



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

TO: Members of the Working Group on Compiling Administrative Records
FROM: Jeremy Graboyes
DATE: January 26, 2021
SUBJECT: Components of and Exclusions from 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.

SUMMARY

ACUS recommends that agencies prepare and publish guidance that explains to rulemaking personnel, among other subjects, what materials they should add to and exclude from public rulemaking dockets during informal rulemaking. This Memorandum identifies several categories of materials addressed in existing agency rules and guidance documents and, for each category, quotes agency guidance on the subject. Categories of materials described below are:

Components

Rulemaking notices (p. 4)
Written submissions in response to rulemaking notices (p. 6)
Procedural requests (e.g., requests for oral presentations, comment-period extensions) and associated materials (p. 7)
Materials related to public meetings and hearings (p. 7)
Materials related to ex parte communications (p. 9)
Economic, environmental, and other regulatory assessments (p. 11)
Other background materials (e.g., studies, reports, data) (p. 12)
Inter-agency communications (p. 13)
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Exclusions

Legally protected materials (p. 17)
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Materials withheld for pragmatic or procedural reasons (p. 21)

INTRODUCTION

Agencies generate, receive, and consider many kinds of materials throughout the course of informal rulemaking. Agency personnel are responsible for compiling administrative records from these materials for specific purposes, for example:

- (1) the *rulemaking record*, i.e., “the full record of materials before the agency in an informal rulemaking,” including those materials which are not ordinarily made publicly available;
- (2) the *public rulemaking docket*, i.e., “the public version of the rulemaking record managed by agency, regardless of location, such as online at Regulations.gov or an agency website or available for physical review in a docket room;” and
- (3) the *administrative record for judicial review*, i.e., “the materials tendered by the agency and certified to a court as the record on review of the agency’s regulatory action.”¹

In Recommendation 2013-4,² the Administrative Conference of the United States (ACUS) encouraged agencies to adopt best practices for compiling these records and advised agencies to issue guidance to aid personnel in implementing the best practices described in the Recommendation. ACUS recommended such guidance address:

- (1) “essential components of the rulemaking record, public rulemaking docket, and the administrative record for judicial review;”
- (2) “appropriate exclusions from the rulemaking record, including guidance on whether and when to exclude materials such as personal notes or draft documents;”
- (3) “timing of compilation and indexing practices;”
- (4) “management and segregation of privileged materials, e.g., attorney work product or pre-decisional deliberative materials;”
- (5) “management and segregation of sensitive or protected materials, e.g., copyrighted, classified, protected personal, or confidential supervisory or business information;”
- (6) “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;”
- (7) “preservation of rulemaking and administrative records and public rulemaking dockets;”

¹ Admin. Conf. of the U.S., Recommendation 2013-4, 78 Fed. Reg. 41,358 (July 10, 2013).

² *Id.*

- (8) “certification of the administrative record for judicial review, including the process for identifying the appropriate certifying official;” and
- (9) “relevant capabilities and limitations of recordkeeping tools and technologies.”³

The Working Group is charged with preparing materials that will help agencies develop guidance suited to their particular needs and circumstances of their rulemaking personnel. At its first three meetings, the Group addressed how agencies can draft guidance to help rulemaking personnel implement best practices for compiling the rulemaking record. At the next two meetings, the Group will discuss how agencies may wish to draft guidance to help rulemaking personnel implement best practices for compiling the public rulemaking docket.

This Memorandum describes 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. A separate memorandum will address how agencies explain processes for compiling docket materials and making them available for public inspection.

COMPONENTS OF THE PUBLIC RULEMAKING DOCKET

Agency rulemaking personnel are required by various statutes, executive orders (EO), and agency rules and practices to make certain materials publicly available during informal rulemaking. Relevant statutes include the Administrative Procedure Act (APA),⁴ E-Government Act,⁵ Regulatory Flexibility Act (RFA),⁶ National Environmental Policy Act (NEPA),⁷ Paperwork Reduction Act (PRA),⁸ Privacy Act,⁹ and Unfunded Mandates Reform Act (UMRA).¹⁰ Some agencies are subject to additional statutory requirements in specific contexts.¹¹ Relevant orders include EO 12866 and EO 13563.¹²

Agencies have long used rulemaking dockets to provide public access to these and other materials. All agencies today maintain an online docket for each rulemaking, as required by the E-Government Act. Some also maintain a physical docket file or provide access to certain materials in a docket office. For purposes of this Memorandum, any material made publicly available, whether in an electronic docket or a docket office, is considered part of the public rulemaking docket.

³ *Id.*, ¶ 11.

⁴ 5 U.S.C. § 553.

⁵ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁶ 5 U.S.C. §§ 603, 604, 611.

⁷ 42 U.S.C. § 4321ff; *see also* 40 C.F.R. § 1502.

⁸ 44 U.S.C. §§ 3501–21.

⁹ 5 U.S.C. § 552a.

¹⁰ 25 U.S.C. § 1532.

¹¹ *See, e.g.*, 15 U.S.C. § 2691 (Toxic Substances Control Act); 42 U.S.C. § 7607(d) (Clean Air Act); 49 U.S.C. § 20133 (Federal Railroad Safety Act).

¹² Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

Although the precise components of the docket will vary from agency to agency and rulemaking to rulemaking, all dockets have essentially the same purpose: to facilitate public participation in the rulemaking process by ensuring members of the public can review and comment on significant materials related to the proposed rule. As an Environmental Protection Agency (EPA) guidance document explains:

The rulemaking docket generally contains the documents that form the basis for EPA's decision. EPA staff should assure that these materials are available to the public either through the docket or other appropriate means. With respect to dockets made available for proposed rules, if a proposed rule relies on materials that are not placed in the docket, commenters who cannot get access to the materials may question whether public notice was adequate.¹³

Indeed, failure to ensure public access to critical rulemaking materials during the informal rulemaking process may result in remand on judicial review.¹⁴

Based on a review of rules and guidance from nearly 20 agencies and several ACUS recommendations, I have identified the following categories of materials that agencies may wish to address in guidance intended to help personnel compile public rulemaking dockets:

- (1) rulemaking notices;
- (2) written submissions in response to rulemaking notices;
- (3) procedural requests (e.g., requests for oral presentations, comment-period extensions) and associated materials;
- (4) materials related to public meetings and hearings;
- (5) materials related to ex parte communications;
- (6) economic, environmental, and other regulatory assessments;
- (7) other background materials (e.g., studies, reports, data, and other factual materials upon which the agency relies);
- (8) inter-agency communications;
- (9) draft rules and notices;
- (10) rulemaking petitions and associated materials;
- (11) advisory committee records, reports, and recommendations;
- (12) records specific to multi-member boards and commissions; and
- (13) indexes.

