

Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking



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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees.



ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES

**Agency Practices and Judicial Review of
Administrative Records in Informal Rulemaking**

Leland E. Beck, Report to the Administrative Conference of the United States¹

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Citation Note: This study utilizes a short-form citation for questionnaire responses from agencies. A list of the responding agencies and short citation forms may be found in Appendix A.

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Executive Summary

This study focuses on judicial review of final agency regulations under the Administrative Procedure Act (APA) requirement that a court, if presented with a challenge to agency action under the APA, “review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706. The Supreme Court has made clear that judicial review is to be based on the full administrative record that was before the agency official at the time he or she made the decision to promulgate the final rule. The Court has also held that the APA’s arbitrary and capricious standard of review requires a narrow review and as long as the agency has examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made, the courts should not disturb that decision. Section I.A.

The APA’s administrative record requirements must be read in the larger context of the Federal Records Act requirements that agencies maintain and transfer their official records to the National Archives and Records Administration. Additionally, administrative records and rulemaking records should be considered in tandem with the Freedom of Information Act (FOIA) requirements that agencies publish, make available for inspection and copying, and release upon request a wide range of agency documents, whether in paper or electronic form. Sections I.B, D.

The concept of the “whole record” is deceptively simple and numerous questions are embedded in that concept that require complex answers. The exponential growth of electronic document management, electronic docket systems, and public comments has expanded the volume of agencies’ rulemaking records over the past twenty years. Sections II.A.1, D. At the same time, judicial interpretation of statutory requirements and additional analytical requirements from general statutes and executive orders have expanded the factors and the substantive analyses that agencies are expected to consider in formulating a final rule. Sections II.A.2 & II.B.

The expansion of the administrative record concept is uneven because Congress has specified parameters directly for administrative records for judicial review in certain instances, and has occasionally provided that agencies consider or not consider specific factors in making decisions. Congressional specification of the parameters of the administrative record for judicial review may abrogate interpretations of the APA requirement, while specification of factors that must or must not be considered can effectively supplement or limit the interpretation. Some agencies have suggested that regulatory limitations may also be applied. Section II.C.

To facilitate the study of agency practices for compiling a rulemaking records and certifying an administrative record to a court for judicial review, this study surveyed a wide range of agencies represented in ACUS with a questionnaire and by requesting related guidance or other documentation. The responses to that questionnaire and the guidance or other documents provided form the heart of this study. The responses are examples, not a statistical study. Section I.C.

The agency responses and guidance illuminate the existence of a number of important record-related issues and the experience of some agencies may help other agencies. Among the key impressions from this process:

- A number of agencies have established guidance for the compilation of rulemaking records, and administrative records for judicial review, although few agencies have pointed to a discrete animating event for the development of that guidance. In many instances, agencies developed guidance in response to cumulative experience and risks. Section III.A.
- Consistent with the notion that an administrative record for judicial review must include all information considered by the agency directly or indirectly, agencies have catalogued a wide

range of documentation for inclusion in their own internal files and in their rulemaking records and administrative records for potential certification to a court. Sections III.A.1, F.2.

- Some agencies have attempted to provide their staffs with assistive guidance on inclusion or exclusion standards. Some of this guidance attempts to clarify the standards applied by courts by suggesting that the administrative record should be composed of documents that are “relevant” to the rulemaking, or on which the agency “relied” in reaching a decision. Although well intended, these substantive interpretations could mislead agency staff to exclude or limit documents in ways that were not intended and introduce a substantive judgment that appears to fall more in the province of a reviewing court. Caution is appropriate in using such qualitative modifiers in staff guidance. Section III.B.2.
- Agency guidance and practice treats privileged documents considered by the agency in different ways: some agencies exclude such documents from the administrative record for judicial review on the basis that the documents reflect mental processes and are not relevant; others identify the documents in the administrative record for judicial review and provided an index of withheld documents to opposing parties, without providing the privileged material. Both approaches appear to have some judicial acceptance; not all courts take the same approach, however. Section III.B.3.
- The segregation of documents into specific categories of information exempt from disclosure under FOIA, as well as segregation of content as privileged, may be applied to administrative records for judicial review. Section III.B.4.

Process issues in creating and compiling a rulemaking record for agency use and ultimately an administrative record for judicial review provide an opportunity for best practices:

- Agencies begin to compile some form of documentation of a rulemaking when they begin to consider promulgating a regulation, but no uniform practice exists and the beginning point is often unclear. Section III.C.1.
- Some agencies compile the rulemaking, and possible administrative, record contemporaneously with the development of the rule, while others suggest that they only compile the administrative record after a final rule has been promulgated and only if required to do so by the filing of a petition for review or a complaint. Contemporary compilation has been notably simplified by agencies that have robust electronic document management systems. Several agencies have pointed out that contemporaneous compilation provides efficiencies, and that post-decision “need based” compilation may create problems (including finding documents in the files of departed colleagues), but these are also agencies that appear to have well-developed electronic document processing systems. Section III.C.2.
- The public comment process in informal rulemaking is supported by *Regulations.gov* and the Federal Docket Management System, which permits an agency to manage large volumes of public comments, eliminate duplicates, and exemplify mass mailings, and download full public rulemaking dockets. Some agencies not participating in *Regulations.gov* have developed similar capacities on indigenous websites. Moreover, full electronic document management systems permit a few agencies – notably multi-member boards and commissions – to manage all documents related to a rulemaking and share them across the agency, including with the decisionmakers. Additionally, some agencies seek to maximize the amount of the rulemaking and administrative record materials included on their public rulemaking dockets. Section III.C.3.

- Most agencies do not formally index rulemaking or administrative records until necessary, although agencies with electronic document management systems point out that they retain basic metadata for the management of that system. Section III.C.4.
- The exponential increase in the availability of electronic resources, particularly the World Wide Web, computer programs, and malleable data, poses some unique problems for agency management of rulemaking and administrative records. Responding agencies do not appear to have had significant experience with the inclusion of computer databases, programs, and generated information in the rulemaking record or in administrative records for judicial review. Whether this will become a problem in the future is not clear. Agencies have developed some innovative approaches to limited experience – such as printing material from the World Wide Web when first considered to document information subject to change – but further development is needed. Section III.D.
- Agencies generally warn the public that protected personal identifying information and confidential business information submitted in public comments may be made public and otherwise appear well versed in handling such personal information and confidential business information. Several agencies raised the issue of handling copyrighted information in rulemaking records and administrative records for judicial review. Some provided indications of solutions that can be applied to holding and disposing of rulemaking records and filing of administrative records, such as identifying copyright information together with the limited inclusion of title pages on electronic forums. Section III.H. Protected documents, like privileged documents, may be included in rulemaking record, but require additional consideration before certification and filing of an administrative record on a public court docket. Section III.E.
- Agencies appear well versed in the closing of a rulemaking or administrative record at the time of decision, although a few exceptions have been noted. Section III.F.1. Agencies often present much less than a complete rulemaking record to the ultimate decisionmaker, particularly single-official decisionmakers. Multi-member boards and commission, particularly those with advanced electronic document management systems, point out that their members have full access to all documents in the rulemaking record. Single-official decision-making agencies also point out that any document can be provided to the decisionmaker. Section III.F.2.
- Agencies are aware of the requirements of the Federal Records Act, but, because rulemaking or administrative records may not be compiled unless necessary for certification to a court those records may be less likely to be designated as a permanent record. Guidance on the issue could be clarified. Agencies should consider whether records should be retained at the agency until litigation is foreclosed by a statute of limitations. Section III.F.3.

Judicial review of a final agency regulatory action also creates opportunities for agencies to improve the compilation of administrative records:

- Certification of an administrative record to the court requires consideration of the organization of the file to make it understandable, the court's rules, practice requirements, and the court's electronic case management and filing system. Section IV.A.1
- Agencies usually have a senior program official certify the administrative record for judicial review, although some agencies utilize a high-ranking records officer for this purpose. This difference does not appear to affect the content of the administrative record. Section IV.A.2.
- Certification has taken a number of different forms, from the traditional paper copy, through filing a series of portable document format (.pdf) files on the court's docket, to certification

of an electronic administrative record. Specific issues have been addressed by filing an administrative record separately from the court's docket on a hard drive or other medium. One agency has even accomplished innovative certification of an index of a portion of the agency's website as the administrative record with opposing counsel's and the court's approval. Negotiation between the agency and the petitioner or plaintiff's counsel, with the court's approval, appears to be the hallmark for efficiency in certification and filing. Section IV.B.10

- Although the Federal Rules of Appellate Procedure require that the whole record be filed with a reviewing court of appeals within 40 days after service of a petition for review, and that rule might be applied by a district judge performing an appellate review of final agency action in the district court, actual use of this requirement appears to be low. A more flexible practice suggests a preference for the parties to cite those parts of the administrative record that are relevant to the case being litigated. Section IV.B.2.
- The presumption of regularity that an agency enjoys in filing an administrative record is well engrained and exceptions to that presumption are narrow. Section IV.C.
- To bring into a court's consideration documents not included in an administrative record, litigants must make a specific showing that an agency erroneously failed to include a document that it considered, that an agency acted improperly, or that an agency's final rule, or propositions in an agency's final rule, is so unsupported by the record that additional documentation must be considered by the court to understand that record. Section IV.D.
- A high standard is likewise imposed on discovery in judicial review of a final agency rulemaking or decision. Section IV.E
- Some documents, particularly sources of law and documents of which a court may take judicial notice, may not need to be reproduced in an administrative record. Section IV.F.
- When an agency does not compile the rulemaking record during the time that it is considering a regulation, a court may have difficulty assessing whether preliminary relief from a rule should be granted before the effective date of the rule. At the point when a final rule becomes effective, the equities considered for a stay or preliminary injunction change, and both the agency and the court may be faced with a difficult task in compiling and reviewing an administrative record prior to the effective date of the rule and that change in status quo. Section IV.G.1. If the administrative record is defective, a court may remand the record to the agency, section IV.G.2, or, if sufficiently defective, a court may vacate the rule or enjoin its enforcement. Section IV.G.3.

In sum, the report finds diverse agency practices based on experience or lack of experience and evaluation of risks. Based on the research, recommendations suggest best practices for agencies but recognize the fluid level of development of procedures and electronic document management systems.

I. The “Administrative Record” in Context

Judicial review of final agency regulations is now presumed to be based on the Administrative Procedure Act (APA) requirement that a court “review the whole record or those parts of it cited by a party”² created by the agency whose decision is being reviewed. The Supreme Court’s construction of this requirement, under *Citizens to Preserve Overton Park v. Volpe*,³ and *Camp v. Pitts*,⁴ and their progeny, leaves open exceptions and less than a hard and fast rule.

In *Overton Park*, the Court interpreted the APA as limiting the process of judicial review and rejecting *de novo* review of administrative decisions. The Court’s remand set the stage for a long debate on the use of administrative records,

for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.⁵

Overton Park left open the possibility that a district court could require the testimony of agency officials if the agency’s explanation of its adjudicatory decision was insufficient.⁶

In the *Camp* formulation, the Supreme Court has made clear that under the APA:

the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. If ... there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary. The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration.⁷

As the Supreme Court has further explained,

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare

² 5 U.S.C. § 706.

³ 401 U.S. 402, 419 n. 30 (1971) (adjudication of whether a “feasible and prudent” alternative route to routing through park existed under Federal-Aid Highway Act) (quoting 5 U.S.C. § 706), *abrogated on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977) (APA not an independent grant to district courts of subject-matter jurisdiction). While the origins of the record reside in adjudications, current expectation is that such a record will exist.

⁴ 411 U.S. 138, 142-43 (1973) (adjudication of national bank charter).

⁵ *Overton Park*, 401 U.S. at 420.

⁶ *Id.*

⁷ 411 U.S. at 142-43.

circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.⁸

The Court applied the same standards for administrative records to informal rulemaking in *Vermont Yankee*.⁹ A court's analysis now entails a "thorough, probing, in-depth review" of the administrative record to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."¹⁰

The application of the "administrative record" concept to informal rulemaking is not, however, so engrained over so long a period nor are administrative records certified to a court so frequently that the concept has become second nature to agencies. An administrative record for judicial review is often misunderstood and not infrequently misapplied. This study examines the construction and compilation of rulemaking records for agency decisions and administrative records for judicial review in informal agency regulatory proceedings to determine existing procedures and recommend best practices.

