



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

TO: Members of the Working Group on Compiling Administrative Records
FROM: Jeremy Graboyes
DATE: October 16, 2019
RE: Timing of Compilation and Indexing Practices

This memorandum provides briefing materials in advance of the October 29, 2019, meeting of the Working Group on Compiling Administrative Records. It covers issues related to the time period of rulemaking proceedings and the timing of compilation and indexing practices.

The information in this memorandum is based on Administrative Conference of the United States (ACUS) Recommendation 2013-4,¹ Leland Beck's 2013 consultant report to ACUS,² and guidance materials previously developed by the following agencies:

- Department of the Interior (DOI);³
- Environmental Protection Agency (EPA);⁴
- Internal Revenue Service (IRS);⁵ and
- National Oceanic and Atmospheric Administration (NOAA).⁶

This information is provided for background purposes only. It does not necessarily represent the views of ACUS or of the Working Group.

BACKGROUND

Agency guidance on compiling administrative records may need to address three key issues related to the timing of rulemaking proceedings and compilation and indexing practices:

¹ Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013), <https://www.acus.gov/recommendation/administrative-record-informal-rulemaking>.

² Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking (May 14, 2013) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/publication/agency-practices-and-judicial-review-administrative-records-informal-rulemaking-report>.

³ Dep't of the Interior, *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 Guidance].

⁴ ENVTL. PROTECTION AGENCY, ADMINISTRATIVE RECORDS GUIDANCE (Sep. 2011), <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [hereinafter EPA Guidance].

⁵ INTERNAL REVENUE MANUAL pt. 32, <https://www.irs.gov/irm/part32> (last visited Sep. 27, 2019) [hereinafter IRS Guidance].

⁶ Nat'l Oceanic & Atmospheric Admin., Guidelines for Compiling an Agency Administrative Record (Dec. 21, 2012), https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf [hereinafter NOAA Guidance].

- (1) Because agencies must compile and index those materials they consider during the course of informal rulemaking proceedings, they may need to determine the period of a rulemaking proceeding (i.e., when it begins, and when it ends).
- (2) Agencies may need to determine when, in the course of a rulemaking proceeding, officials should begin compiling and indexing rulemaking records. Agencies may also need to determine when officials should stop compiling and indexing records, especially when the rulemaking does not result in a notice of proposed rulemaking or final rule.
- (3) Third, agencies may need to determine which official(s) should make the determinations in (1) and (2) above, and how the official(s) should communicate her conclusions to other officials who are involved in the rulemaking.

PERIOD OF THE RULEMAKING

A rulemaking generally begins when an agency begins to “consider” its substance.⁷ In some cases, there may be a “discrete animating event” that sets a rulemaking in motion, such as a petition for rulemaking.⁸ In other cases, a beginning point will be less clear.⁹

An agency may need to establish retrospectively when it began to “consider” the substance of a rulemaking.¹⁰ Beck notes “[t]he beginning point, at a minimum, likely precedes publication of an advance notice of proposed rulemaking or publication of an entry in the [Unified Agenda], both of which are indicators that the agency has begun considering a rulemaking.”¹¹ ACUS recommended agencies at least “include materials considered in preparation of the notice of proposed rulemaking,” including “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.”¹²

Agency	Guidance
DOI	“A Decision File should be created once consideration of a decision begins, which will vary based on the situation.” ¹³
IRS	“A regulation project may be opened only with the approval of the Associate Chief Counsel and Treasury.” ¹⁴
NOAA	“The decision-making process is initiated when the agency begins to consider a concrete proposal for action. This may vary from case to case; the process is typically initiated when the agency begins to move forward on a specific course of action. For example, in the case of a petition for rulemaking, the decision-making

⁷ Beck, *supra* note 2, at 40.

⁸ *Id.* at 41.

⁹ *Id.* at 40-41.

¹⁰ *Id.* at 40-41.

¹¹ *Id.* (emphasis omitted).

¹² Recommendation 2013-4, *supra* note 1, ¶ 4.

¹³ DOI Guidance, *supra* note 3, at 4.

¹⁴ IRS Guidance, *supra* note 5, § 32.1.2.2.

process begins when the agency receives a written request for specific action from the public.”¹⁵

Because judicial review focuses on “the full administrative record that was before the [agency] at the time [it] made [its] decision,”¹⁶ a rulemaking generally ends, and the administrative record closes, “at the time a final rule is signed or published.”¹⁷

The end date of a rulemaking may be less clear when an agency decides not to finalize a rule. In some cases, an agency may publish a notice in the *Federal Register* withdrawing an advance notice or notice of proposed rulemaking. In other cases, the decision to end or pause a rulemaking initiative may need to be communicated to relevant officials.

Agency	Guidance
EPA	“The final decision document is the document signed by the Agency official authorized to make the decision, such as the final rule signed by the Administrator, or the final determination or approval/disapproval document” ¹⁸
	“The administrative record for a decision is complete upon signature by the decision-maker. Documents generated or altered after signature are not part of the administrative record for that decision.” ¹⁹
IRS	“After a final regulation is published, the drafting attorney should use Form 9506, Treasury Decision File Closing Information Sheet and Assembly Checklist, to assemble and organize the folder(s) of the legal file. . . . After a final regulation is published, the drafting attorney should ensure that the final regulation is closed on CASE-MIS using status code 951 (closed—publication) and classification code W (Regulations, revenue ruling, revenue procedure, IRB notice & announcement (non-ministerial)).” ²⁰
DOI	“Once the decision-maker has made a final decision, the Decision File should be closed.” ²¹
NOAA	“Agency action ends when the decision-maker makes a final decision. It is important to assure that the Administrative Record includes sufficient material to support the decision. A deficient record cannot generally be cured by creating new supporting documents after the decision-maker has signed the decision. In short, any documents created after the decision-maker has made a final decision will generally be excluded from the Administrative Record.” ²²

¹⁵ NOAA Guidance, *supra* note 6, at 11.