Although some categories will apply in every rulemaking, others are relevant only in certain contexts. Agencies should consider which categories are most prevalent in their proceedings.

1. Rulemaking Notices

The APA requires agencies to publish a notice of proposed rulemaking (NPRM) in the *Federal Register* for each rulemaking. Agencies must also publish the final rule in the *Federal*

¹³ Env'tl. Protection Agency, *EPA Action and Development Process: Creating and Managing Dockets: Frequently Asked Questions for EPA Action Developers*, at 7–8 (Oct. 2011) [hereinafter "EPA Guidance"].

¹⁴ See, e.g., *Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

Register.¹⁵ In addition to the NPRM and final rule, agencies may also publish, among other notices: advance notice of proposed rulemaking, supplemental notice of proposed rulemaking, and other requests for information; notice withdrawing or terminating a proposed rulemaking; or procedural notices, such as those extending the time period for public comments or announcing a public meeting or hearing.

ACUS has recommended that agencies include all “notices pertaining to the rulemaking.” in the public rulemaking docket.¹⁶ Some agencies specify in their rules that personnel should add some or all rulemaking notices to the docket. Examples include:

| Agency | Guidance |
|--------------|---|
| EPA | “The documents in the rulemaking docket may include, but are not limited to, the following items: . . . Advance notice of proposed rulemaking. Proposed rule. Notice to extend or reopen the comment period. Final rule. Direct final rule. Notice of availability, or notice of data availability. Information collection request.” ¹⁷ |
| FAA | “To propose or adopt a new regulation, or to change a current regulation, FAA will issue one or more of the following documents. . . . We make all documents available to the public by posting them in the Federal Docket Management System at http://www.regulations.gov . (1) An advance notice of proposed rulemaking (ANPRM). (2) A notice of proposed rulemaking (NPRM). (3) A supplemental notice of proposed rulemaking (SNPRM). (4) A final rule. (5) A final rule with request for comments. (6) A direct final rule.” ¹⁸ |
| FDA | “The record of the administrative proceeding consists of all of the following: . . . (3) The proposed rule published in the <i>Federal Register</i> (4) The notice promulgating the final regulation” ¹⁹ |
| FEMA | “Documents which are public records and which are a part of a specific rulemaking procedure, including, but not limited to, advance notices of proposed rulemaking, notices of proposed rulemaking, . . . final rules and general notices shall be maintained in the Office of Chief Counsel.” ²⁰ |
| HUD | “All documents relating to rulemaking procedures including but not limited to advance notices of proposed rulemaking, notices of proposed rulemaking, . . . , withdrawals or terminations of proposed rulemaking, . . . , final rules and general notices are maintained in the Rules Docket Room” ²¹ |
| NHTSA | “[N]otices of proposed rulemaking . . . and final rules are maintained in the Docket Room” ²² |
| USCG | “Each rulemaking docket contains copies of every rulemaking docket published for the project” ²³ |

¹⁵ 5 U.S.C. § 553(b)–(c).

¹⁶ Recommendation 2013-4, *supra* note 1, ¶ 1(a).

¹⁷ EPA Guidance, *supra* note 13, at 9.

¹⁸ 14 C.F.R. § 11.25(a).

¹⁹ 21 C.F.R. § 10.40(g)(3), (5).

²⁰ 44 C.F.R. § 1.5(a).

²¹ 24 C.F.R. § 10.4(a).

²² 49 C.F.R. § 553.5(a); *see also* 49 C.F.R. §§ 106.45(a)(2) (PHMSA), 389.5(a) (FMCSA).

²³ 33 C.F.R. § 1.05-25(a).

2. Written Submissions in Response to Rulemaking Notices

The APA requires agencies to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”²⁴ Agencies satisfy this requirement by instructing the public, in the NPRM, to submit written comments in a specific manner (e.g., through an online portal or by mail to a named contact) by a specific deadline.

Agencies ordinarily add properly and timely submitted comments to the docket as required by the E-Government Act. Agencies may also wish to explain whether personnel should add the following to the docket: (a) attachments submitted with comments; (b) written materials submitted before publication of the NPRM, for example in response to an associated ANPRM, or after the close of the comment period; and (c) written materials submitted in a manner not specified in the NPRM, e.g., during a public meeting or hearing, during an “ex parte” contact, or in response to coverage of the rulemaking on agency-administered social media.²⁵

Some agencies have published rules or guidance that instruct rulemaking personnel to add written submissions to the docket. Examples include:

| Agency | Guidance |
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| ATF | “The Bureau will post written comments received in response to a notice of proposed rulemaking to the appropriate rulemaking docket” ²⁶ |
| DOE | “There shall be established at the DOE National Office . . . a public docket room in which shall be made available for public inspection and copying: . . . (c) The comments received during each rulemaking proceeding” ²⁷ |
| EPA | “The documents in the rulemaking docket may include, but are not limited to, the following items: . . . Copies of comments regarding a proposed rule or notice received from members of the public (whether during or after the applicable comment periods) and attachments submitted with those comments. Response to comments.” ²⁸ “EPA shall invite and consider written comments on proposed interim regulations from any interested or affected persons and organizations. All such comments shall be part of the public record, and a copy of each comment shall be available for public inspection. EPA will maintain a docket of comments received and any Agency responses.” ²⁹ |
| FDA | “The record of the administrative proceeding consists of all of the following: . . . (4) All comments received on the proposal, including all information submitted as a part of the comments.” ³⁰ |

²⁴ 5 U.S.C. § 553(c).

²⁵ See Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

²⁶ 27 C.F.R. § 70.802(g)(1).

²⁷ 10 C.F.R. § 205.15.

²⁸ EPA Guidance, *supra* note 13, at 11.

²⁹ 40 C.F.R. § 25.10 (Resource Conservation and Recovery Act, Safe Drinking Water Act, Clean Water Act).

³⁰ 21 C.F.R. § 10.40(g)(4).