The APA provides little guidance on the creation and compilation of the "whole record" or "administrative record" as it has come to be known. The Attorney General's Manual, as the authoritative interpretation of the APA, points out that the APA did not define "administrative record," at the time of enactment.¹¹ The administrative record concept has evolved over time through judicial interpretation and agency practice.

To structure this study, several distinctions must be initially be made. Foremost, the administrative record concept studied here is the documentation of agency decision-making that is a necessary *predicate* for judicial review of final agency rulemaking, rather than simply the general records of an agency. That predicate does not mean that the administrative record is necessary for the resolution of every petition for review of a final rule or suit to set aside every final rule. Quite to the contrary, many cases raising fundamental issues of whether the agency has adopted a regulation in accordance with the APA and the underlying programmatic statute raise no issues relating to the administrative record, and an administrative record is not necessary for the court's decision – the final rule alone is the focus of judicial decision. That distinction is not clear in many cases, however, and the question of whether an administrative record is necessary for judicial review may only be answerable when a certified administrative record is actually made available for review.

Second, rulemaking tends not to be a categorical or discrete and insular action, but the product of a process at one end of a spectrum of agency decision-making. Congress has created specific decisions subject to judicial review and engrafted a number of procedural requirements onto specific administrative decisions that make them "rule like" – policy decisions that affect significant segments of future conduct and that do not, by law, fall distinctly within the rubric of a

⁸ *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

⁹ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 549 (1978).

¹⁰ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. at 415 – 16.

¹¹ Tom C. Clark, *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* 24, 25 (1947) [hereinafter *A.G.'S MANUAL*]. The Attorney General's Manual refers to the subject sparingly and in reference to the then-pre-Freedom of Information Act approach to publication and release of government documents. The limited legislative history suggests that the record concept should apply flexibly to the situation. H.R. REP. No. 79-1980, at 259 (1946).

rule, but have that effect.¹² Case law on administrative records has not developed along discrete lines of “rulemaking” or “adjudication” or “hybrid” proceedings, but more generally, and therefore cases that might appear to be technically applicable only under one statute are often applied to more generally on judicial review of agency action under the statute is governed by the APA.

Although the administrative record concept is well embedded in administrative law and frequently implemented by diverse agencies, the practice of administrative recordkeeping is changing rapidly with the dynamic development of electronic records. Scholarly research of important related issues has been limited in recent years and the pace of change has outstripped academic review.¹³

The study seeks to recommend the best agency practices based on agency experience and the law, improvements in the process of compiling and presenting administrative records, and changes that would make the process more efficient and effective for the agencies, the courts, and private parties. Where practical, the recommended best practices reflect current agency practices considered the most efficacious for specific issues.¹⁴

A. The Larger Context

Statutes and government program management do not exist in a vacuum and the concept of an administrative record for purposes of judicial review under the APA is impacted by other statutes and judicial precedent interpreting those other statutes. To understand the concept of an administrative record for judicial review of a final agency rulemaking, the concept must be placed in a larger context.

At the most fundamental level, agencies must maintain and preserve official records and do so under a broad definition of records that includes papers, electronic files, and other media pursuant to the Federal Records Act (FRA).¹⁵ The FRA encompasses all “official” records,

¹² 42 U.S.C. § 4321ff.

¹³ See, e.g., 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); William Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE. L.J. 38 (1975-1976).

¹⁴ Agencies have illustrated the inherent conflict between a need for wide latitude to develop guidance and practice to fit their individual requirements and structure and the need for coordination between agencies, particularly in joint rulemaking. Compare FDIC*R with EPA*R. In the former, the FDIC specifically noted that “in view of the diverse scope and variety of rulemakings by federal agencies — as well as differences in the fundamental approach to the development of rulemaking records — each agency should develop and manage a rulemaking record consistent with the Administrative Procedure Act and related court decisions, and in a manner which best fits the agency’s resources and decision making process. Any recommendations for ‘best practices’ relating to rulemaking administrative records should be limited to general guidance rather than specific detailed procedures and practices that could be misconstrued by agencies or courts as a new “standard” that an agency must follow in developing its rulemaking record.” FDIC*R. In the latter, EPA suggested that “It is difficult to explain to opposing parties and a reviewing Court why the same document (e.g., an internal email) would be treated differently by different federal agencies (e.g., one agency excludes the document from the record, another includes the document in the record, and a third puts the document in a “confidential” part of the record or privilege log).” EPA*R.

¹⁵ Federal Records Act, 44 U.S.C. §§ 3301, defines a “record” as all documentary materials in whatever form made or received by an agency as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the agency or because of the informational value of data in them. This overall framework contributes to the timing of records compilation as much as it does to the substance of the records. As the Attorney General’s Manual points out in the original public disclosure

whether they lead directly to a specific final agency action or whether they ever become subject to judicial review. The FRA requires agencies to separate and preserve permanent records¹⁶ and schedule the deposit of those records with the National Archives and Records Administration (NARA).¹⁷ Agency rulemaking records documenting the development, clearance, and processing of proposed and final rules for publication in the *Federal Register* do not appear to be covered by the General Records Schedules. These records may be, but are not necessarily, permanent;¹⁸ they must be scheduled individually by each agency so NARA can conduct an analysis and appraisal to determine their appropriate disposition.

The E-Government Act of 2002 facilitated the evolution from the historic paper-based records to the more fluid and transparent electronic record.¹⁹ Most notable for the purpose of administrative records for judicial review purposes, the E-Government Act directed the creation of an online docket and public comment system for regulatory agencies, to the extent feasible,²⁰ and judicial electronic dockets.²¹ These two not unrelated requirements effected a paradigm shift in the way agencies and the courts interact with the public, particularly in establishing agency and court electronic filing systems, the APA's public comment processes, and the availability of court documents.

context of the APA, the term "official record" is "difficult of definition." A.G.'S MANUAL, *supra* note 11, at 24.

¹⁶ As ACUS has previously recognized, electronic records are becoming more prevalent if not predominant, and "Agencies should examine their record schedules and maintain electronic records in lieu of paper records as appropriate." Administrative Conference of the United States, Recommendation 2011-1, Legal Considerations in e-Rulemaking (Adopted June 16, 2011), 76 Fed. Reg. 48,789, 48,791 (Aug. 9, 2011) (Recommendation 3). [hereinafter Recommendation 2011-1]. "In implementing their responsibilities under the Federal Records Act, agencies should ensure their records schedules include records generated during e-Rulemaking." *Id.* (Recommendation 7). See also Administrative Conference of the United States, Recommendation 90-5: Federal Agency Electronic Records Management and Archives (Adopted December 17, 1990), 55 Fed. Reg. 53,270 (Dec. 28, 1990).

¹⁷ FRA records scheduling has not been well implemented in the past, to the point that the White House has made the enforcement of the FRA the focal point of Presidential interest, complete with mandatory training. See Memorandum on Managing Government Records, 76 Fed. Reg. 75,423, 75,423 (Dec. 1, 2011) ("Improving records management will improve performance and promote openness and accountability by better documenting agency actions and decisions.").

¹⁸ National Archives and Records Administration, General Records Schedules, General Records Schedule 16, Administrative Management Records, Transmittal No. 22 (Apr. 2010), available at <http://www.archives.gov/records-mgmt/grs/grs16.html> (last visited Apr. 5, 2013).

¹⁹ Pub. L. No. 107-347, 116 Stat. 2899 (2002) (codified as amended in scattered sections of 5, 10, 13, 31, 40, 41, and 44 U.S.C.) (*e.g.*, increasing document availability and providing for redaction rules).

²⁰ *Id.* at § 206; 44 U.S.C. § 3501 note. As NARA has pointed out, the development of *Regulations.gov* and the Federal Docket Management System (FDMS) poses new challenges for federal recordkeeping:

Although this is a centralized Government-wide docket management system and records repository, Federal agencies using FDMS are responsible for creating, maintaining and properly managing their own records within the system.

National Archives and Records Administration, General Records Schedules, General Records Schedule 16, Administrative Management Records, Transmittal No. 22 (Apr. 2010), available at <http://www.archives.gov/records-mgmt/grs/grs16.html> (last visited Apr. 5, 2013).

²¹ *Id.* at § 205; 44 U.S.C. § 3501 note.

Administrative records for purposes of judicial review are informed, also, by other distinct statutes, such as the disclosure of records under the APA subsidiary Freedom of Information Act (FOIA).²² FOIA requires agencies to publish certain matters in the *Federal Register*,²³ to make available for inspection and copying a larger population of documents,²⁴ and to release upon request a still larger population of documents,²⁵ which, once released become a part of the population of documents that must be made available for inspection and copying.²⁶ The FOIA public release upon request process and discretionary exemptions from release have been the subject of litigation and concern in recent years, but its inspection and copying requirements also play a large role in the management of administrative records.

Even before the agencies were required to provide public electronic input into regulatory processes under the E-Government Act, agencies were required to provide information to the public in electronic format under the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA Amendments).²⁷ The E-FOIA Amendments redefined records to include any information that would be an agency record subject to the requirements of FOIA maintained by an agency in any electronic format.²⁸ For present purposes, the E-FOIA Act also expanded the availability of documents by electronic means and in compatible formats.²⁹

For certain types of agency decisions, Congress has at times imposed distinct requirements and limitations on administrative records for final agency action and the scope of the agency action itself, which, in limiting the decision limits the administrative record, or in mandating consideration of specific factors in a decision, mandates the some aspect of the scope of the administrative record.³⁰

²² 5 U.S.C. § 552. The Administrative Procedure Act's Public Information section, originally section 3 of the APA, and now 5 U.S.C. § 552, dates back to the original 1946 enactment. Pub. L. 79-404, 60 Stat. 237 (1946); A.G.'S MANUAL *supra* note 11, at 17-25. The APA's public information section has undergone considerable revision and expansion since it was first adopted, beginning with the Freedom of Information Act of 1966 and more recently with the Electronic Freedom of Information Act of 1996 and the OPEN Government Act of 2007. Pub. L. 89-487, 80 Stat. 250 (1966); Pub. L. No. 104-231, 110 Stat. 3048 (1996); Pub. L. No. 110-175, 121 Stat. 2524 (2007).

²³ 5 U.S.C. § 552(a)(1) (organization and function, procedural, and substantive regulations).

²⁴ 5 U.S.C. § 552(a)(2) (final opinions, orders, statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, administrative staff manuals and instructions to staff that affect a member of the public).

²⁵ 5 U.S.C. § 552(a)(3) ("any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person").

²⁶ 5 U.S.C. § 552(a)(2)(D).

²⁷ Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified at 5 U.S.C. § 552) (*e.g.*, expanding available documents in electronic format).

²⁸ *Id.* § 3, 5 U.S.C. § 552(f)(3).

²⁹ *Id.* § 5, 5 U.S.C. § 552(a)(3)(B) – (D).

³⁰ *See infra* Section II.C.

B. The Administrative Record in the Judicial Review Context

Federal courts generally, and by default if no other statute provides otherwise, review agency final decisions under the APA.³¹ The APA “sets forth the full extent of judicial authority to review executive agency action for procedural correctness.”³² The APA establishes varied bases for review, such that a court may or may not need to review the certified administrative record to adjudicate a challenge to an agency decision. The APA provides that a court shall “(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Under the APA, the scope of review of rulemaking is narrow and a court must not substitute its judgment for that of the agency.³³ These standards for judicial review involve judicial review of an administrative record to different degrees. A challenge that a final agency action is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right may involve only a comparison between the delegating statute and the promulgated regulation without resort to the administrative record, while a challenge that a final agency action is arbitrary, capricious, an abuse of discretion may depend entirely upon the content of the administrative record. In the latter type of cases, as long as an agency has “examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” courts will not disturb the agency’s decision.³⁴ The burden of showing that the agency action violates the APA standards falls on the plaintiff or petitioner.³⁵ While the burden, and the deference owed to the agency decision, may vary, the premise is that the evidence has been adduced by the agency and contained in its certified administrative record.

As a general proposition – one considered throughout this study – “a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision.”³⁶ The rationale for this “record rule” is that the reviewing court, when considering a rule that an administrative agency is authorized by law to promulgate, should have before it nothing more than the materials that were before the agency when it made its decision, and should not substitute its opinion for that of the agency.³⁷ Put procedurally, when a court reviews

³¹ 5 U.S.C. § 706

³² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

³³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

³⁴ *E.g.*, *MD Pharm., Inc. v. Drug Enforcement Admin.*, 133 F.3d 8, 16 (D.C. Cir. 1998).

³⁵ *E.g.*, *Diplomat Lakewood Inc. v. Harris*, 613 F.2d 1009, 1018 (D.C. Cir. 1979).

