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FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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Paul R. Verkuil
Chairman
Administrative Conference of the United States
1120 20th Street, NW
Suite 706 South
Washington, DC 20036

Dear Chairman Verkuil:

I am writing to provide comments on the draft report by Leland E. Beck, entitled *Development, Compilation, and Judicial Review of Informal Agency Rulemaking Administrative Records* ("*Draft Report*"). I would like to thank the staff of the Administrative Conference for their commendable efforts to provide useful guidance to administrative agencies on difficult issues of administrative law.

The *Draft Report* does an admirable job of cataloguing precedent addressing whether agencies must include agency deliberative materials in an administrative record certified for judicial review of an agency rulemaking. I am concerned, however, that the report and accompanying recommendations do not reflect the judicial consensus on this topic. As described below, courts considering this question have consistently held that federal agencies are not required to include deliberative agency materials in the administrative record.

Inclusion of Deliberative Agency Materials in the Certified Administrative Record

As the many cases cited in the *Draft Report* amply demonstrate, courts have provided that internal agency deliberative documents need not be included in the administrative record relating to an agency rulemaking. The *Draft Report* should reflect this consensus.

Citing related Supreme Court precedent, the D.C. Circuit and other federal courts have long recognized that an agency's "internal memoranda made during the decisional process . . . are never included in a[n administrative] record." *Norris & Hirschberg v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947). The D.C Circuit has explained simply that "[a]gency deliberations not part of the record are . . . immaterial as a matter of law." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279 (D.C. Cir. 1998) (citing *United States v. Morgan*, 313 U.S. 409, 421-22 (1941) (internal deliberations and mental processes of agency

decisionmakers are not appropriate subject of discovery in challenge to an agency rulemaking). Likewise, the Ninth Circuit has provided that "neither the internal deliberative process of the agency nor the mental processes of individual agency members" form proper components of the administrative record. *Portland Audubon Society v. Endangered Species Comm.*, 984 F.2d 1534, 1549 (9th Cir. 1993).

Federal district courts have also followed this reasoning. As the District Court for the District of Columbia has explained, "deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record." *Amfac Resorts, L.L.C., v. Department of Interior*, 143 F.Supp.2d 7, 13 (D.D.C. 2001); *see also Tafas v. Dudas*, 530 F.Supp.2d 786, 794 (E.D. Va. 2008) ("A complete administrative record . . . does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege."); *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305 (S.D.N.Y. 2012).

While the *Draft Report* carefully catalogues this precedent, it does not fully acknowledge the important policy rationales underlying these cases. As the D.C. Circuit has explained, requiring the inclusion of deliberative materials in the administrative record would pressure agencies to conduct internal discussions with judicial review in mind, rendering "agency proceedings . . . useless both to the agency and to the courts." *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (en banc); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–52 (1975) (excluding deliberative materials from the administrative record "prevent[s] injury to the quality of agency decisions" by encouraging uninhibited and frank discussion of legal and policy matters).

Rather than reflecting the consensus on this topic,[1] the report declares instead that "courts diverge in their approach to the composition of an administrative record with some district court judges in the D.C. Circuit taking the position that deliberative material is excluded from the administrative record, while some district courts in the Ninth tak[e] the position that deliberative materials are part of the administrative record and may not be withheld absent a justified showing of privilege." *Draft Report* at 39. The *Draft Report* does not cite any support in the case law for this proposition, however.[2]

Accordingly, I encourage you to revise the *Draft Report* to reflect the prevailing view that internal agency deliberative documents need not be included in the administrative record relating

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[1] The *Draft Report* merely acknowledges that there is "some judicial sanction" approving the widespread agency practice of not including privileged, deliberative memoranda in a certified administrative record. *Draft Report* at 37.

[2] The report cites only NOAA's *Guidelines for Compiling an Agency Administrative Record, available at* http://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf. NOAA's guidelines, however, do not provide case law support for this proposition. NOAA's Guidelines cite only one case for the proposition that the administrative record "consists of all documents directly or indirectly considered by agency decision-makers": *Thompson v. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The *Thompson* case does not, however, stand for the proposition that agency deliberative materials must be included in the administrative record for judicial review. Instead, the case holds that a reviewing court may consider extrinsic evidence, such as letters documenting private parties' negotiation of a settlement that were submitted in support of a petition for reconsideration, to form part of the administrative record for review of the agency's decision dismissing the petition based on the terms of the underlying private settlement.

to an agency rulemaking.

In addition, the draft recommendations circulated in conjunction with the *Draft Report* recommend that agency certifications of the administrative record "should briefly describe exclusions of Administrative Record material from the Certified Administrative Record, if any" in connection with litigation challenging agency rulemakings. Based on precedent discussed above and the sensitive nature of agency deliberative materials, I encourage you to clarify that—while agencies should catalogue any factual materials submitted by participants in a rulemaking that may be excluded from a certified record—this recommendation is not intended to suggest that agencies may be obligated to catalogue deliberative agency materials for a reviewing court or include such materials in a certified administrative record.

Conclusion

If you have questions about these comments, you may contact my colleagues Lisa Harrison, Assistant General Counsel, or Kenny Wright, Attorney, Office of the General Counsel. Lisa can be reached via email at lharrison@ftc.gov or by phone at (202) 326-3204, and Kenny can be reached at kwright@ftc.gov or by phone at (202) 326-2907.

Sincerely,

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