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| FEMA | “Documents which are public records and which are a part of a specific rulemaking procedure, including, but not limited to, . . . written comments addressed to the merits of a proposed rule, and comments received in response to notices . . shall be maintained in the Office of Chief Counsel.” ³¹ |
| HUD | “All documents relating to rulemaking procedures including but not limited to . . . written comments received in response to notices . . . are maintained in the Rules Docket Room” ³² |
| IRS | “All written and electronic comments received become part of the public record . . . and are available for public inspections and copying.” ³³ |
| NHTSA | “[C]omments received in response to notices . . . are maintained in the Docket Room” ³⁴ |
| USCG | “Each rulemaking docket contains . . . public comments received” ³⁵ |

3. Procedural Requests and Agency Responses

Members of the public sometimes make procedural requests related to a rulemaking—asking, for example, that the agency provide an opportunity for oral presentation or extend the public comment period. Some agencies have adopted rules governing such requests.

Agencies may wish to explain to rulemaking personnel whether they should add the following to the docket: (a) procedural requests submitted by members of the public, and (b) any agency responses to such requests. HUD and FEMA rules, for example, explain that all “requests for oral argument in public participation cases, requests for extension of time, [and] grants or denials of petitions or requests” are maintained in a docket office.³⁶

4. Materials Related to Public Meetings and Hearings

Although some agencies are required by statute to hold a public meeting or hearing when they conduct rulemakings, the APA generally leaves it to agencies to decide whether an “opportunity for oral presentation” would be beneficial and how and when it should take place.³⁷ Agencies may be required to consult with state, local, or tribal officials under the UMRA and various EOs.³⁸

When a meeting or hearing does occur, ACUS recommends that officials record and prepare a summary of the event and include a transcript or recording in the docket.³⁹ Some agencies have adopted rules consistent with this practice. Agencies may also wish to explain to rulemaking personnel whether they should add the following to the docket: (a) materials

³¹ 44 C.F.R. § 1.5(a).

³² 24 C.F.R. § 10.4(a); *see also* 44 C.F.R. § 1.5(a) (FEMA).

³³ Internal Revenue Manual § 32.1.7.2(1).

³⁴ 49 C.F.R. § 553.5(a); *see also* 49 C.F.R. §§ 106.45(a)(2) (PHMSA), 389.5(a) (FMCSA).

³⁵ 33 C.F.R. § 1.05-25(a).

³⁶ 24 C.F.R. § 10.4(a); *see also* 44 C.F.R. § 1.5(a) (FEMA).

³⁷ 5 U.S.C. § 553(c); *see also* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

³⁸ *See, e.g.*, Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

³⁹ Recommendation 2018-7, *supra* note 37, ¶ 8(a)(viii)–(ix); Recommendation 2013-4, *supra* note 1, ¶ 1(c).

distributed by agency officials at the public event (e.g., agendas, handouts), and (b) materials submitted by members of the public to agency officials at the public event. Examples include:

| Agency | Guidance |
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| DOE | <p>“There shall be established at the DOE National Office . . . a public docket room in which shall be made available for public inspection and copying: . . . (c) . . . a verbatim transcript of the public hearing if such a public hearing was held”⁴⁰ “A verbatim transcript shall be made of the hearing. The transcript, together with any written comments submitted in the course of the proceeding, shall be made available for public inspection and copying in the public docket room”⁴¹</p> |
| EPA | <p>“The documents in the rulemaking docket may include, but are not limited to, the following items: . . . Materials related to public hearings or meetings including transcripts or summary minutes, lists of speakers or attendees, and hearing or meeting briefing materials such as agendas and handouts. . . . Documentation of any consultations . . . under the Unfunded Mandates Reform Act and other relevant statutes and Executive Orders.”⁴²</p> <p>“The agency holding the hearing shall prepare a transcript, recording or other complete record of public hearing proceedings and make it available at no more than cost to anyone who requests it. A copy of the record shall be available for public review.”⁴³</p> |
| FDA | <p>“The record of the administrative proceeding consists of all of the following: . . . (6) The transcripts, minutes of meetings, reports, <i>Federal Register</i> notices, and other documents resulting from [optional procedures including conferences, meetings, discussions, and hearings]”⁴⁴ “FDA promptly will file in the appropriate administrative file memoranda of meetings prepared by FDA representatives and all correspondence, including any written summary of a meeting from a participant, that relate to a matter pending before the agency.”⁴⁵</p> |
| HUD | <p>“[T]ranscripts or minutes of informal hearings . . . are maintained in the Rules Docket Room”⁴⁶ “The Secretary may invite persons to present oral arguments, appear at informal hearings, or participate in any other procedure affording opportunity for oral presentation of views. The transcript or minutes of such meetings, as appropriate, will be kept and filed in the Rules Docket.”⁴⁷</p> |
| NHTSA | <p>“Information and data deemed relevant by the Administrator relating to rulemaking actions, including . . . records of additional rulemaking</p> |

⁴⁰ 10 C.F.R. § 205.15.

⁴¹ 10 C.F.R. § 205.173(f).

⁴² EPA Guidance, *supra* note 13, at 11.

⁴³ 40 C.F.R. § 25.5(f) (Resource Conservation and Recovery Act, Safe Drinking Water Act, Clean Water Act). *But see* 40 C.F.R. § 25.6.

⁴⁴ 21 C.F.R. § 10.40(g)(6).

⁴⁵ 21 C.F.R. § 10.65(f).

⁴⁶ 24 C.F.R. § 10.4(a); *see also* 44 C.F.R. § 1.5(a) (FEMA).

⁴⁷ 24 C.F.R. § 10.12; *see also* 44 C.F.R. § 1.14 (FEMA).