³⁶ *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 – 44 (1985)).

³⁷ *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

an agency determination, the facts are provided to the court in the administrative record and there are no disputed for the court to resolve.³⁸ “[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.”³⁹

C. Methodology

The Administrative Conference of the United States (ACUS)⁴⁰ contracted for this study and report in August 2012. Initial discussions between ACUS staff and the consultant suggested the utility of seeking input from agencies through a questionnaire. An initial review of regulations and agency public guidance on administrative record compilation and certified administrative record filing and service simplified and contributed to the development of the more detailed questionnaire and discussions with public officials on agency practice.

The consultant and ACUS staff met with staff of the Department of Justice Office of the Associate Attorney General, Office of Legal Policy, Civil and Environmental and Natural Resources Divisions on October 11, 2012, to solicit DOJ’s initial thoughts and comments on the project and a draft agency questionnaire. The Committee on Judicial Review considered a preliminary outline of the report, as well as a draft survey instrument, at its October 3 and October 17, 2012, meetings and narrowed the focus of the survey to rulemaking records. After receiving input from the Committee and interested parties, the consultant and ACUS staff refined the agency questionnaire. Interpretation of the APA requirements for an administrative record in rulemaking, however, borrows extensively from judicial interpretation of the APA in adjudications, which is reflected throughout this report.

In November 2012, the eleven-question survey was sent to all Conference members from government agencies. The survey on administrative records considered those records created, compiled, and considered in reaching a decision to take final administrative action to promulgate a regulation through informal rulemaking⁴¹ rather than to promulgate a formal “hearing on the record” rule, or to adjudicate cases informally or formally.⁴² The questionnaire requested descriptions of agency practice and any guidance on a range of topics relating to the compilation of administrative records for judicial review, focusing on regulations, but with latitude for agency input that crosses over to adjudications. The questionnaire focused first on whether agencies had developed regulations / guidance / policy / manuals / memoranda on how to develop and retain an administrative record of final agency action, or that affect record compilation, and, if so, any reason for the creation of that guidance. The questionnaire sought information on the process used by agencies in compiling administrative records, including whether they compiled administrative records contemporaneously with rulemaking development or after the fact; whether rulemaking records were managed in paper or electronic form, and, if electronic, how their electronic document system affected administrative recordkeeping; and whether they index the record contemporaneously. The questionnaire asked agencies what they presented to the signatory authority when requesting approval of a final rule and about which officials certified administrative records to a court for judicial review.

³⁸ *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).

³⁹ *Id.*

⁴⁰ 5 U.S.C. §§ 591 – 596. *See generally* <http://www.acus.gov> (last visited Feb. 27, 2013).

⁴¹ 5 U.S.C. §§ 551(4), 553.

⁴² 5 U.S.C. §§ 554, 556, 557.

Substantive questions in the survey asked whether agencies were governed by more specific statutes than the APA in compiling an administrative record or material considered by the decisionmaker. Additionally, agencies were asked to describe variance between the internal rulemaking record and the public rulemaking docket and how they handled different types of privileged and protected documents. Finally, the questionnaire invited open-ended responses to problems agencies had experienced, issues that were not raised by the questionnaire, and suggested improvements.

Over two dozen agency or sub-agency responses were received through January 2013. The consultant and ACUS staff discussed the survey with a number of agency officials to respond to questions and provide guidance on issues raised by the questionnaire. Additionally, the consultant and ACUS staff met with staff of the Environmental Protection Agency (EPA) twice to discuss their detailed response and their role as the program management office for the Federal Docket Management System and *Regulations.gov*. These discussions focused on the experience of EPA with judicial review of their rulemaking records, the structure of FDMS and *Regulations.gov*, and agency use of those tools.⁴³ Additionally, the consultant met with the former career Deputy Assistant Attorney General for the Environment and Natural Resources Division to discuss the history of environmental litigation after it became evident that environmental statutes, regulations, and litigation significantly impacted the development of the law governing administrative records in informal rulemaking.⁴⁴ Moreover, the consultant has discussed the issues presented by this report with a number of agency officials in a less formal manner.

The results of the questionnaire are reflected throughout this study.⁴⁵ Respondents represented or worked at diverse agencies and their views on the development of “guidance” on

⁴³ Interview by author with Carol Ann Siciliano, Associate General Counsel, Cross-Cutting Issues Law Office; Caroline (Carrie) Wehling, Team Leader for Legal Counsel on the Safe Drinking Water Act; and Marilyn Kuray, Acting Assistant General Counsel, Office of the General Counsel, U.S. Environmental Protection Agency in Wash., D.C. (Nov. 7, 2012) (hereinafter Siciliano Interview);

Interview by author with Carrie Wehling, Team Leader for Legal Counsel on the Safe Drinking Water Act; and Marilyn Kuray, Acting Assistant General Counsel, Office of the General Counsel, U.S. Environmental Protection Agency in Wash., D.C. (Jan. 9, 2012) (hereinafter Wehling Interview);

Interview by author with Eric Schultz, Program Officer, COTR -- EPA Docket Center; Patrick Grimm, Branch Chief, Office of Environmental Information, Information Strategies Branch; Adam McWilliams, Acting Program Director, eRulemaking Program Management Office, Acting Branch Chief, Project Officer and Technical Lead, Office of Environmental Information, eRulemaking Branch; Kristin Tensuan, FDMS.gov Project Manager, COTR; Valerie Brecher-Kovacevic (by telephone), Deputy Director, Administration and Security/Legal Lead; and Carrie Wehling, SDWA team leader, Office of General Counsel, Water Law Office, U.S. Environmental Protection Agency (Jan. 9, 2013) (hereinafter Schultz Interview).

⁴⁴ Interview by author with John C. Cruden, President, Environmental Law Institute, in Washington, D.C., Jan. 9, 2013 (hereinafter Cruden Interview).

⁴⁵ The questionnaire was originally sent to all government members of ACUS whose agencies were believed to undertake rulemakings; several follow-up emails were also sent and numerous telephone discussions were held with Government Members and their staffs by the consultant and ACUS staff counsel. All of the questionnaire responses and guidance documents are on file. The questionnaire responses and acronym list is appended to this report. Additionally, the author has discussed this questionnaire with the staff of several additional agencies, such as the Equal Employment Opportunity Commission, the National Labor Relations Board, and the Postal Rate Commission, that had no experience

the development, compilation, and certification of an administrative record were similarly diverse. Agency perspectives on administrative recordkeeping have been articulated in a variety of formats, ranging from informal staff commentary on the author’s survey, not intended to bind the agency, to provision of more formal agency-wide guidance documents, intended to be bind agency components. The Department of Justice (DOJ) has appropriately noted that the questionnaire results and the guidance provided are voluntary, discretionary, and informal.⁴⁶ As a potentially informal compilation of staff responses, the responses do not necessarily reflect the formal position of any agency.⁴⁷ The results of this questionnaire are experiential, not statistical, and inclusion or exclusion in this study should be understood to reflect the information acquired from the process, not whether the process resulted in some statistically valid and reliable sample because that was not its purpose.

Agency practice in the development of administrative records for purposes of judicial review of regulations varies widely. That variance has often been based on individual agency needs, and multiple agency rulemakings may exacerbate some issues – such as when one agency publicly releases a document that another agency considers exempt from release and would not have done so. The survey questionnaire focused on agency rulemaking but allowed latitude for agencies to consider some “determinations.” Agency practices are illustrative and reflect what the agency believes to be best practices for it, and no single agency has developed guidance that reflects practice applicable to the entire span of federal agencies.

Several factors may influence whether an agency has developed guidance on the compilation of administrative records and certified administrative records, including:

- complexity of the issues and decision-making process;
- the volume or frequency of rulemaking;
- the organizational level at which administrative record compilation occurs;
- statutory requirements; and
- the scope of future effect of the final agency action.

Agencies may consider each of these factors in evaluating its risks against the application of limited resources.

with regulatory administrative records or administrative record issues, and determined with them that a response with no relevant information would not be necessary.

⁴⁶ DOJ*R. Several agencies have noted that they have developed legal memoranda or policies on administrative records over the years, and that these have been largely superseded as the agency developed electronic records and electronic discovery formats. CFTC*R; PTO*R.

⁴⁷ DOJ*R. DOJ points out that its responses, “are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.” Id. The author agrees with DOJ that the ultimate efficacy of judicial enforcement of these guidance documents is not necessary to the subject of this report, but also cautions that adoption of programmatic regulations or guidance under the standards for programmatic regulations poses a separate issue applicable to all documents discussed in this report. Further, the author agrees with DOJ that privileged documents were not requested for the purpose of this report and that the documents discussed in this report have been released for public consumption; DOJ did not provide internal documents.

D. Nomenclature

Finally, the questionnaire illustrated that agencies use different terminology, some considering the rulemaking “docket” to mean only the public notice and comment docket, while others suggest that their docket includes all documents (public or privileged) that relate to a rulemaking. Some agencies maintain distinct types of rulemaking files, such as a “legal” file separate from a “program” file. In some instances, one agency’s language might vary from another agency’s terminology, creating confusion. Additionally, as discussed below, agencies have injected into the discussion some additional distinctions by limiting their administrative records, and what they subsequently submit to a court as a certified administrative record, based on privilege or concepts such as “relevant” and “reliance.”⁴⁸

These differences in definition and treatment suggest that uniform terminology may be useful, and this study attempts to use consistently three distinct terms in the context of informal rulemaking:⁴⁹

- “Rulemaking Record” means the full record of material before the agency in an informal rulemaking.
- “Administrative Record” means the rulemaking record certified to a court as the record on review of the agency’s regulatory action. By judicial interpretation, the administrative “whole” record contains all the material “considered”—directly or indirectly—by the agency’s decisionmaker in reaching the final agency action.⁵⁰ The materials contained in the certified administrative record are typically a subset of the rulemaking record, although agency withholdings may be challenged and withheld materials are potentially subject to disclosure or judicial review through record completion or supplementation.⁵¹ On rare occasions, discovery may also be permitted.⁵² The administrative record will also include an affidavit, made by a certifying official, attesting to the contents and accuracy of the record being certified.⁵³ Administrative records should also include an index itemizing the contents of the record being certified.⁵⁴
- The “Public Rulemaking Docket” means the public rulemaking file managed by the agency, regardless of format, such as online at *Regulations.gov*, or an agency website, or physically in a docket room. The public rulemaking docket includes all information that the agency has made available for public viewing. It is a subset of both the rulemaking record and the administrative record in most cases because it may not include privileged or other materials protected from disclosure or information such as post-notice and comment response studies that the agency considers.

Consistent use of the terminology may assist in understanding the issues considered in this study, although the study must also accurately reflect agencies’ perceptions of their practices.

⁴⁸ See *infra* Section II.B.2-3.

⁴⁹ Statutes may modify these definitions of the administrative record and certified administrative record, and these statutory definitions control in specific instances. See *infra* Section II.C.

⁵⁰ See *infra* Section III.F.2.

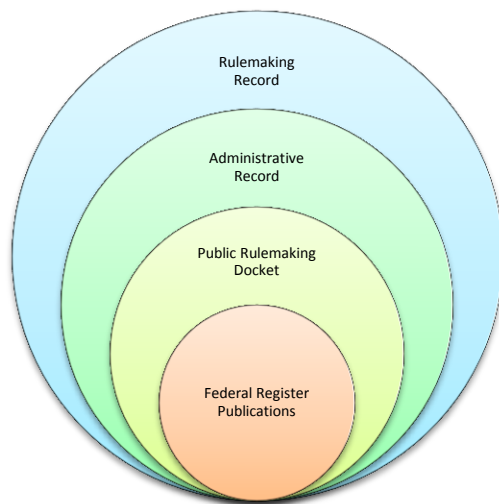
⁵¹ See *infra* Section IV.D.

⁵² See *infra* Section IV.E.

⁵³ See *infra* Section IV.A.

⁵⁴ *Id.*

The relationship between and the declining volume from a rulemaking record to an administrative record to the public documents published by the agency in the public rulemaking docket can be graphically presented:



II. Inputs to the “Whole Record”

The concept of a regulatory administrative record containing all material “directly or indirectly considered” by the agency poses an inclusiveness that makes an administrative record fulsome. An administrative record, whether defined by requirements of the APA or a superseding statute, routinely includes all the material on a public rulemaking docket. Moreover, statutory requirements superseding the judicial interpretations of, for example, what material a decisionmaker must consider implicate also the construction of an administrative record for judicial review of that decision. Some regulations impact the administrative record for judicial review as well. Less well known, however, are the materials that an agency may consider in a rulemaking and which may become a part of the administrative record, but that may not be publicly available.