¹⁶ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

¹⁷ Beck, *supra* note 2, at 54.

¹⁸ EPA Guidance, *supra* note 4, at 9.

¹⁹ *Id.* at 10.

²⁰ IRS Guidance, *supra* note 5, § 32.1.9.2.

²¹ DOI Guidance, *supra* note 3, at 4.

²² NOAA Guidance, *supra* note 6, at 11.

PERIOD OF COMPILEMENTATION AND INDEXING

While agencies need not compile an administrative record until a rule is challenged, many agencies have adopted a policy of “contemporaneous compilation” that takes place throughout the rulemaking process.²³ Others direct staff to compile an administrative record once the agency is notified of pending or impending judicial review but may recommend or require the compilation of a working file during the rulemaking process, especially for rules likely to result in litigation.²⁴

ACUS recommended agencies “begin compiling rulemaking records no later than the date on which an agency publishes the notice of proposed rulemaking” and continue compiling the rulemaking record as long as the rule is pending before the agency.”²⁵

Agency	Guidance
EPA	“While the record is not officially compiled until a court orders the Agency to file the record in litigation, it is important to focus on the record through the entire decision-making process. A deficient record cannot generally be cured by creating new supporting documents after the decision-maker has signed the decision. . . . [A]ll record documents must be completed before the decision-maker has signed the decision document.” ²⁶
DOI	“A Decision File should be created once consideration of a decision begins, which will vary based on the situation.” ²⁷
IRS	“The drafting team is responsible for creating the legal file and should begin compiling the file as soon as the regulation project is opened.” ²⁸
NOAA	“Once the agency has been notified that litigation seeking judicial review of the agency decision is commencing or has commenced, the Custodian must begin compiling the Administrative Record, and where needed generating a Privilege Log, unless notified otherwise by the assigned NOAA General Counsel’s Office attorney.” ²⁹ “For any decision likely to be controversial or the subject of litigation, as a ‘best practice’ the Custodian should strive to compile and organize documents contemporaneously with the agency decision-making process, rather than wait until litigation is initiated to begin compiling the Administrative Record. On the other hand, there may be circumstances—for example, where the agency expects to advance a jurisdictional defense—where it may be appropriate to defer assembly of the Administrative Record.” ³⁰

²³ Beck, *supra* note 2, at 41-44.

²⁴ *Id.*

²⁵ Recommendation 2013-4, *supra* note 1, ¶ 4.

²⁶ EPA Guidance, *supra* note 4, at 11.

²⁷ DOI Guidance, *supra* note 3, at 4.

²⁸ IRS Guidance, *supra* note 5, § 32.1.2.1.

²⁹ NOAA Guidance, *supra* note 6, at 12.

³⁰ *Id.* at 12 n.23.

COORDINATING RECORD COMPILATION AND INDEXING

Agencies differ in their internal development and coordination of rulemaking. Some agencies employ a hierarchical model, while others opt for a more team-based model. Some empower specialized program offices to take the lead in rulemaking, while others centralize rulemaking authority in a dedicated regulatory affairs office.³¹ Agencies must consider which individual(s) or office is best positioned to designate the relevant rulemaking period and direct the compilation and indexing of materials that date from that period.

ACUS recommended agencies “designate one or more custodians for rulemaking recordkeeping, either on a rulemaking-by-rulemaking basis or generally” and that the custodian “document the record compilation process.”³² At some agencies, it may be appropriate for the designated custodian to identify or request the identification of a rulemaking’s start date.

Agency	Guidance
NOAA	“The Custodian should consult with the assigned NOAA General Counsel’s Office attorney to identify the point at which the decision-making process was initiated.” ³³

ACUS also recommended agencies “inform agency personnel of the custodian(s) and direct them to deposit rulemaking record materials with the custodian(s) . . .”³⁴ Agency guidance should perhaps address how and when a custodian or other official will inform agency staff that a rulemaking has commenced and that they should compile and index rulemaking records until its completion. Agency guidance may also need to address how the Custodian or an official responsible for ending a rulemaking initiative without issuing a final rule will communicate that decision to staff who are responsible for compiling and indexing rulemaking records an on ongoing basis.

Agency	Guidance
IRS	The <i>Internal Revenue Manual</i> addresses the procedures staff should follow when a final regulation is published, when the agency publishes a withdrawal of a notice of proposed rulemaking, and when the agency decides not to finalize a rule but does not issue a withdrawal. ³⁵

³¹ See generally Christopher Carrigan & Russell Mills, Organization, Process, and Agency Rulemaking 5-7 (Mar. 9, 2018), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Carrigan-Mills_Organization-Process-and-Agency-Rulemaking-3-2018_0.pdf; Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 451-72 (2015).

³² Recommendation 2013-4, *supra* note 1, ¶ 5.

³³ NOAA Guidance, *supra* note 6, at 11.

³⁴ Recommendation 2013-4, *supra* note 1, ¶ 5.

³⁵ IRS Guidance, *supra* note 5, § 32.1.9.