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| proceedings . . . are maintained in the Docket Room” ⁴⁸ “Additional rulemaking proceedings” described in the regulations include “oral arguments,” “conferences between the Administrator or his representative and interested persons at which minutes of the conference are kept,” and “informal hearings presided over by officials designated by the Administrator, at which a transcript or minutes are kept.” ⁴⁹ |
| USCG “Each rulemaking docket contains . . . summaries of public meetings or hearings.” ⁵⁰ |

Agencies may also attend meetings between OMB officials and members of the public conducted pursuant to EO 12,866. At least two agencies—DOT and the Department of Education—have adopted rules that specifically require personnel who attend any such meeting to “draft a summary report of the meeting” and add it to the docket.⁵¹

5. Materials Related to Ex Parte Communications

Many agencies have adopted rules governing “ex parte” communications during informal rulemaking proceedings. Many agencies have adopted rules governing “ex parte” communications, defined broadly as any “(i) written or oral communication; (ii) regarding the substance of an anticipated or ongoing rulemaking; (iii) between the agency personnel and interested persons; and (iv) that are not placed in the rulemaking docket at the time they occur.”⁵² Although some agencies broadly restrict ex parte contacts and others largely permit them, many have adopted rules that require rulemaking personnel to document them when they do occur.

The Working Group has previously discussed how agencies should explain to rulemaking personnel: (a) what constitutes an ex parte communication; (b) whether there are any restrictions on ex parte communications; and (c) how to document an ex parte communication. Agencies may also wish to explain to rulemaking personnel whether they should add such documentation to the public rulemaking docket.

ACUS recommends agencies include in the public rulemaking docket documentation of the occurrence or content of oral and written ex parte communications that occur between publication of an NPRM and issuance of a final rule.⁵³ Several agencies have adopted rules consistent with ACUS’s recommendation. Agencies may also wish to explain to rulemaking personnel whether they should add the following materials to the docket: (a) materials related to ex parte communications which take place during other stages of the rulemaking process, for example before issuance of an NPRM or after the close of the comment period; and (b) written materials exchanged during otherwise oral communications. Examples include:

⁴⁸ 49 C.F.R. § 553.5(a); *see also* 49 C.F.R. §§ 106.45(a)(2) (PHMSA), 389.5(a) (FMCSA).

⁴⁹ 49 C.F.R. § 553.25; *see also* 49 C.F.R. § 106.90 (PHMSA), 389.25 (FMCSA).

⁵⁰ 33 C.F.R. § 1.05-25.

⁵¹ 49 C.F.R. § 5.19(b) (DOT); 34 C.F.R. § 9.11(b) (Department of Education).

⁵² Admin. Conf. of the U.S., “*Ex Parte*” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014).

⁵³ Recommendation 2014-4, *supra* note 52, ¶ 7.

| Agency | Guidance |
|--------|---|
| EPA | <p>“The documents in the rulemaking docket may include, but are not limited to, the following items: . . . Lists of participants in external group meetings regarding the rulemaking. Summaries of relevant information regarding the rulemaking received during external group meetings. Records of communications containing relevant information from members of the public, including summaries of telephone conversations or other contacts containing information relevant to the rulemaking.”⁵⁴</p> <p>“For each meeting with a person or party outside of government, the Agency will prepare, based on notes taken at the meeting, a memorandum of the meeting.” The regulations describe the timing and contents of the memorandum and require it be added to the public rulemaking docket. EPA rules also require that officials add to the docket a “copy of each document, comment, item of correspondence or other written material . . . submitted by any person or party outside of government, whether in a meeting or separately” and a “copy of each document, proposal, or other item of written material . . . provided by the Agency to any person or party outside of government.”⁵⁵</p> |
| DOT | <p>“DOT personnel may have meetings or other contacts with interested members of the public concerning an informal rulemaking . . . at any stage of the rulemaking process, provided the substance of material information submitted by the public that DOT relies on in proposing or finalizing the rule is adequately disclosed and described in the public rulemaking docket such that all interested parties have notice of the information and an opportunity to comment on its accuracy and relevance.”⁵⁶</p> |
| FDA | <p>“An official transcript, recording, or memorandum summarizing the substance of any meeting described in this section will be prepared by a representative of FDA when the agency determines that such documentation will be useful. . . . FDA promptly will file in the appropriate administrative file memoranda of meetings prepared by FDA representatives and all correspondence, including any written summary of a meeting from a participant, that relate to a matter pending before the agency.”⁵⁷</p> |
| FEMA | <p>“All oral communications from outside FEMA of significant information and argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by FEMA or its offices and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in the Rules Docket File available for public inspection.”⁵⁸</p> |
| STB | <p>“Any Board Member, hearing officer, or Board employee who receives an ex parte communication not permitted by these regulations must promptly transmit either the written communication, or a written summary of the oral</p> |

⁵⁴ EPA Guidance, *supra* note 13, at 10.

⁵⁵ 40 C.F.R. §§ 155.30(d), 155.32(b)(3)–(5) (pesticide registration standards).

⁵⁶ 49 C.F.R. § 5.19(a)(1).

⁵⁷ 21 C.F.R. § 10.65(e)–(f).

⁵⁸ 44 C.F.R. § 1.6(a).

communication with an outline of the surrounding circumstances to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board. The Section Chief shall promptly place the written material or summary in the correspondence section of the public docket of the proceeding with a designation indicating that it is a prohibited ex parte communication that is not part of the decisional record.”⁵⁹

6. Economic, Environmental, and Other Regulatory Assessments

Several statutes and EOs require agencies to prepare and make publicly available assessments of a proposed rule’s economic, environmental, or other regulatory impact. Legal authorities that impose such requirements include, among others, the Regulatory Flexibility Act, Paperwork Reduction Act, Privacy Act, National Environmental Policy Act, Unfunded Mandates Reform Act, and EO 12,866.

Although NPRMs often contain at least a summary of these assessments or statement of their findings,⁶⁰ a 2010 memorandum from the Office of Information and Regulatory recommends agencies include “environmental impact statements,” “regulatory impact analyses,” and “information collections” in the docket.⁶¹ Some agencies have also adopted rules directing rulemaking personnel to add them to the docket. Examples include:

| Agency | Guidance |
|--------|--|
| EPA | “The documents in the rulemaking docket may include, but are not limited to, the following items: . . . Initial and final regulatory flexibility analyses prepared under the Regulatory Flexibility Act or documentation supporting the factual basis for a certification of no significant economic impact on a substantial number of small entities. Documentation of any . . . analyses under the Unfunded Mandates Reform Act and other relevant statutes and Executive Orders.” ⁶² |
| FDA | A rule requires that, as appropriate, rulemaking notices inform the public that relevant environmental assessments and findings of no significant impact are available for inspection in the agency’s docket office. ⁶³ |
| HUD | “Copies of environmental reviews and findings shall be maintained . . . in the rules docket files for <i>Federal Register</i> publications.” ⁶⁴ |
| USCG | “Each rulemaking docket contains copies of . . . regulatory assessments.” ⁶⁵ |

⁵⁹ 49 C.F.R. § 1102.2(e)(1).