The composition of a rulemaking or an administrative record, accordingly, rises to the level of a “scope” issue.⁵⁵ The administrative record is presumed to be completed by the agency, and exceptions are rare because “[w]ere courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President.”⁵⁶ Yet, there are exceptions worthy of exploration.⁵⁷

At the same time, a number of statutes, regulations, and Executive Orders have expanded the concept of what an agency “considers.” Statutes and Executive Orders generate the most obvious increases in the size of rulemaking administrative records. Regulations by the Council on

⁵⁵ *E.g.*, *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 56 (D.D.C. 2003) (definition of record and whether some 300 documents should be included or excluded).

⁵⁶ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984).

⁵⁷ *See infra* Section II.C.

Environmental Quality (CEQ) have contributed not only to the expansion of administrative records for purposes of Records of Decision under NEPA, but have also substantially guided both the development of broader rulemaking and administrative record policies and judicial interpretation.⁵⁸ Before turning to these issues, it is important to present an overview of the types of information that may be found in agencies' public rulemaking dockets, rulemaking records maintained internally, or that may be required to be included in an administrative record because of statutes or regulations.

At a most fundamental level, the court's review of a record or material "considered" by the agency raises an initial and daunting scope issue. Dictionary definitions provide only so much support. "Consider" has been defined as: "to think about carefully, as (a) to think of especially with regard to taking some action ... (b) to take into account,"⁵⁹ or "to think carefully about, especially in order to make a decision."⁶⁰ In application by an agency, what it "considers" through its hierarchy of officials, attorneys, analysts, economists, and program officers, may be quite substantial. The problem itself was considered within the Committee on Judicial Review, which ultimately formulated a definition of considered sufficient to warrant inclusion of materials in a rulemaking record:

"Considered" entails review by an individual with substantive responsibilities in connection with the rulemaking. Considered also entails some minimum degree of attention to the contents of a document. Thus, the rulemaking record need not encompass every document that rulemaking personnel encountered while rummaging through a file drawer, but it generally should include a document that was reviewed by an individual with substantive responsibilities in order to evaluate its possible significance for the proceeding, unless the review disclosed that the document was not germane to the subject matter of the proceeding. For example, a list of potentially helpful articles compiled by a librarian at the request of an agency official generally does not qualify for inclusion. A document should not be excluded from the rulemaking record on the basis that the reviewer disagreed with the factual or other analysis in the document, or because the agency did not or will not rely on it. Although the concept resists precise definition, considered should be interpreted so as to fulfill its purpose of generating a body of materials by which the rule can be evaluated and to which the agency and others may refer in the future.

The critical operational scope will vary to some degree among and between agencies because of composition of the agency staff and composition of the substance of the rulemaking. The course suggested throughout the rulemaking record compilation process, however, is an expansive understanding of what is "considered."

⁵⁸ See 40 C.F.R. § 1502. CEQ regulations are binding on all federal agencies, and CEQ's interpretation of NEPA is entitled to "substantial deference." *Sugarloaf Citizens Ass'n v. Fed. Energy Reg. Comm'n*, 959 F.2d 508, 512 n.3 (4th Cir. 1992).

⁵⁹ Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/consider> (last visited Mar. 22, 2013) (first definition).

⁶⁰ Dictionary.com, available at <http://dictionary.reference.com/browse/consider> (last visited Mar. 22, 2013).

A. Rulemaking's Public Docket

The public rulemaking docket is the obvious immediate source of vast swaths of the rulemaking and administrative record. The E-Government Act of 2002,⁶¹ to the extent practicable, requires that agencies make available on a publicly available Federal Government website all documents required to be made available to the public by the advance notice and comment procedures of the APA.⁶² As a result, when notice and comment rulemaking is undertaken, the public rulemaking docket (*i.e.*, *Regulations.gov*, or agency specific dockets) may begin with the publication of a proposed rule and nominally includes, according to the effects of statutes and judicial decisions, a wide range of supporting analyses.⁶³ In some cases, the public rulemaking docket may open with a related discretionary action, such as an Advance Notice of Proposed Rulemaking (ANPRM) or publication of a Petition for Rulemaking.

1. Notice and an Opportunity to Comment

Agencies are required by the APA to provide, for the most part, advance notice and an opportunity for the public to comment on a proposed rule before adopting a final rule,⁶⁴ including “either the terms or substance of the proposed rule or description of the subjects and issues involved.”⁶⁵ Following notice, “the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.”⁶⁶ This requires that the rule be made public, together with the substantial supporting documentation that the agency considered.

At the first formal stage of rulemaking, the proposed rule, an electronic public docket system is generally required by both statute and Executive Order.⁶⁷ As noted above, the critical

⁶¹ E-Government Act, Pub. L. No. 107-347, § 207(d)(1), 116 Stat. 2899, 2916 (2002) [hereinafter E-Gov't Act]. *See* Cal. Cmty. Against Toxics v. EPA, 688 F.3d 989, 993 (9th Cir. 2012) (“EPA's failure to include all documents in the electronic docket was not an error. The E-Government Act requires online disclosure only ‘to the extent practicable, as determined by the agency in consultation with the Director’ of [OMB] . . . We defer to the EPA on what is practicable to post on its online docket.”). “Practical” is changing rapidly, which is one reason animating this study and analysis.

⁶² 5 U.S.C. § 553(c).

⁶³ ACUS has recommended inclusive release of documents on a public rulemaking docket: “To facilitate the comment process, agencies should include in a publicly available electronic docket of a rulemaking proposal all studies and reports on which the proposal for rulemaking draws, as soon as practicable, except to the extent that they would be protected from disclosure in response to an appropriate Freedom of Information Act request.” Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking* (Adopted June 16, 2011), 76 Fed. Reg. 48,789 (Aug. 9, 2011) (Recommendation 4); *see, generally*, Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments* (Adopted June 16, 2011), 76 Fed. Reg. at 48,791.

⁶⁴ 5 U.S.C. § 553(b), (c).

⁶⁵ *Id.* at § 553(b).

⁶⁶ *Id.* § 553(c).

⁶⁷ E-Gov't Act, Exec. Order No. 13,563, *Improving Regulation and Regulatory Review*, § 2(b), 76 Fed. Reg. 3821-822 (Jan. 21, 2011) (“To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on *regulations.gov*, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.”).

documents that formed the basis for the agency's preliminary judgment in a proposed rule must be subjected to public comment and this requirement means that a wide range of material, discussed below, is placed on a public rulemaking docket.⁶⁸ Public posting of decision-related materials results, naturally, in two critical issues being resolved: (1) privileges are waived, and (2) inclusiveness within the administrative record is decided.

Public comments are frequently received in electronic form, through *Regulations.gov* or through agency-specific electronic docket systems.⁶⁹ Agencies continue, however, to maintain mail, e-mail, facsimile, delivery, and other systems for the public to comment.⁷⁰ Many agencies scan and post these documents to their electronic docket format to the extent practicable.⁷¹ Agencies may provide exemplification of a larger set of public comments in an administrative record, rather than every copy of a boilerplate or "post card" comment filed with *Regulations.gov* or the agency. Even if the agency should retain each comment as an official record, exemplification online, along with a statement of numerosity, may be sufficient.⁷² Though social media engagement in rulemaking is beyond the scope of this study, it is worth noting that expanding the definition of public input to include feedback provided over social media results in a concomitant expansion of the administrative record if the agency considers the social media inputs.⁷³

When an agency undertakes a rulemaking that does not involve a public comment process – either exempt or excepted for good cause under 5 U.S.C. § 553 or an overriding statute – the same general rules of administrative recordkeeping apply to that rulemaking, but there are no

⁶⁸ A few agencies have established regulations that explicitly provide for posting of all documents on the electronic public docket. *E.g.*, 14 C.F.R. § 11.25(a) (2007) (Federal Aviation Administration general rulemaking procedures).

⁶⁹ It is possible that unless multiple regulations and dockets are contemporaneously coordinated, commenters may need to review multiple sources to provide effective response comments. *See* Portland Cement Ass'n v. EPA, 665 F.3d 177 (D.C. Cir. 2011) (coordination of two different regulations affecting the same industrial process; required coordination of regulations).

⁷⁰ The Federal Communications Commission (FCC), Securities and Exchange Commission (SEC), and other agencies maintain separate electronic docket systems to fulfill their own needs, although in many cases. For example, the FCC, while permitting both comments and reply comments, 47 C.F.R. §§ 1.415, 1.419, provides several portals: (1) The FCC's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Federal Communications Commission, Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998). On the other hand, MSPB noted, for example, that its limited regulatory requirements for public comments make the use of *Regulations.gov* cost prohibitive. MSPR*R.

⁷¹ An issue may exist of whether agencies are required to make the public's comments on a rulemaking available to the public during the public comment period. The Administrative Conference of the United States has previously recommended that agencies manage their rulemaking files to achieve maximum disclosure to the public and advised agencies to include, insofar as feasible, all written comments submitted to the agency in the rulemaking file. *See* Administrative Conference of the United States, Recommendation 93-4: Improving the Environment for Agency Rulemaking (adopted Dec. 9, 1993), 59 Fed. Reg. 4,670 (Feb. 1, 1994); correction 59 Fed. Reg. 8,507 (Feb. 22, 1994) (Recommendation V.E).

⁷² *See* S. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23 (2009).

⁷³ ACUS is currently considering issues relating to social media in regulations. *See* Administrative Conference of the United States, *Social Media in Rulemaking*, <http://www.acus.gov/research-projects/social-media-rulemaking> (last visited Mar. 10, 2012).

public comments. Some downstream requirements depending on the public comment process also change. These alternatives may limit the substance of the record, but do not change the rules applicable to record development, compilation, certification, and judicial review.

Discretionary agency actions may provide additional notice of potential agency decision-making, provide an opportunity for public input, and create additional administrative record documents. “Advance notice of proposed rulemaking” is an example of an agency process that may add appreciably to a rulemaking administrative record. An advance notice of proposed rulemaking (ANPRM) is an informal tool, frequently undertaken discretionarily, that may provide the public with less than formal “notice” of a potential agency action.⁷⁴ This process of public consultation can create a wealth of information that the agency “considers” if it proceeds with the rulemaking process, and, therefore, would form a part of the “whole” record.

Similarly, even though informal rulemaking does not involve formal public hearings, agencies often hold public meetings during a public comment period, resulting in hearing transcripts or public meeting summaries that executive agencies, at the least, are instructed to include in their public rulemaking docket.⁷⁵ Some highly formalized public meetings, such as meetings of Federal Advisory Committees, already require public disclosure and, to the extent they form the premise of a rulemaking, should be included within the administrative record. Given the purpose of a Federal Advisory Committee Act committee, it would appear awkward at least for these materials not to be included – in some form – in the initial public consideration of a proposed rule. This does not necessarily mean that they ought to be replicated on the public rulemaking docket, *i.e.*, on *Regulations.gov*, if they already are in the public domain in permanent form at a site referenced by the proposed rule preamble.⁷⁶ Electronic voting records of multi-member commissions and boards may form another unique element of a public rulemaking docket.⁷⁷

2. Significant Analyses Required by Law or Executive Order

A number of statutes and executive orders impose specific duties on agencies that impact the compilation and presentation of rulemaking administrative records and distinguish those records from adjudicatory records. An exhaustive list of these requirements and their impacts is beyond the scope of this study, but it is worth noting that these requirements can impact administrative record compilation.⁷⁸ This is because, “[u]nder APA notice and comment requirements, [a]mong the information that must be revealed for public evaluation are the ‘technical studies

⁷⁴ Material considered in the formulation of an ANPRM *may* form the beginning of a rulemaking record. If an ANPRM is followed by a proposed and final rule on the same subject, it would seem logical that the material considered in formulating the ANPRM would constitute part of the rulemaking record. In some cases, the government has argued that an ANPRM is a sufficient signal that the government intends to promulgate a rule.

⁷⁵ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁷⁶ See Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act – Issues and Proposed Reforms* (adopted December 9, 2011), 77 Fed. Reg. 2,257, 2,261 (Jan. 17, 2012) (Recommendation 9).

