONS FOR THE WORKING GROUP

Compiling and Indexing the Public Rulemaking Docket

- (1) When a comment is submitted to your agency, where within the agency does it go?
- (2) How do you index the materials in the public rulemaking docket?
- (3) When you add materials to the rulemaking docket, such as studies and analyses, do you inform the public by sending out automated alerts?
- (4) Who determines which supporting materials go into the docket and gets them into the hands of docket managers at the outset of the rulemaking process and throughout the rulemaking process?
- (5) Does your agency have policies of posting public comments to the internet within a specified period after submission?

Managing Sensitive and Protected Information in the Public Rulemaking Docket

- (6) Do you conduct any kind of screening? If so, what are you looking for?
- (7) Do you conduct redaction, aggregation, and other forms of protection of certain materials contained within comments?

⁵⁴ *User Notice Page*, *supra* note 11.

⁵⁵ *Commenting on EPA Dockets*, *supra* note 9.

⁵⁶ *See, e.g.*, 44 U.S.C. § 3301.

⁵⁷ Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov’s Rulemaking Dockets*, 84 Fed. Reg. 2143 (Feb. 6, 2019).

- (8) Do you ever disagree with a submitter's claim of CBI? If so, how do you handle the disagreement?
- (9) What happens when a member of the public requests access to a comment, or a portion of a comment, that is claimed as CBI? Do you use your typical FOIA procedures or do you have special procedures set up for this particular scenario?
- (10) Has any aspect of your rulemaking docketing procedures changed because of COVID-19? For instance, access to reading rooms? Submissions of paper files?
- (11) Do you have procedures established for handling pre-decisional and deliberative-process materials?
- (12) Are comments containing copyrighted materials a major concern with your agency? If so, how do you handle them?
- (13) What other kinds of sensitive submissions does your agency routinely encounter?

Preserving the Public Rulemaking Docket

- (14) Who within your agency is responsible for ensuring that records within public rulemaking dockets are maintained and disposed of per NARA's records retention schedules?
- (15) Do you have internal quality-control mechanisms to ensure that if there are multiple dockets for the same rulemaking (e.g., one docket for the NPRM and one docket for the final rule), such dockets are linked?