⁶⁰ See, e.g., 44 C.F.R. § 1.12(f) (FEMA); 49 C.F.R. § 5.13(e) (DOT).

⁶¹ Memorandum from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, to the President’s Management Council (May 28, 2010).

⁶² EPA Guidance, *supra* note 13, at 11.

⁶³ 21 C.F.R. § 25.51.

⁶⁴ 24 C.F.R. § 50.11(b).

⁶⁵ 33 C.F.R. § 1.05-25(a).

7. Other Background Materials

The APA requires agencies to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”⁶⁶ Under the prevailing judicial interpretation of this provision, agencies must make the “critical factual material” underlying proposed rules—e.g., technical studies, staff reports, data, and methodologies—available for public comment. Consistent with this principle, EO 13,563 requires agencies to include “relevant scientific and technical findings” in the public rulemaking docket.⁶⁷

ACUS has recommended that agencies include in the docket: (a) studies and reports on which the proposal relies;⁶⁸ (b) references to the scientific literature, underlying data, models, and research results that the agency considered, including a list of all information on which it relied and any material information it considered but on which it did not rely; (c) data underlying scientific research, including privately and federally funded research; and (d) conflict of interest disclosures for scientific research.⁶⁹ More broadly, ACUS has recommended that agencies include “any other materials considered by the agency during the course of the rulemaking,” subject, of course, to “legal limitations on disclosure, any claims of privilege, or any exclusions allowed by that the agency chooses to invoke.”⁷⁰

Some agencies have adopted rules directing rulemaking staff to add certain background materials to the docket. Examples include:

| Agency | Guidance |
|---------------|---|
| DOT | “To inform public comment when the NPRM is published, the proposing POC will place in the docket for the proposed rule and make accessible to the public, including by electronic means, material information relied upon by the POC in the NPRM that is not provided in the NPRM, unless the information is exempt from disclosure under 5 U.S.C. 552(b), 5 U.S.C. 552a, or any other applicable law. . . . The proposing POC will determine the most reliable and relevant scientific, technical, and economic information reasonably available to the Department as a basis for the proposal, [and] identify the sources and availability of such information” ⁷¹ |
| EPA | “The documents in the rulemaking docket may include, but are not limited to, the following items: . . . 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. |

⁶⁶ 5 U.S.C. § 553(c).

⁶⁷ Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁶⁸ Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, ¶ 4, 76 Fed. Reg. 48,789 (Aug. 9, 2011).

⁶⁹ Admin. Conf. of the U.S, Recommendation 2013-3, *Science in the Administrative Process*, 78 Fed. Reg. 41,357 (July 10, 2013).

⁷⁰ Recommendation 2013-4, *supra* note 1, ¶¶ 1(f)–(2).

⁷¹ 49 C.F.R. § 5.13(h)(3); *see also* 34 C.F.R. § 9.9(g)(3) (Department of Education).

...

“Under section 553 of the Administrative Procedure Act (APA), a proposed rule must provide notice to the public that is sufficient to inform them of either the substance of the proposed rule or the subjects and issues under consideration by the agency. The proposed rule *Federal Register* notice together with supporting documents included in the docket should provide sufficient detail and rationale to permit interested parties to comment meaningfully. . . . Supporting documents for the final rule include the materials that the agency directly or indirectly considered in making the decision, including the supporting documents for the proposed rule and the additional documents considered after the proposal. If portions of a final supporting document supersede statements in a supporting document created for the proposed rule, the final supporting document should make clear which positions have been changed or updated.”⁷²

FDA “The record of the administrative proceeding consists of all of the following . . . (3) The proposed rule published in the *Federal Register*, including all information identified or filed by the Commissioner with the Division of Dockets Management on the proposal.”⁷³

NHTSA “Information and data considered relevant by the Administrator relating to rulemaking actions . . . are maintained in the Docket Room”⁷⁴

Of course, some materials may already be reasonably available to members of the public. Ready public access to a supporting material online or in a print publication may obviate the need for rulemaking personnel to add it to the rulemaking docket.⁷⁵ Agencies may wish to explain to rulemaking personnel when they should add background materials to the docket and when it is sufficient to include a citation to materials available elsewhere. EPA guidance, for example, states: “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.)”⁷⁶

8. Inter-Agency Communications

Agencies may receive solicited or unsolicited communications from officials at other federal agencies related to a rulemaking.

The most common inter-agency communications are those between the agency and the Office of Information and Regulatory Affairs (OIRA). EO 12,866, for example, requires agencies to make certain information available: “the substantive changes between the draft submitted to OIRA for review and the action subsequently announced,” “those changes in the

⁷² EPA Guidance, *supra* note 13, at 10, 16.

⁷³ 21 C.F.R. § 10.40(g)(3).

⁷⁴ 49 C.F.R. § 553.5(a); *see also* 49 C.F.R. § 190.305(a) (PHMSA), 389.5(a) (FMCSA).

⁷⁵ *See* *Conn. Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir. 1982); *Pharm. Research & Mfrs. of Am. v. FTC*, 44 F. Supp. 3d 95 (D.D.C. 2014); *Cape Cod. Hosp. v. Sebelius*, 677 F. Supp. 2d 18 (D.D.C. 2009).

⁷⁶ EPA Guidance, *supra* note 13, at 21.

regulatory action that were made at the suggestion or recommendation of OIRA,” and additional materials for significant regulatory actions. Agencies may wish to address such materials in guidance to help rulemaking staff compile the public rulemaking docket.

Where it is required or common practice for agency officials to solicit input from officials at other agencies, it may be beneficial to explain to rulemaking staff whether they should add such materials to the docket. For example, an FCC regulation governing the establishment of antenna farm areas, requires the FCC to seek the advice of the FAA and add the FAA’s written response to the docket.⁷⁷

With respect to inter-agency communications generally, ACUS has recommended that agency personnel add to the docket any communications they receive from the President, advisers to the President, the Executive Office of the President, or other administrative bodies which contain “material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule.”⁷⁸ Agencies may wish to address inter-agency communications in guidance for rulemaking staff. EPA guidance, for example, instructs rulemaking personnel: “If the other agency’s intent was to submit a public comment to the docket, the communication should be included in the docket as a public comment. You may, however, want to contact that agency in order to ensure that it did not inadvertently include any pre-decisional deliberative material in its comments.”