⁷⁷ See *Chamber of Commerce v. NLRB*, 879 F.Supp. 2d 18 (D.D.C. 2012) (violation of quorum requirement), on motion to alter or amend judgment, 2012 U.S. Dist. LEXIS 104539; 162 Lab. Cas. (CCH) P10,512 (D.D.C. July 27, 2012) (consideration of post decision affidavit explaining the NLRB’s electronic voting system), appeal pending, U.S. Court of Appeals, D.C. Circuit No. 12-5250.

⁷⁸ Curtis W. Copeland, *Regulatory Analysis Requirements: A Review and Recommendations for Reform* (Apr. 23, 2011) (report to the Administrative Conference of the United States).

and data' upon which the agency relies..." in rulemaking.⁷⁹ "More particularly, '[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it.'"⁸⁰

Particularly significant regulatory analysis requirements include:

- Executive Order 12,866, which requires executive agencies to conduct an impact analysis of a significant rule.⁸¹
- The Paperwork Reduction Act, which requires that an agency seek approval on nearly all collections of information from the public and retention of information by the public.⁸²
- The Regulatory Flexibility Act (RFA), which requires agencies to conduct and publish analyses on the impact of a regulations on small businesses, governments, tribes, and other entities.⁸³
- The Privacy Act, which requires substantial subsidiary analysis relating to the use of personal information collected by the U.S. government.⁸⁴
- The National Environmental Policy Act (NEPA)⁸⁵ and related Council on Environmental Quality regulations, which require environmental analysis of certain types of agency decisions.⁸⁶

Materials generated as a result of these analytical requirements may comprise an important component of an administrative record or a certified administrative record.⁸⁷

B. Variance Between Public Rulemaking Dockets, Rulemaking Records, and Administrative Records.

The rulemaking record, administrative record and the public rulemaking docket (particularly *Regulations.gov*) differ in substantive ways.

A number of resources routinely factor into a final agency rulemaking decision and the record of that decision that are not found on the public rulemaking docket. Numerous types of

⁷⁹ *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (quoting *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006)) (alterations in original).

⁸⁰ *Id.* (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984) (alteration and emphasis in original).

⁸¹ *Cf.*, *R.J. Reynolds Tobacco Co. v. FDA*, 2012 U.S. App. LEXIS 17925 (D.C. Cir. Aug. 24, 2012) (evaluating RIA for substantial evidence).

⁸² 44 U.S.C. §§ 3501 – 3521.

⁸³ 5 U.S.C. §§ 603, 604, 611 (Certification of No Significant Impact on a Substantial Number of Small Entities analysis or Initial Regulatory Flexibility Analyses required).

⁸⁴ 5 U.S.C. § 552a(e)(4), (11), (f).

⁸⁵ 42 U.S.C. § 4321ff.

⁸⁶ *E.g.*, 40 C.F.R. § 1502 (Environmental Impact Statements). CEQ regulations are binding on all federal agencies, and CEQ's interpretation of NEPA is entitled to "substantial deference." *Sugarloaf Citizens Ass'n v. Fed. Energy Reg. Comm'n*, 959 F.2d 508, 512 n.3 (4th Cir. 1992).

⁸⁷ The Department of Transportation (DOT) points out that recent litigation has focused on these supporting analyses. DOT*R.

substantive material may not appear on the public rulemaking docket, including copyrighted materials, confidential business information (CBI), large datasets, public submissions deemed to be a duplicate of a document generated through a mass mail campaign, original signature documents, physical objects, and some documents that are incorporated by reference.⁸⁸ Nearly every agency responding to the ACUS questionnaire cited privileged and protected documents that are not generally available to the public, though their disposition of that material within or without a rulemaking record or administrative record for judicial review differed.⁸⁹

As the District of Columbia Circuit pointed out long ago, not *all* data – but at least the most critical data – must be placed on the public docket for scrutiny at the proposed rule stage.⁹⁰ An administrative record may naturally include more than what is publicly evident:

[T]he administrative record might well include crucial material that was neither shown to nor known by the private parties in the proceeding – as indeed appears to have been the situation in *Camp v. Pitts* itself. It is true that, in informal rulemaking, at least the most critical factual material that is used to support the agency’s position on review must have been made public in the proceeding and exposed to refutation. That requirement, however, does not extend to all data.⁹¹

For a court “to review *less* than the full administrative record might allow a party to withhold evidence unfavorable to its case,” and but “to review *more* than the information before the [agency] at the time [of its] decision risks our requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations.”⁹²

An agency “may act on the basis for data contained in its own files or on its own views and opinions.”⁹³ An agency administrative record, particularly in rulemaking, consists of the information “considered” and, therefore, may not include all material that someone else might consider in reaching a decision; the courts will defer to an agency’s judgment as to what it considered despite gaps and imperfections in the record.⁹⁴

Judicial deference does not, however, permit an agency to include only that which supports its decision – contrary evidence considered must also be included.⁹⁵ Nor should an agency assume that a court will sanction exclusion of information on the grounds that it did not “rely” on

⁸⁸ EPA*R. See Section III.E.

⁸⁹ See Section III.B.3.

⁹⁰ Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors, 745 F.2d 677 (D.C. Cir. 1984).

⁹¹ *Id.* at 684-85. The court has clarified that rulemaking records are governed by other, more stringent requirements, including the requirement for notice and comment. Chamber of Commerce v. SEC, 443 F.3d 890 (D.C. Cir. 2006).

⁹² Walter O. Boswell Mem’l Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984) (emphasis added).

⁹³ Chrysler Corp. v. Dep’t of Transp., 472 F.2d 659, 669 (6th Cir. 1972).

⁹⁴ See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1448 (9th Cir. 1996) (deferring to agency judgment despite “gaps and imperfections” in the administrative record).

⁹⁵ Env’tl. Def. Fund v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978) (agency may not bias the record by excluding pertinent but unfavorable information).

the excluded information in its final decision.⁹⁶ An agency *may* exclude arguably relevant information that it did not possess, but that was or is available from others.⁹⁷

***Regulations.gov* and the Federal Docket Management System**

The public rulemaking docket management structure for *Regulations.gov*, the Federal Docket Management System (FDMS), provides agencies with the “back office” non-public mechanism for managing documents that may or may not constitute part of the rulemaking and administrative record. FDMS is a government-wide document management system operated by the EPA on a service provided basis.⁹⁸ This back office process also structures, for example, *Regulations.gov*’s ability to support varied native file formats used by the public to submit comments.⁹⁹ Thus, FDMS should be understood as a management tool, not substantive material that is part of the regulatory process. Substantive material made available to the public on *Regulations.gov* is managed through FDMS.

FDMS is structured by dockets (*i.e.*, file folders) and functionally operated through “roles” assigned to specific personnel to permit them to manage or view the dockets and documents “owned” by their respective agencies. Only the program management office (PMO) has full access to all documents and structures within the FDMS. FDMS can support additional non-public administrative document management and a number of agencies have opened a separate records module that permits recordkeeping beyond the public rulemaking docket, as well as record archiving.

A primary distinction between documents available in *Regulations.gov* and FDMS is often not more than temporal in nature – documents reside only in FDMS prior to their release onto *Regulations.gov* public rulemaking dockets, or if the underlying proposed rule, for example, is never released or is withdrawn.¹⁰⁰ FDMS also contains managerial controls and document

⁹⁶ *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 139 (D.D.C. 2002); *Amfac Resorts, LLC v. U.S. Dep’t of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001).

⁹⁷ *Blum*, 458 F. Supp. at 661 n. 4.

⁹⁸ The Economy Act, 31 U.S.C. § 1535.

⁹⁹ *Regulations.gov* supports bitmap image file (.bmp), Microsoft word (.doc, .docx), Microsoft Excel (.xls, .xlsx), Adobe Portable Document Format (.pdf), Graphics Interchange Format (.gif), HyperText Markup Language (.htm and html), Joint Photographic Experts Group lossy compressions (.jpg, .jpeg), Portable Network Graphics raster graphics (.png), Microsoft PowerPoint (.ppt, .pptx), Rich Text Format (.rtf), Simplified General Markup Language (.sgml), Tagged Information File Format (.tiff), text files (.txt), Wordperfect (.wpd), and Expanded Markup Language (.xml). Email to author from Eric Schultz, Program Officer, EPA Docket Center, U.S. Environmental Protection Agency (Jan. 22, 2013) (copy on file with author). *But see* Section IV.B (CM/ECF supports only portable document format (.pdf)).

¹⁰⁰ Schultz Interview, *supra* note 43. FDMS and *Regulations.gov* may not always be available, as is true of any computer system. *See* Department of Homeland Security, Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities; Extension of Comment Period, 78 Fed. Reg. 8,987 (Feb. 7, 2013) (extension of comment period due to projected outages for maintenance at *Regulations.gov* and FDMS). A variant on the availability issue is the actual *timing* issue: not all computer clocks are set to the same time. The Department of Labor’s Employment and Training Division (ETA) reported that it once needed to resolve whether an electronically submitted comment was timely and should be included. “FDMS records showed that the commenter tried to access *regulations.gov* to submit a comment after midnight on the closing date. However, the commenter provided a screenshot from his computer that showed attempted access before midnight. Apparently, the clock on the submitter’s

metadata (such as a filing sequence number or sub-URL address) that are not apparent on *Regulations.gov*. FDMS permits the agency to review materials submitted through *Regulations.gov* before that material becomes publicly available on *Regulations.gov* to ensure, for example, filing to the proper docket, or avoidance of republication of clearly copyrighted material or obscene images.¹⁰¹ FDMS also provides “deduplication” of mass mailings into an exemplified copy and receipt count.

Additional documentation accumulated during the rulemaking process may include, as one agency has noted:

- relevant agency administrative orders, policies, guidelines, directives and manuals (or portions of such documents);
- any FOIA request, with the agency’s response, concerning topics integral to the rulemaking;
- communication the agency received from other agencies and Congress and any responses to those communications;
- any memorializations of telephone conversations and meetings with members of the public concerning the rule, including any materials received from the public and any memoranda written by staff concerning the meeting with the public.¹⁰²

Moreover, agencies are likely to consider separately published guidance that reflected the agency’s position prior to the decision to undertake a rulemaking and prior precedent and non-precedent adjudications of facts contemplated within the scope of a regulation (whether or not the reason for a regulation). No full explication of the types of material that may be considered by an agency and therefore found in a rulemaking record and an administrative record for judicial review is possible if for no other reason that any information may be considered and find its way into a rulemaking record and an administrative record.

The distinction between the public rulemaking docket (for comment purposes) and the material “considered directly or indirectly” for a rulemaking or an administrative record in reaching a final decision can be significant. As an agency accumulates information during the regulatory process, a record may grow to include both studies (scientific, technical, empirical, and otherwise) conducted by the government and private research and inputs cited in the public comments. At times, the close of the public comment period may be said to begin a new round of data accumulation into the administrative record as the agency considers its final decision. Agency research and analysis in response to public comments is a natural example of information in an administrative record and certified administrative record that may not appear in the public rulemaking docket.¹⁰³

computer was a few minutes behind the regulations.gov clock. We had to decide whether to accept the comment.” ETA*R. This is a justified concern and perhaps the better part of discretion and the simplest solution is to resolve such issue in favor of the commenter.

¹⁰¹ *Id.*

¹⁰² U.S. Patent and Trademark Office, USPTO Policy on Gathering the Administrative Record for Potentially Contested Agency Rulemakings 2 – 3 (undated draft) (copy on file) [hereinafter PTO Policy].

¹⁰³ *Compare* Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (wholly new studies), *with* Community Nutrition Institute v. Block, 749 F. 2d

The post-public comment process of finalizing a rule and the interagency and executive review process additionally may influence agency decision-making.¹⁰⁴

C. Legal Modifications to the Administrative Record

Congress has modified administrative record requirements on a number of occasions, either directly or through modification of those factors to be considered by the decisionmaker, and either affirmatively requiring consideration or barring consideration. At times, Congress specifies that agencies have discretion to define relevancy for the purpose of recordkeeping. Additionally, a few agencies have sought to directly define the administrative record through regulations. Many of these modifications impact the scope of the administrative record for judicial review purposes, but some do not.

1. Direct Modification

Congress has modified requirements for the administrative record and consequently the administrative record for judicial review in specific situations. Congress is presumed to understand the state of the law at the time it makes these modifications.¹⁰⁵

The Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, for example, modifies the whole record rule in the context of hybrid rulemaking (1) with several specifically enumerated common elements and (2) specifically introducing into the Federal Trade Commission’s (FTC) judgment and record “any other information which the Commission considers relevant to such rule.”¹⁰⁶ Similar enumeration and an expansive “relevancy” standard is utilized in the Consumer Product Safety Act.¹⁰⁷ The enumeration of specific elements may be

50 (D.C. Cir. 1984) (studies affecting only partially the issues presented). If material considered after the close of the comment period reaches the threshold of “critical factual material that is used to support the agency’s position on review” then it should be exposed to public refutation. *Ass’n of Data Processing Serv. Orgs v. Bd. of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984).

