



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: Introduction to the Working Group on Compiling Administrative Records

Thank you for volunteering to participate in the Administrative Conference of the United States (ACUS), Office of the Chairman's Working Group on Compiling Administrative Records. I look forward to working with you over the next several months to prepare materials that will help agencies develop their own guidance on preserving and compiling rulemaking materials. Please feel free to contact me by email at jgraboyes@acus.gov or by phone at (202) 480-2095.

This memorandum introduces the Working Group's membership and procedures, provides an overview of its purpose and goals, lays out a tentative schedule, and offers a bibliography of additional resources that may inform the Working Group's discussions.

MEMBERS AND STAFF COUNSEL¹

Staff Counsel: Jeremy Graboyes, Attorney Advisor, ACUS

Member	Title	Affiliation
James Barton	Senior Associate	WilmerHale
Reeve Bull	Research Director	ACUS
Daniel Cohen	Assistant General Counsel for Legislation, Regulation, and Energy Efficiency	Department of Energy
Peter Constantine	Associate Solicitor, Office of Legal Counsel	Department of Labor
Kelly P. Dunbar	Partner	WilmerHale
Andrew Emery	President	The Regulatory Group
Cynthia R. Farina	William G. McRoberts Research Professor in Administration of the Law, Emerita	Cornell Law School
Noelle Green	Attorney-Advisor, Office of General Counsel	Environmental Protection Agency
Connor Raso	Senior Counsel, Office of General Counsel	Securities and Exchange Commission

¹ Other individuals may become members of the Working Group in the discretion of the ACUS Vice Chairman.

Member	Title	Affiliation
Melissa Rifkin	Attorney, Office of General Counsel	Pension Benefit Guaranty Corporation
Peter Robbins	Attorney, Office of the Assistant General Counsel for Legislation, Regulations, and Oversight	Department of Commerce
Adina Rosenbaum	Attorney	Public Citizen Litigation Group
Matthew L. Wiener	Vice Chairman and Executive Director	ACUS

PROCEDURE

I will act as the Working Group’s Staff Counsel. In this role, I will prepare and distribute briefing materials in advance of each meeting; call meetings to order and adjourn them; record our discussions; and assemble, revise, and distribute draft materials for the Working Group’s consideration and approval.

Meetings will be open to the public and streamed online at <https://livestream.com/ACUS>. I will publish notice in advance of each meeting on the ACUS website. Interested members of the public are invited to submit comments for the Working Group’s consideration. However, only Working Group members may vote to approve a final product. A product will be considered approved and final when a majority of the Working Group’s membership votes to approve it.

OVERVIEW

When a federal court reviews a rule adopted pursuant to the Administrative Procedure Act’s (APA) notice-and-comment procedures,² it considers the “whole record” underlying the rule.³ In Recommendation 2013-4, ACUS offered best practices for preserving and compiling the whole record and certifying it for judicial review. ACUS also encouraged agencies to issue guidance to aid personnel in implementing those best practices.⁴

The goal of this Working Group is to produce materials to assist agencies in preparing guidance that incorporates these best practices. While ACUS acknowledged that the contents of such guidance may vary based on agency-specific factors such as the size of typical rulemaking records, institutional experience, the need for consistency across components, and agency resources, it recommended that agencies address at least the following subjects in such materials:

- (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;

² 5 U.S.C. § 553.

³ 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971).

⁴ Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

- (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.⁵

Although the Working Group is not limited to addressing these subjects, they will provide a helpful outline for its discussions and may inform the organization of its final product.

I have grouped the subjects into five main categories for discussion:

- (1) Timing of the Rulemaking Period and Compilation and Indexing Practices (c).
- (2) Components of and Exclusions from the Rulemaking Record and the Certified Administrative Record (a, b).
- (3) Procedures for Preserving Rulemaking Records (g).
- (4) Managing, Protecting, and Segregating Privileged, Sensitive, and Protected Materials (d, e, f).
- (5) Certifying the Administrative Record for Judicial Review (h).

Recordkeeping tools and technologies will be discussed throughout.

TENTATIVE SCHEDULE

The initial plan is that we will meet once about every two months between October 2019 and October 2020. Each meeting will last two-to-three hours depending on its subject matter. The dates listed below are **tentative**. We will discuss the proposed schedule at our first meeting.

Tentative Date	Tentative Agenda
Oct. 29, 2019	MEETING: Introduction to Working Group; Time Period of Rulemaking; Timing of Compilation and Indexing Practices
Jan. 8, 2020	MEETING: Review Draft; Components of and Exclusions from the Rulemaking Record and the Certified Administrative Record
Mar. 11, 2020	MEETING: Review Draft; Procedures for Preserving Rulemaking Records
May 6, 2020	MEETING: Review Draft; Managing, Protecting, and Segregating Privileged, Sensitive, and Protected Materials

⁵ *Id.* ¶ 11.

Tentative Date	Tentative Agenda
July 14, 2020	MEETING: Review Draft; Certifying the Administrative Record for Judicial Review
<i>July 28, 2020</i>	<i>First Consolidated Draft</i>
Aug. 12, 2020	MEETING: Discussion of First Consolidated Draft
<i>Aug. 26, 2020</i>	<i>Revised Consolidated Draft</i>
Sep. 16, 2020	MEETING: Discussion of Revised Consolidated Draft
Oct. 2, 2020	<i>Final Draft</i>

BIBLIOGRAPHY

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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>.

Existing Agency Guidance

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>.

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Jean Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record*, U.S. ATTY. BULL. 7 (Feb. 2000), <https://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab4801.pdf>.⁶

INTERNAL REVENUE MANUAL pt. 32, <https://www.irs.gov/irm/part32>.

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.

⁶ The guidance in this document was subsequently supplemented by (1) Memorandum from Ronald J. Tenpas, Assistant Attorney Gen., to Selected Agency Counsel, Guidance to Federal Agencies on Compiling the Administrative Record (Dec. 23, 2008), and (2) Memorandum from Jeffrey H. Wood, Acting Assistant Atty. Gen., to Selected Agency Counsel, Administrative Record Compilation in Light of *In re Thomas E. Price*, Ninth Cir. No. 17-71121 (Oct. 20, 2017). See Kelly Dunbar et al., *Federal Agencies Need a Uniform Record-Keeping Process*, Law360 (July 15, 2019).

Judicial Opinions

- Camp v. Pitts, 411 U.S. 138 (1973).
- Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
- Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985).
- Pension Benefit Guar. Corp. v. LTV Corp., 497 U.S. 633 (1990).

Secondary Sources⁷

- Travis O. Brandon, *Reforming the Extra-Record Evidence Rule in Arbitrary and Capricious Review of Informal Agency Actions: A New Procedural Approach*, 21 LEWIS & CLARK L. REV. 981 (2017).
- Kelly Dunbar, James Barton & Megan Yan, *Federal Agencies Need a Uniform Record-Keeping Process*, LAW360 (July 15, 2019), <https://www.wilmerhale.com/-/media/893f4d1e4988406bb84ac855fc08f9f8.pdf>.
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- CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE §§ 4:44, 8:27 (3d ed. 2010).
- JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (6th ed. 2018).
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- KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., Administrative Law Treatise § 10.5 (6th ed. 2019).
- Daniel J. Rohlf, *Avoiding the Bare Record: Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N.U. L. REV. 575 (2009).
- James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301 (2008).
- Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984).
- Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record"*, 10 ADMIN. L.J. 179 (1996).

⁷ I offer these sources for informational purposes. I do not endorse their content, nor does the exclusion of other documents carry any significance. Members are invited to bring other resources to the Working Group's attention.