9. Draft Rules and Notices

Unless a statute specifically directs an agency to do so,⁷⁹ federal law does not require agencies to include draft proposed and final rules in public rulemaking dockets.⁸⁰ Nevertheless, agencies that regularly make draft notices or rules available for public inspection may wish to explain to rulemaking personnel when and how to do so. For example, FDA rules permit, but do not require, officials to make draft proposed regulations and tentative final regulations available for public inspection.⁸¹

As noted above, agencies may also wish to explain to rulemaking personnel how they should comply with EO 12,866’s requirement that agencies disclose certain draft materials shared with or received from OIRA.

10. Rulemaking Petitions and Associated Materials

The APA requires that agencies give interested persons “the right to petition for the issuance, amendment, or repeal of a rule.”⁸² Although agencies have adopted different practices for rulemaking petitions, several have adopted rules directing personnel to make them available for public inspection. Agencies may wish to explain to rulemaking personnel whether they should

⁷⁷ 47 C.F.R. § 17.8(a).

⁷⁸ Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407, ¶ 2 (Dec. 31, 1980).

⁷⁹ See, e.g., 15 U.S.C. § 2691(c)(2)(B) (Toxic Substances Control Act).

⁸⁰ *Banner Health v. Price*, 867 F.3d 1323, 1336–37 (D.C. Cir. 2017).

⁸¹ 21 C.F.R. § 10.40(f)(4), (6).

⁸² 5 U.S.C. § 553(e).

add the following to the docket or otherwise make them available for public inspection: (a) rulemaking petitions, (b) attachments to rulemaking petitions, (c) any agency response to or decision regarding a petition, and (c) any public comments submitted in response to a petition. Examples include:

| Agency | Guidance |
|---------------|--|
| DOE | “The Secretary will assign a docket number to the petition, place a copy in the Public Document Room and notice its receipt in the <i>Federal Register</i> .” ⁸³ |
| FSIS | “All rulemaking petitions filed with FSIS, along with any documentation submitted in support of a petition, will be available for public inspection in the FSIS docket room and will be posted on the FSIS Web site at http://www.fsis.usda.gov/ .” ⁸⁴ |
| HUD | “All documents relating to rulemaking procedures including . . . petitions for rulemaking . . . are maintained in the Rules Docket Room” ⁸⁵ |
| NHTSA | “Information and data deemed relevant by the Administrator relating to rulemaking actions, including . . . petitions for rulemaking . . . [and] denials of petitions for rulemaking . . . are maintained in the Docket Room” ⁸⁶ |
| NRC | Requiring the following be included in the docket: (1) the petition for rulemaking, (2) all comment submissions in response to the petition, and (3) any decision not to complete the rulemaking action. ⁸⁷ |
| USCG | “The Coast Guard maintains an electronic public docket for each petition for rulemaking Each rulemaking docket contains copies of every rulemaking document published for the project, public comments received, . . . and other publicly-available information.” ⁸⁸ “Any petition for rulemaking and any reply to the petition will be kept in a public docket open for inspection.” ⁸⁹ |

11. Advisory Committee Records, Reports, and Recommendations

In a report to ACUS, Leland Beck observed that it may be beneficial to include relevant advisory committee materials in the public rulemaking docket for a rule, or at least inform members of the public where they can obtain them.⁹⁰ ACUS has recommended that agencies add “reports or recommendations of any relevant advisory committees” to the docket.⁹¹

⁸³ 10 C.F.R. § 110.131(d).

⁸⁴ 9 C.F.R. § 392.6.

⁸⁵ 24 C.F.R. § 10.4(a); *see also* 44 C.F.R. § 1.5(a) (FEMA).

⁸⁶ 49 C.F.R. § 553.5(a); *see also* 49 C.F.R. §§ 106.45(a)(2) (PHMSA), 389.5(a) (FMCSA).

⁸⁷ 10 C.F.R. § 2.803; *see also* 10 C.F.R. § 110.131.

⁸⁸ 33 C.F.R. § 1.05-25.

⁸⁹ 33 C.F.R. § 1.05-20.

⁹⁰ Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking*, at 15 (report to the Admin. Conf. of the U.S.) (May 14, 2013).

⁹¹ Recommendation 2013-4, *supra* note 1, ¶ 1(d).

12. Records Specific to Multi-Member Boards and Commissions

Beck observed that “[e]lectronic voting records of multi-member commissions and boards may form another unique element of a public rulemaking docket.”⁹² Relevant transcripts, minutes, recordings, and notices for agency meetings prepared under the Government in the Sunshine Act may also be appropriate for inclusion or reference in the docket.⁹³

13. Indexes

ACUS recommends that agencies “index public rulemaking dockets for informal rulemaking, at an appropriate level of detail.”⁹⁴ At least one agency—EPA, for pesticide registration standards—explicitly requires that public dockets contain an index of their contents. The index must list (a) “each meeting between the Agency and any person or party outside of government, containing the date and subject of the meeting, the names of participants and the name of the person requesting the meeting,” and (b) “each document in the docket by title, source or recipient(s), and the date the document was received or provided by the Agency.”⁹⁵

EXCLUSIONS FROM PUBLIC RULEMAKING DOCKETS

Although ACUS has recommended that agencies “manage their public rulemaking dockets to achieve public disclosure,” it has also recognized that some rulemaking materials may be “subject to legal limitations on disclosure, any claims of privilege, or any exclusions allowed by law that the agency chooses to invoke.”⁹⁶

Materials commonly excluded from public rulemaking dockets include legally protected materials, privileged materials, and other materials excluded for pragmatic or procedural reasons:

- Legally protected materials include those enumerated in statutes such as the Freedom of Information Act (FOIA), Privacy Act, Trade Secrets Act, and Sunshine Act; executive orders; and agency rules.⁹⁷
- Commonly invoked privileges include the deliberative process privilege, attorney work product privilege, and attorney-client privilege.
- Pragmatic or procedural exclusions include those covering materials that are irrelevant to the rulemaking, improperly submitted, or publicly available outside the docket.

⁹² Beck, *supra* note 90, at 15.