¹⁰⁴ See Section III.B.3.

¹⁰⁵ See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184 – 85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts”).

¹⁰⁶ 15 U.S.C. § 57a(e)(1)(B). In full, the paragraph provides “For purposes of this section, the term ‘rulemaking record’ means the rule, its statement of basis and purpose, the transcript required by subsection (c)(5), any written submissions, and any other information which the Commission considers relevant to such rule.” The Magnuson—Moss Act, as the District of Columbia Circuit described it, established a highly complex “blended” process that has rarely been used and includes indirect modification of the administrative record, requiring the FTC to consider the economic effect of any a rule and the effect on small business and consumers. *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979) (MacKinnon, J., dissenting in part and concurring in part). FTC*R.

¹⁰⁷ 15 U.S.C. § 2060(a) (“any other information which the Commission considers relevant to such rule”), in consumer product safety standards under other detailed procedures and findings of 15 U.S.C. §§ 2056, 2057, or 2058. The addition of “any other information which the [agency] considers relevant” in this statute, and a few others, appears to broaden the scope of the record that the agency may define. See also *Aqua Slide ‘N’ Dive Corp. v Consumer Prod. Safety Comm.*, 569 F.2d 831 (5th Cir. 1978) (agency not required to conduct elaborate cost-benefit analysis in promulgating safety standard, but must examine relevant factors and produce substantial evidence that standard actually promised to reduce risks, including comparative risks); *D. D. Bean & Sons Co. v Consumer Prod. Safety Comm.*, 574 F.2d 643 (1st Cir. 1978) (reasonably necessary within meaning of 15 U.S.C. § 2058(c)(2) only after existence of hazard and likelihood of its reduction at reasonable cost have been established by Commission).

argued to exclude all others under traditional canons of construction.¹⁰⁸ While the codification may not make a substantial difference in most cases, it may affect how the courts consider the agencies' decisions by granting the FTC and the Consumer Product Safety Commission (CPSC) more leeway in constructing the administrative record to be reviewed by the court.

The same is true of codifying factual situations. The Clean Air Act requires, for example, that a notice of proposed rulemaking state “the docket number, the location or locations of the docket, and the times it will be open to public inspection,” the later two elements becoming less relevant and verging on obsolescence with the development of the electronic docket.¹⁰⁹ Of particular concern is a specification that a “record for judicial review shall consist *exclusively* of” a distinct series of documents.¹¹⁰ Such a regime might freeze the administrative record for judicial review into a rigid and inflexible mold.

Similarly, the Toxic Substances Control Act defines a “rulemaking record” to mean the rule being reviewed, specific findings and statements depending on the nature of the specific rule, any required transcript of oral presentations, any written submission of “interested parties” respecting the promulgation of such rule; and any other information which the Administrator considers to be “relevant to such rule and which the Administrator identified, on or before the date of the promulgation of such rule, in a notice published in the Federal Register.”¹¹¹ This detailed specification risks the application of the pre-existing term “interested parties” to narrow the scope of the record by excluding general public comments of those who are not adversely or directly affected by the rule. Similarly, the section specifies a more specific form of “notice” of core documents than typically envisioned under the APA at a specific post-comment, pre-promulgation publication.¹¹²

A number of agencies are not affected by such specific statutes and cited the need only follow the requirements of the APA as interpreted by the courts. Some agencies noted that the development of the administrative record was informed by the APA notice and comment requirements,¹¹³ and others noted that not only the APA, but also FOIA,¹¹⁴ and the Federal Advisory Committee Act, Privacy Act, Paperwork Reduction Act, Unfunded Mandates Act, and the Regulatory Flexibility Act inform what is contained in the administrative record.¹¹⁵

¹⁰⁸ *E.g.*, *United States v. Giordano*, 416 U.S. 505, 514 (1974).

¹⁰⁹ 42 U.S.C. § 7607(d)(3).

¹¹⁰ *Id.* at § 7607(d)(6)(A) (emphasis added).

¹¹¹ 15 U.S.C. § 2618(3)(A) – (E) (TSCA). EPA*R; EPA, *Action Development Process: Administrative Records Guidance* (Sept. 2011) [hereinafter EPAADP]. *See, infra*, section III.B.2 agency use of “relevant” as a criteria, which correlates with the broader TSCA provision, but may not correlate as well with other statutes or the APA.

¹¹² *Compare* 5 U.S.C. § 553(b), *and* *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449-50 (3d Cir. 2011), *with* 15 U.S.C. § 2618(2)(E).

¹¹³ *E.g.*, STB*R; OSHA*R.

¹¹⁴ *E.g.*, CFTC*R.

¹¹⁵ *E.g.*, EBSA*R; WHD*R; TREAS*R.

2. Indirect Modification: Consideration and Decision Requirements

Numerous statutes impose obligations on decisionmakers to consider certain matters and/or bar consideration of other matters.¹¹⁶ Such obligations take various formats, including:

- **Affirmative showing of consideration.** Consideration of a subject may be coupled with an affirmative obligation on that subject. The National Highway Traffic Safety Administration, for example, is required by statute to “ensure” in regulations on the use of electronic monitoring devices in commercial vehicles that the devices are not used to harass vehicle operators.¹¹⁷ This type of requirement requires at least an administrative record documentation of evidence, and preambular discussion would appear necessary to explain how the requirements of a regulation would accomplish that assurance.¹¹⁸
- **Affirmative showing of consideration and non-prohibited action.** More complex analyses may require both affirmative and negative showings by an agency. The Securities Exchange Act¹¹⁹ and Investment Company Act of 1940¹²⁰ require the Securities and Exchange Commission to consider a rule’s effect upon economic efficiency, competition, and capital formation.¹²¹ The SEC, when promulgating regulations under the Exchange Act, must consider the impact a new rule would have on competition and must not adopt any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.¹²²
- **Affirmative showing of anti-backsliding.** Cumulative floors or “anti-backsliding” provisions of a statute – such as in the Federal Mine Safety Act – may constrain an agency decision and create a premise that must be addressed in a preamble and evidenced

¹¹⁶ Citizens to Preserve Overton Park itself involved a structured decision by the Secretary of Transportation: “Both the Department of Transportation Act and the Federal-Aid Highway Act provide that the Secretary ‘shall not approve any program or project’ that requires the use of any public parkland ‘unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park’ 23 U. S. C. § 138 (1964 ed., Supp. V); 49 U. S. C. § 1653 (f) (1964 ed., Supp. V).” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971).

¹¹⁷ 49 U.S.C. § 31137(a).

¹¹⁸ *Owner-Operator Indep. Drivers Ass’n. v. FMCSA*, 656 F.3d 580 (7th Cir. 2011) (failure to consider potential for driver harassment when promulgating rule about use of electronic monitoring devices in commercial trucks was arbitrary and capricious).

¹¹⁹ 15 U.S.C. § 78c(f). The SEC is required to perform a two-step analysis, (1) whenever it “is required to consider or determine whether an action is necessary or appropriate in the public interest,” (2) “the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” *Id.*

¹²⁰ 15 U.S.C. § 80a-2(c).

¹²¹ *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (finding rule arbitrary on its face for failure to respond to issue raised by comments and mandatory issues; citing analysis in preamble to rule only with no apparent reference to the administrative record to support evidence of consideration). The SEC also has a “statutory obligation to determine as best it can the economic implications of the rule.” *See also Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 167–68 (D.C. Cir. 2010) (rejecting asserted reasoning of SEC’s analysis).

¹²² 15 U.S.C. 78w(a).

in an administrative record.¹²³ The Mine Safety Act’s prohibition of “reduction” of safety standards results in any new regulation necessarily increasing safety standards. An anti-backsliding statute may also create the potential for cumulative administrative records where the initial administrative record is needed to understand the base upon which the second rule builds.¹²⁴

- **Affirmative showing of new consideration.** Other statutes may impose exclusive subject matter requirements that have cumulative, potentially progressive effect, such as “best scientific and commercial data available.”¹²⁵

Each of these different types of statutes may incrementally expand the scope of documents noticed for public comment with a proposed rule (and thus the rulemaking record and any administrative record for judicial review). The contrary may also be true:

- **Prohibition of consideration.** Still other statutes prohibit an agency from considering a particular subject in promulgating a rule, constricting the administrative record. The Supreme Court has held, for example, that the text of § 109 of the Clean Air Act, “interpreted in its statutory and historical context ... unambiguously bars cost considerations” in setting air quality standards under that provision when cost consideration is permitted by other sections of the statute.¹²⁶ The Administrator of EPA, accordingly, may not consider the costs, even if developed for other purposes, in reaching a decision. The bar from consideration might logically lead to a bar from the administrative record, but this leads to a legal fiction that what the staff might be required to do is not “indirect” consideration. This prohibition would not bar the documentation from the rulemaking record.

Each of these changes alters the default requirement from judicial precedent that the agency consider the “relevant factors.” When Congress does not mention cost considerations, for

¹²³ *E.g.*, 30 U.S.C. § 811(a) (9) (Mine Safety Act: “No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard.”).

¹²⁴ An example might be the judicial review of the EPA approval of a State implementation plan regulation under EPA-promulgated NAAQS regulations. 42 U.S.C. § 7502(e) (National Ambient Air Quality Standards (NAAQS) anti-backsliding provision); *South Coast Air Quality Management Dist. v. EPA*, 472 F. 3d 882 (D.C. Cir. 2006). *Cf.*, *Natural Resources Defense Council v. Jackson*, 650 F. 3d 662 (7th Cir. 2011). Memorandum from Lois J. Schiffer, General Counsel, National Oceanic and Atmospheric Administration, to Administrators and Directors, National Oceanic and Atmospheric Administration, at 6-7 (December 21, 2012), available at http://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf (last visited Feb. 5, 2013) [hereinafter NOAAG](recognizing possibility).

¹²⁵ A rule-like example of specific limitation has been the source of extensive litigation. The Endangered Species Act dictates that a decision to list a species must be based

solely on the basis of the best scientific and commercial data available to [the Secretary] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by a State or foreign nation ... to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction

16 U.S.C. § 1533(b)(1)(A).

¹²⁶ *Whitman v. Am. Trucking Ass’ns., Inc.*, 531 U.S. 457, 471 (2001) (prohibition by negative inference: other provisions in the Clean Air Act expressly authorized consideration of costs, whereas § 109 did not; § 109 barred consideration of costs).

example, the Court has found that the lack of mention did not bar consideration of costs.¹²⁷ Thus, the Court, when faced with language that set a standard subject to interpretation, deferred to the agency's interpretation to permit it to reasonably consider factors that were neither required nor precluded by the ambiguity.¹²⁸ Where a statute precludes consideration of a factor, inclusion of documentation regarding that factor within the administrative record may pose a problem for the agency if a court thinks this signifies the agency's consideration in decision-making. Thus, the inclusion may raise questions of whether the agency violated the underlying statute or acted in excess of authority under the APA.

3. Regulatory Modification

Agency regulations may adopt requirements for a rulemaking record, and this is consistent with the agency's authority to create a process supplementing the statutory process for regulations, that may constrict issues presented on appeal and define a final agency decision.¹²⁹ The most significant regulatory requirement – particularly in terms of impact – may be the government-wide and mandatory CEQ regulations on agency decision-making under NEPA because these regulations are specifically delegated by Congress and any major federal action, including regulatory activity with significant environmental implications must follow the CEQ process, as a supplement to the APA process, before reaching the final regulatory decision.¹³⁰ NEPA and CEQ government-wide regulations serve the dual purpose of informing agency decisionmakers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to members of the public so they “may also play a role in both the decisionmaking process and the implementation of that decision.”¹³¹ NEPA does not mandate particular results, but prescribes a necessary process; if the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.¹³² NEPA merely guards against “uninformed – rather than unwise – agency action.”¹³³ NEPA, however, has imposed an even greater role on the administrative record process because it

¹²⁷ EPA has suggested that they prepare cost estimates pursuant to Executive Order 12,866 only for OMB and public consumption but the analysis is not considered in making a final decision. Wehling Interview, *supra* note 43.

¹²⁸ *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 510–12 (1981) (Court relied in part on a statute's failure to mention cost-benefit analysis in holding that the relevant agency was not required to engage in cost-benefit analysis in setting certain health and safety standards).