⁹³ See 5 U.S.C. § 552b.

⁹⁴ Recommendation 2013-4, *supra* note 1, ¶ 6.

⁹⁵ 40 C.F.R. § 155.32(b)(1), (c).

⁹⁶ Recommendation 2013-4, *supra* note 1, ¶ 2.

⁹⁷ Christopher S. Yoo, Protected Materials in Public Rulemaking Dockets 9–19 (Nov. 23, 2020) (report to the Admin. Conf. of the U.S.).

Examples of relevant agency policies are listed below. I make three observations before turning to them:

- In addition to the examples below, the Working Group may find it helpful to consult agency rules and policies that implement FOIA and the Privacy Act more generally.
- Some agencies have adopted rules or policies specific to online dockets. For example, some agencies provide that copyrighted materials, certain sensitive materials, or obscene or threatening comments should be excluded from the online docket but included in the docket generally and available for public inspection in an agency reading room.⁹⁸ The Working Group will address such policies at its next meeting.
- Some agencies have established processes whereby members of the public can request that certain materials or information be excluded from the public or online docket.⁹⁹ The Working Group will address these processes at its next meeting.

In addition to the topics described in the third and fourth bullets, the Working Group will discuss agency processes for identifying and segregating protected, sensitive, and other excluded materials at its next meeting.

1. Legally Protected Materials

Legally protected materials potentially include those enumerated in FOIA, the Privacy Act, the Trade Secrets Act, the Sunshine Act, and other federal statutes; executive orders; and agency rules. Examples include:

- personal information, i.e., “information about an individual including his or her education, financial transactions, medical history, criminal or employment history, or similarly sensitive information, and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual;”¹⁰⁰
- confidential commercial information, i.e., “commercial information that is customarily kept private, or at least closely held, by the person or business providing it;”¹⁰¹
- national security and other classified information;
- law enforcement records or information.

Examples below address protected materials generally, confidential commercial information, and national security information. As noted above, the Working Group may find it helpful to consult rules and policies that implement FOIA and the Privacy Act more generally.

⁹⁸ Recommendation 2013-4, *supra* note 1, ¶ 2; Beck, *supra* note 90, at 50–52; Bridget C.E. Dooling, Legal Issues in e-Rulemaking: A Report to the Administrative Conference of the United States 11–19 (Mar. 17, 2011) (report to the Admin. Conf. of the U.S.).

⁹⁹ See generally Recommendation 2020-2, *supra* note 100; Yoo, *supra* note 97, at 40–105.

¹⁰⁰ Admin. Conf. of the U.S., Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, 86 Fed. Reg. 6614 (Jan. 22, 2021).

¹⁰¹ *Id.*

a. Protected Materials Generally

| Agency | Guidance |
|--------|--|
| EPA | “Although listed in the docket index at regulations.gov, some information is not publicly available, e.g., . . . information whose disclosure is restricted by statute.” ¹⁰² “Materials whose disclosure is protected by statute generally should not be included in the docket. You should consult your OGC or ORC 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.” ¹⁰³ |
| FMCSA | “ <i>Except for material ordered withheld from the public under section 552(b) of title 5 of the United States Code, any person may examine docket material in the Department of Transportation Docket Management Facility . . .</i> ” ¹⁰⁴ |
| FSIS | “If FSIS determines that a petition, or any documentation submitted in support of a [rulemaking] petition, contains information that is exempt from a public disclosure under the Freedom of Information Act (5 U.S.C. 552 <i>et seq.</i>) or any other applicable laws or regulations, and that the information would provide the basis for granting the petition, FSIS will inform the petitioner in writing.” ¹⁰⁵ |

b. Confidential Commercial Information

Under FOIA, agencies may (or must) withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹⁰⁶ The Department of Justice *Guide to the Freedom of Information Act* contains detailed guidance on this exemption.

Agencies have adopted different policies regarding the inclusion in the docket of confidential commercial information that public commenters submit. Some do not accept comments including confidential commercial information. Some routinely exclude such information but provide notice in the docket that the information has been excluded. Some include such information in the docket by default but prescribe processes by which individuals can request that the agency exclude such information.¹⁰⁷ As noted above, the Working Group will discuss these processes in greater depth at its next meeting.

¹⁰² 40 C.F.R. § 150.17(b) (Office of Pesticide Programs Regulatory Public Docket); *see also* 40 C.F.R. § 700.17(b) (Office of Pollution Prevention and Toxics Docket).

¹⁰³ EPA Guidance, *supra* note 13, at 10.

¹⁰⁴ 49 C.F.R. § 389.5 (emphasis added).

¹⁰⁵ 9 C.F.R. § 392.6.

¹⁰⁶ 5 U.S.C. § 552(b)(4).

¹⁰⁷ Steven J. Balla, Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States 23–24 (Mar. 15, 2011) (report to the Admin. Conf. of the U.S.).

| Agency | Guidance |
|--------|---|
| EPA | <p>“Although listed in the docket index at regulations.gov, some information is not publicly available, e.g., Confidential Business Information (CBI)”¹⁰⁸</p> <p>“The docket will contain, within the time frames indicated, all of the following documents and information (except that information claimed to be confidential business information will not be included)”¹⁰⁹</p> <p>“Documents containing confidential business information (CBI) . . . should be listed in the index to the docket, but the protected materials should not be placed in the docket. For documents containing CBI only in part, a redacted version of the document (the non-CBI portions) may be placed in the docket.”¹¹⁰</p> |
| FAA | <p>“<i>Proprietary information.</i> 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 the public does not have access, and place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552).”¹¹¹</p> |

c. National Security Information

| Agency | Guidance |
|--------|---|
| FAA | <p>“<i>Sensitive security information.</i> . . . For all proposed rule changes involving civil aviation security, we review comments as we receive them, before they are placed in the docket. If we find that a comment contains sensitive security information, we remove that information before placing the comment in the general docket.”¹¹²</p> |

2. Privileged Materials

ACUS has recognized that rulemaking 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.”¹¹³ The Department of Justice *Guide to the Freedom of Information Act* contains detailed guidance on FOIA’s deliberative process exemption. At least one agency, the EPA, also provides specific instructions on the exclusion of intra- and inter-agency communications.

¹⁰⁸ 40 C.F.R. § 150.17(b) (Office of Pesticide Programs Regulatory Public Docket); *see also* 40 C.F.R. § 700.17(b) (Office of Pollution Prevention and Toxics Docket).

¹⁰⁹ 40 C.F.R. § 155.32(b) (pesticide registration standards).

¹¹⁰ EPA Guidance, *supra* note 13, at 15.

¹¹¹ 14 C.F.R. § 11.35(b).

¹¹² *Id.* § 11.35(a).

¹¹³ Recommendation 2013-4, *supra* 1.

a. Privileged Materials Generally

| Agency | Guidance |
|---------------|--|
| EPA | <p>“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.</p> <p>...</p> <p>“In the development of an agency action, the factual information that forms the basis for the final decision, or a necessary justification for a policy decision that is reflected in the rule, should not be contained solely in a pre-decisional deliberative document. However, in unusual cases, a pre-decisional deliberative document (such as an internal memo or a document labeled ‘draft’) may be the only available document that contains factual information forming the basis of a final decision or that provides a necessary justification for a policy decision. If you believe that this may be the case, you should consult with your OGC or ORC attorney and your management before proceeding. In such cases, it is highly preferred that the pre-decisional deliberative material be redacted from the document, and the redacted document be placed in the docket without the pre-decisional deliberative material. If the pre-decisional deliberative material cannot be redacted, you should write a separate document to record the information for the docket rather than docketing a document that is deliberative in nature. If the pre-decisional deliberative material cannot be redacted and you are unable to write a separate document, and you therefore need to place in the docket a document containing pre-decisional deliberative material, you may want to attach a cover note explaining its relevance.</p> <p>...</p> <p>“Informal staff notes, such as those taken by EPA staff at a meeting, generally are not included in the docket unless they contain information relevant to the decision that is not contained in other documents. A succinct ‘Note to Docket’ from the project manager, or appropriate supervisor is a good way to capture information from meetings, telephone calls, and other contacts with outside parties, rather than relying on informal staff notes.”¹¹⁴</p> |
| FDA | <p>“The record of the administrative proceeding consists of all of the following . . . (6) The transcripts, minutes of meetings, reports, <i>Federal Register</i> notices, and other documents resulting from the procedures specified in paragraph (f) of this section, <i>but not the transcript of a closed portion of a public advisory committee meeting.</i>”¹¹⁵</p> |

¹¹⁴ EPA Guidance, *supra* note 13, at 13–14.

¹¹⁵ 21 C.F.R. § 10.40(g)(7) (emphasis added).

b. Intra-Agency Communications

| Agency | Guidance |
|--------|---|
| EPA | “Internal comments on a rulemaking from EPA offices or Regions are generally considered internal agency documents, not public comments. They should be sent directly to the appropriate EPA contact rather than to a public docket. As indicated above if these documents contain factual information relied on by EPA, that information should be segregated or recorded in a separate document for placement in the docket.” ¹¹⁶ |

c. Inter-Agency Communications

| Agency | Guidance |
|--------|--|
| EPA | “Pre-decisional deliberative documents shared between EPA and other federal agencies generally should not be docketed unless a statute, regulation, or Executive Order directs the agency to include these materials in the docket . . . If a document that is deliberative in nature contains relevant information relied on by the agency, that information should be recorded in a separate document for the docket. In some circumstances, the docket may receive communications that were not intended as public comments, but rather as pre-decisional and deliberative, interagency communications. If the comment was intended to be pre-decisional and deliberative, it should be excluded or withdrawn from the docket and redirected to the appropriate EPA office.” ¹¹⁷ |

3. Pragmatic or Procedural Exclusions

Pragmatic or procedural exclusions observed in agency rules and guidance documents cover irrelevant comments, improperly submitted comments, and materials cited or incorporated by reference in an agency-prepared or a publicly-submitted document and generally available elsewhere.

Other materials that agencies may sometimes exclude from public rulemaking dockets include especially voluminous materials, duplicates (e.g. materials generated through a mass mail campaign), original signature requirements, and physical objects.¹¹⁸ As noted above, some agencies exclude these materials from the online docket and make them part of the docket available for public inspection in a reading room.

a. Irrelevant Comments

| Agency | Guidance |
|--------|--|
| PHMSA | “We may reject comments that are not relevant to the rulemaking.” ¹¹⁹ |

¹¹⁶ EPA Guidance, *supra* note 13, at 14.

¹¹⁷ EPA Guidance, *supra* note 13, at 15.

¹¹⁸ Beck, *supra* note 90, at 16–17.

¹¹⁹ 49 C.F.R. § 106.70(c).

b. Improperly Submitted Comments

| Agency | Guidance |
|--------|--|
| PHMSA | “We may reject comments you file electronically if you do not follow the electronic filing instructions at the DOT Web site.” ¹²⁰ |

c. Materials Generally Available Elsewhere

| Agency | Guidance |
|--------|---|
| EPA | “Your docket is complete when every item cited in <i>Federal Register</i> documents associated with the rulemaking is either included <i>or generally accessible to the public in such a way that public notices and access are adequate (such as through widely available publications)</i> . Before you exclude cited items from the docket you should check with your OGC or ORC attorney.” ¹²¹ |

QUESTIONS FOR THE WORKING GROUP

Components of the Public Rulemaking Docket

- (1) The Memorandum describes 13 categories of materials agencies may wish to include in guidance to help rulemaking personnel compile public rulemaking dockets (see pages 3–4). Are there any additional categories agencies should consider addressing in guidance for rulemaking personnel? Are there any listed categories agencies should consider not addressing in guidance for rulemaking personnel?
- (2) For each of the 13 categories described in the Memorandum, is there any information you would add, remove, or change?

Exclusions from the Public Rulemaking Docket

- (3) The Memorandum describes “commonly invoked limitations, privileges, and exclusions” as those found in FOIA, the Privacy Act, the Trade Secrets Act, the Sunshine Act, and those established at common law. Are there other sources of limitations, privileges, or exclusions?
- (4) The Memorandum describes specific limitations, privileges, or exclusions described in agency rules and guidance (see pages 16–19). Are there any additional categories agencies should consider addressing in guidance for rulemaking personnel? Are there any listed categories agencies should consider not addressing in guidance for rulemaking personnel?

¹²⁰ *Id.* § 106.70(c).

¹²¹ EPA Guidance, *supra* note 13, at 21.