¹²⁹ *See Darby v. Cisneros*, 509 U.S. 137 (1993); *Sims v. Apfel*, 530 U.S. 103 (2000).

¹³⁰ 40 C.F.R. part 1500.

¹³¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹³² *Id.* at 351. *See also* *Comm. to Pres. Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1554 (10th Cir. 1993) (“NEPA is essentially procedural in that it does not require major federal actions to have no significant environmental impact, it only requires that the environmental impacts be considered in the decision process.”).

¹³³ *Robertson*, 490 U.S. at 351. “NEPA prescribes the necessary process by which federal agencies must take a ‘hard look’ at the environmental consequences of the proposed courses of action. It imposes no substantive limits on agency conduct. Rather, once environmental concerns are adequately identified and evaluated by the agency, NEPA places no further constraint on agency actions.” *Silverton Snowmobile Club v. USFS*, 433 F.3d 772, 780 (10th Cir. 2006) (internal quotations and citations omitted).

requires fundamentally more rigorous “consideration” in reaching a record of decision and in the administrative record supporting that decision.¹³⁴

If a rulemaking necessitates a NEPA analysis and record of decision, the NEPA record categorically becomes part of the rulemaking administrative record. CEQ regulations specifically require agencies to adopt procedures specifying that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings, the relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions, and the alternatives considered by the decisionmaker must be encompassed by the range of alternatives discussed in the relevant environmental documents.¹³⁵ NEPA requirements and case law, accordingly, may naturally affect consideration of rulemaking records to which they apply.

Agency regulations dealing with the administrative record before the agency appear most often to be rules of practice and procedure. Food and Drug Administration (FDA) rules, for example, establish the contents of the rulemaking record for any promulgation of regulations,¹³⁶ and the rulemaking record is intended to be the sole basis for the FDA's decision.¹³⁷ If the definition in the regulation is the product of legislative rulemaking under a delegation from Congress, it may constrict judicial review if it can supplant the more general requirements of the APA. On the other hand, if the regulatory definition is not under delegated authority and does not supplant the requirements of the APA, a regulation could theoretically create a difference between the agency rulemaking record and the administrative record for judicial review. Such regulations must be viewed with some caution because the APA is a general statute, not a specific programmatic statute delegating authority to the agency to make legislative rules, and procedural rules constrain the agency, not a court. If, however, the programmatic statute provides a basis for rules limiting rulemaking records and administrative records, then these rules could fall into the category of legislative rules.

¹³⁴ As discussed *infra*, note 150 and accompanying text, this fundamental difference appears to be the cause of much of the administrative record precedent and litigation to be focused in environmental cases.

¹³⁵ 40 C.F.R. § 1505.1(c) – (e).

¹³⁶ 21 C.F.R. § 10.40(g). *See, e.g.*, NVE Inc. v. HHS, 436 F.3d 182, 195 (3d Cir. 2006); United States v. Nova Scotia Food Products Corp., 568 F. 2d 240 (2nd Cir. 1977). *See also* 21 C.F.R. § 10.3(a) (enforcement actions; definitions, “Administrative record means the documents in the administrative file of a particular administrative action on which the Commissioner relies to support the action.”). At least one district judge has criticized this definition. *See* Ivy Sports Medicine LLC v. Sebelius, D.C. No. 11-cv-1006 (RLW), Dk. No. 52 (Oct. 24, 2012) (designated not for publication).

¹³⁷ 21 C.F.R. § 10.45(f). This particular rule requires that a party file a new petition with the FDA if seeking court consideration of material not filed in a certified administrative record.

III. Agency Practices

The survey of agency recordkeeping practices revealed that a number of agencies have developed rulemaking or administrative record guidance, of varying degrees of formality. Some agencies have included rulemaking or administrative record directions within their regulations¹³⁸ or otherwise published statements of policy in the Federal Register.¹³⁹ More commonly, agencies or agency components have publicly released more informal rulemaking or administrative record guidance documents¹⁴⁰ or staff-prepared manuals.¹⁴¹ Occasionally, agency documentation of rulemaking or administrative record policies is available on the Internet, without indication of intentional public release.¹⁴² More formal expressions of guidance, such as regulations, may more clearly indicate an agency's intention to be bound by its views on recordkeeping practices, but the purpose here is merely to illustrate the degree of forethought given by an agency to the treatment of rulemaking records and the potential for filing of an administrative record for judicial review.¹⁴³

A. Animating Policy Considerations

Whether an agency develops internal policy guidance on the compilation of rulemaking or administrative records may depend on either a deliberate or a default risk evaluation:

- Agencies may adopt guidance when they perceive a recurring issue; or
- Agencies may adopt guidance when a specific incident creates a policy development tipping point; or
- Agencies may not adopt guidance if no institutional experience animates review of the issue simply because the relevant officials have no experience with the issue; or
- Agencies may not adopt guidance even if institutional experience has animated a review of the issue, but that review has not concluded that the issue is of such recurrence or seriousness as to warrant the commitment of scarce agencies resources to policy development.

¹³⁸ E.g., 49 C.F.R. § 1110 (Department of Transportation, Surface Transportation Board); 16 C.F.R. § 1.18 (defining the “rulemaking record” in the context of hybrid rulemakings by the Federal Trade Commission (FTC) under section 18 of the Federal Trade Commission Act).

¹³⁹ E.g., FDIC Statement of Policy on the Development and Review of Regulations,” 63 Fed. Reg. 25,157 (1998).

¹⁴⁰ E.g., U.S. Dep’t of Transp., *Rulemaking Requirements* (Apr. 2011), available at <http://www.dot.gov/regulations/rulemaking-requirements> (last visited Feb. 4, 2013); NOAAG, *supra* note 124; EPAADP, *supra* note 111.

¹⁴¹ E.g., I.R.S., *Chief Counsel Regulation Handbook*, IRM Part 32, available at <http://www.irs.gov/irm/part32/index.html> (last visited Dec. 18, 2012).

¹⁴² Memorandum to Assistant Secretaries, Directors of Bureaus and Offices, from David L. Bernhardt, Deputy Solicitor, Department of the Interior, *Standardized Guidance on Compiling a Decision File and an Administrative Record* (June 27, 2006) (cover memorandum), available at <http://www.fws.gov/midwest/endangered/permits/hcp/pdf/DecFileAdminRecordGuidance.pdf> (last visited October 12, 2012) [hereinafter DOIS]. The DOIS guidance has been available on a number of component websites, but there is no indication that the Solicitor intended public release of that memorandum.

¹⁴³ See, *supra*, Section I.C.

The lack of agency policy guidance, therefore, should not necessarily be viewed negatively.¹⁴⁴

A number of agencies have developed internal guidance for generalized reasons:

- to provide clear procedures for building a rulemaking or administrative record in informal rulemaking,¹⁴⁵
- to establish basic principles that guide promulgation and review of all regulations and written statements of policy,¹⁴⁶ or
- to ensure consistency across components in the development and maintenance of the docket and corresponding rulemaking record for regulatory initiatives.¹⁴⁷

Some agencies developed rulemaking or administrative record guidance in response to specific rulemakings, or to statutory commands that they develop a number of specific rulemakings.¹⁴⁸ Only a few agencies suggested that the development of administrative record guidance was the result of specific litigation¹⁴⁹ or repetitive litigation.¹⁵⁰ EPA, for example, developed one of the more refined policies for agency recordkeeping:

to help inform EPA personnel about basic principles for record compilation, provide information to the public on how EPA compiles records, and to contribute to an orderly process for judicial review based on a complete record. This document is consistent with the US Department of Justice recommendation that agencies develop guidance on the compilation and contents of the administrative record.¹⁵¹

¹⁴⁴ Several discussions with government officials, questionnaire responses, and review of public documentation of agency guidance illustrated that agencies may adopt policies on a range of regulatory issues without touching on the scope or compilation of an administrative record for decisional or litigation purposes. This reinforces a notion expressed several times, and consistent with the author's own government experience, that policy and procedure development and refinement tend to be the product of repeated episodic need or a significant problem with a specific rulemaking or other event, but that agencies generally do not adopt policies (or have the resources necessary to do so) without some animating event.

¹⁴⁵ STB*R.

¹⁴⁶ FDIC*R.

¹⁴⁷ DOT*R; MSHA*R.

¹⁴⁸ CFTC*R.

¹⁴⁹ PTO*R; EPA*R.

¹⁵⁰ Cruden Interview, *supra* note 44; EPA*R. See also EPAADP, *supra* note 111, at 3. The extensive administrative record litigation in environmental (EPA) and natural resources (Department of the Interior (DOI), Department of Agriculture (DOA)) cases may be the result of a shift in law under the NEPA, CEQ regulations, and their progeny. NEPA and other statutes created a record-based decision process magnifying the consideration of all factors in reaching a decision, independently of the substance of the actual decision. *Id.* This scheme is fundamentally different than the judicial interpretation of APA's "arbitrary and capricious" standard because it places a premium on mere consideration; there does not necessary need to be a rational relationship to the decision ultimately made or substantial evidence to support that decision because a court is empowered to set aside a decision for mere failure to consider a factor. As Mr. Cruden pointed out, the resulting Environmental Impact Statement process puts a premium (and a high cost) on analyzing attenuated impacts because failure to consider one may be cause for judicial avoidance of an administrative decision. Cruden Interview, *supra* note 44.

¹⁵¹ EPAADP, *supra* note 111, at 3 (citing Memorandum from Ronald J. Tenpas, Assistant Attorney General, to Selected Agency Counsel, (Dec. 23, 2008)).

EPA recognizes that an administrative record for judicial review may be the end product of rulemaking recordkeeping and looks backward to establish policies to meet that goal, at the same time it recognizes that administrative record development is ‘litigation risk’ sensitive.¹⁵²

The lack of uniform animating events, as well as the diversity of agency organization and procedure, leads, perhaps inexorably, to a wide diversity of agency guidance and practice, as well as a wide diversity of sophistication in guidance and practices. An overriding observation arising from the agency guidance and practice suggests that within and among agency personnel there exist widely divergent views on the scope of rulemaking and administrative records, the process for their development and compilation, the technical requirements of inclusion and certification, and, ultimately, the management of disposition of records. Agency practice in compilation of rulemaking and administrative records is as diverse as the agencies themselves.

B. Defining the Rulemaking and Administrative Record

Agency rulemaking record guidance documents may define, interpret, or qualify the “rulemaking record” and “administrative record” concepts in varied ways. If an agency chooses to use a guidance document to aid in recordkeeping and compilation, it is important for the agency to clearly identify its definition of the rulemaking and administrative records and materials included therein, as well as any permissible qualifications or exclusions from the rulemaking or administrative record. While care should be taken to avoid reading more into guidance document definitions that suggest legal requirements for rulemaking or administrative records – because the APA, as a general statute, does not provide a substantive delegation to agencies for rulemaking or otherwise – clear definitions offer several potential benefits:

- provide direction to agency personnel involved in recordkeeping and compilation, which may include non-attorneys or different individuals from those who later defend a regulation subject to a legal challenge;
- permit the preparer of the administrative record for judicial review, if different from the preparer of the rulemaking record, to more easily identify resources that should be included in the rulemaking administrative record;
- can help agencies to identify and explain differences in recordkeeping and compilation practices in cases of multi-agency decision-making;
- can help the court and third parties to understand the materials provided as the administrative record for judicial review, and how those materials might differ (if at all) from the rulemaking record before the agency at the time of its decision.

1. Expansively Defining the Rulemaking and Administrative Record

Agencies have taken a variety of approaches to defining the rulemaking and administrative record in agency guidance documents, informational articles, and internal memoranda. Some agencies have followed guidance initially provided by DOJ’s Environment and Natural Resources Division (ENRD), later published for a broader audience, and noteworthy because ENRD is the principal litigator for a number of agencies, with the caution that this guidance reflects neither a Department of Justice policy nor litigating position.¹⁵³ In order to defend an agency decision-

¹⁵² EPAADP, *supra* note 111, at 3.

¹⁵³ ENV’T & NATURAL RES. DIV., U.S. DEP’T OF JUSTICE, GUIDANCE TO FEDERAL AGENCIES IN COMPILING THE ADMINISTRATIVE RECORD (Jan. 1999), *available at* http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf. A version of this guidance with nonsubstantive edits was published. Joan Goldfrank, *Guidance to Client Agencies on*

making on the basis of an administrative record to be certified to a court, however, litigators must clearly understand the basis of the agency's decision. Recent EPA and NOAA guidance continue an expansive approach.¹⁵⁴

At a basic level, the guidance supports the notion that the rulemaking and administrative records consist of all agency documents, files, and materials directly or indirectly considered by the agency decisionmaker or agency decisionmakers.¹⁵⁵ Agency control, possession, and maintenance determine an agency rulemaking record.¹⁵⁶ "Key" rulemaking or administrative record documents include: the final decision document or memorandum, federal register notices pertaining to the rulemaking, public comments, and required analyses that support the final agency action, such as Environmental Impact Statements or Environmental Assessments under NEPA¹⁵⁷ or Regulatory Flexibility Analyses under the Regulatory Flexibility Act.¹⁵⁸ The administrative record is not limited to documents and materials relevant only to the merits of the agency's decision, but also includes documents and materials logically connected to the process of making the decision or informing the decisionmaker.¹⁵⁹ Documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decisionmaker should be included, even though the final decisionmaker may not have actually reviewed or known about the documents and materials.¹⁶⁰ The rulemaking and administrative records should include materials regardless of whether they support or oppose the agency's decision.¹⁶¹

Compiling the Administrative Record, U.S. ATTY. BULL. 7 (Feb. 2000) [hereinafter U.S. ATTY. BULL.], available at http://www.justice.gov/usao/eousa/foia_reading_room/usab4801.pdf. For present purposes, this report uses the version published in the United States Attorneys' Bulletin, although, as noted. The memorandum and the article have been modified and limited by more recent guidance. Memorandum from Ronald J. Tenpas, Assistant Attorney Gen., to Selected Agency Counsel, Env'tl. & Natural Res.'s Div. (Dec. 23, 2008) (copy on file) [hereinafter Tenpas Memorandum]. The Tenpas memorandum points out that the original memorandum (and United States Attorney Bulletin) "does not represent a formal policy of the Department of Justice, nor even an official directive of the Environment and Natural Resources Division." The Tenpas Memorandum goes on to point out that litigants have sought to use the original memorandum and United States Attorneys Bulletin in litigation against the government, ignoring the standard disclaimer that such documents do not create any rights, substantive or procedural which are enforceable at law by any party. *Id.*; GUIDANCE TO FEDERAL AGENCIES IN COMPILING THE ADMINISTRATIVE RECORD, *supra*, at 9; U.S. ATTY. BULL., *supra*, at 7. The original memorandum and Bulletin should *only* be read as illustrative, particularly in light of the fact that each agency and each statutory authorization for judicial review may place litigation before a court that has otherwise interpreted the APA's record requirements.

The ENRD guidance has been subsequently tracked by some agencies for whom ENRD litigates, as well as other agencies. *See* DOIS, *supra* note 142.

¹⁵⁴ EPAADP, *supra* note 111; NOAAAG, *supra* note 124.

¹⁵⁵ NOAAAG, *supra* note 124, at 6; U.S. ATTY. BULL., *supra* note 153, at 8.

¹⁵⁶ U.S. ATTY. BULL., *supra* note 153, at 8.

¹⁵⁷ 42 U.S.C. § 4321ff.

¹⁵⁸ NOAAAG, *supra* note 124, at 7.

¹⁵⁹ NOAAAG, *supra* note 124, at 6-7; U.S. ATTY. BULL., *supra* note 153, at 8.

¹⁶⁰ U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

¹⁶¹ NOAAAG, *supra* note 124, at 6; EPAADP, *supra* note 111, at 4 (footnote omitted); U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

Considering these and other guidance documents and questionnaire responses, a complex *illustrative* menu of subjects suggested for a rulemaking record, and subject to a number of caveats discussed later in this report, an administrative record for judicial review would routinely include:

- Electronic records such as e-mail, computer drives, microfilm, etc.;¹⁶²
- Illustrations such as graphs, charts, recordings, photographs;¹⁶³
- Related policies, guidelines, directives, and manuals;¹⁶⁴
- Articles and books;¹⁶⁵
- Technical or scientific information or data, including assessments, modeling reports, sampling results, survey information, engineering reports or studies, etc.;¹⁶⁶
- Memorializations of telephone conversations¹⁶⁷ and meetings, such as transcripts, minutes, memorandum, or handwritten notes (unless they are personal notes);¹⁶⁸
- Communications the agency received from other agencies and from the public, and any responses to those communications;¹⁶⁹
- All draft documents that were circulated for comment either outside the initiating agency or outside the author's immediate office, if changes in these documents reflect significant input into the decision-making process;¹⁷⁰ and
- An index of a preceding administrative record where decisions are cumulative and one regulatory action builds upon prior decisions, with reproductions of none, some, or all of the prior administrative record documents as appropriate.¹⁷¹

Several categories of agency records may require special attention, such as privileged documents or protected resources,¹⁷² addressed in greater detail in later sections of the report.¹⁷³

¹⁶² U.S. ATTY. BULL., *supra* note 153, at 8.

¹⁶³ NOAAG, *supra* note 124, at 6-7; U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

¹⁶⁴ EPAADP, *supra* note 111, at 8; U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

¹⁶⁵ U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

¹⁶⁶ NOAAG, *supra* note 140, at 7; U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

¹⁶⁷ At times, telephone conversations can become substantively critical, although more so in adjudication than in rulemaking. *See, e.g.,* Watson Lab's v. Sebelius, No. 12-1344 (ABJ) 2012 U.S. Dist. LEXIS 185685 (D.D.C., Oct. 22, 2012) (originally filed under seal).

¹⁶⁸ NOAAG, *supra* note 124, at 7 (meetings with the public); EPAADP, *supra* note 111, at 8; U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

¹⁶⁹ NOAAG, *supra* note 140, at 7 (public comments and responses); U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

¹⁷⁰ U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

¹⁷¹ NOAAG, *supra* note 124, at 8. At the least, inclusion of the preceding administrative record index gives notice that the prior administrative record was considered in the current decision.

¹⁷² NOAAG, *supra* note 124, at 8 – 11; EPAADP, *supra* note 111, at 9 (exclude from the administrative record); U.S. ATTY. BULL., *supra* note 153, at 8 – 9.

Other agencies have similarly extensive menus, and also respond to specific issues in guidance – such as the Patent and Trademark Office inclusion within its rulemaking record and potential administrative record for judicial review of “[a]ny Freedom of Information Act (FOIA) request and the Agency’s response concerning topics integral to the rulemaking.”¹⁷⁴

A key to agency formulation of guidance that defines the rulemaking record, and ultimately an administrative record for judicial review, and as they certify administrative records, is that a court will ultimately judge the adequacy of the certified administrative record. As NOAA points out, “different federal Circuits take widely divergent approaches to the proper composition of an Administrative Record.”¹⁷⁵ Agencies may take divergent approaches into account as they compile rulemaking records, as NOAA does, but would be well advised to expansively define the concept in guidance to agency personnel. Reducing a broader rulemaking record to meet a specific court’s interpretation of the scope of the administrative record is much simpler than expanding upon a minimal record for certification to a particular court once agency action is challenged.

2. Relevancy and Reliance in the Rulemaking or Administrative Record.

Some agency guidance appears to limit these inclusive concepts of the rulemaking or administrative record by testing whether to include materials in the administrative record using a “relevancy” standard.¹⁷⁶ This raises the question of whether application of such an intervening test would narrow the administrative record beyond the “whole record” required for judicial review. Terms such as “relevance” can be broadly or narrowly construed. For example, relevance can be defined differently throughout the litigation process. Relevance is broadly construed at the discovery stage, such that information is discoverable if there is any possibility it might be relevant to subject matter of action; relevant information includes any matter that is or may become issue in litigation.¹⁷⁷ Relevant evidence, by comparison, is that which has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.¹⁷⁸ These varied constructions

¹⁷³ See *infra* at Sections III.B.3, 4, E.

¹⁷⁴ PTO Policy, *supra* note 102.

¹⁷⁵ NOAAG, *supra* note 124, at 3 n. 3.

¹⁷⁶ DOIS, *supra* note 142, at 3 (distinguishing a “decision file” from the administrative record: “the Decision File will be used as the primary basis for compilation of the AR [(administrative record, meaning the certified administrative record)], 6 (“The following documents are typically included in an AR when they are relevant”); EPAADP, *supra* note 111, at 3 (*e.g.*, “Enhance the defensibility of EPA decisions by ensuring that the underlying administrative record includes all relevant information that EPA considered and any necessary responses to that information.”), 5 (“... EPA is aware of that is relevant to the decision and that was considered directly or indirectly by the decision-maker, including information that supports or is contrary to the action taken by EPA. . .”), 4 n. 3 (“A number of different phrases with the same meaning may be used interchangeably to describe the contents of the administrative record. For example, the administrative record may be referred to as the set of documents that ‘provides the basis’ or ‘forms the basis’ for an action; that the agency or decision-maker ‘considered’; that the decision-maker ‘considered either directly or indirectly’; or that the agency or the agency decision-maker ‘relied on.’”). Even if EPA believes that this interchange of terms is not significant, it may mislead non-attorneys to include less than intended. Compare, however, the addition of “relevant” material to the record under certain instances, *supra*, Section II.C.1.

¹⁷⁷ FED R. CIV. P. 26.

¹⁷⁸ FED. R. EVID. 401.

illustrate that failure to define terms such as “relevance” precisely in guidance may lead to varied, and perhaps unintended, interpretations by individuals involved in compiling rulemaking records that may lead to further unintended consequences in administrative records. NOAA defines “relevance” broadly to include a document “if it relates (*i.e.*, has a logical connection) to the action under consideration and informs (or has the potential to inform), the decision-maker.”¹⁷⁹ This notion appears to be the most consistent with judicial interpretations of the administrative record the court reviews under the APA.

In a slightly different vein, a “reliance standard” could create similar issues. One agency noted that it includes “supporting documents and material it relies upon during the rulemaking,” while another suggests that it includes documents “on which the agency relies to take final action,” and another includes “anything relied upon” in the administrative record.¹⁸⁰ These responses, informal as they are, should not be read as suggesting that the agencies restrict the administrative record to the documents that support the position taken in the final rule.¹⁸¹ Rather, they illustrate the confusion that could be created regarding whether to include documents that agency personnel do not believe are sufficiently important to be “relied upon” in the administrative record. The language suggests that an agency could inadvertently provide less than the “whole record” required on judicial review of agency decision-making.

Agency guidance should avoid introducing subjective judgments regarding whether materials have been “relied” upon or are “relevant” at the programmatic level. Agencies using such qualifications should include consultation with counsel as part of the record preparation process to ensure that the rulemaking record is complete and that the administrative record will conform to the court’s expectations.¹⁸²

3. Including or Excluding Privileged Resources in the Administrative Record for Judicial Review

A significant issue for agencies revolves on whether material considered by the agency that the agency determines would be privileged from disclosure in litigation (and presumably never released to the public) should be included in an administrative record.

The ENRD guidance initially advised that:

¹⁷⁹ NOAAG, *supra* note 124, at 6-7.

¹⁸⁰ MSHA*R; EBSA*R; WHD*R. *See also* CMMS*R (noting that “Ensuring that information relied upon by all CMS components with responsibility for a policy set out in the rulemaking are identified and added timely to the official rulemaking record.”).

¹⁸¹ Guidance that incorporates some form of “reliance” to assist staff in compilation of a certified administrative record could run afoul of the notion enunciated in some courts that an agency may not exclude materials because it did not “rely” on the excluded information in its final decision. The guidance should not be considered as a direct contradiction of that principle, and agencies should be cautious about such an interpretation when judicial review might be brought into those courts, or any other that may adopt the position. *E.g.*, *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 139 (D.D.C. 2002) (rejecting argument and supplementing record); *Amfac Resorts, LLC v. U.S. Dep’t of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (“First and most basically, a complete administrative record should include all materials that ‘might have influenced the agency’s decision,’ and not merely those on which the agency relied in its final decision. *See Bethlehem Steel v. EPA*, 638 F.2d 994, 1000 (7th Cir. 1980) (citing *National Courier Association v. Board of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975)).”).

¹⁸² The Solicitor of the Interior provides just such an expansive listing. DOIS, *supra* note 142, at 7-8.

Generally, the administrative record includes documents and materials that are privileged and contain protected information. However, once the record is compiled, privileged or protected documents and materials are redacted or removed from the record... If documents and materials are determined to be privileged or protected, the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they are being withheld.¹⁸³

In light of recurrent issues and discussions with agencies, however, the Assistant Attorney General for ENRD clarified that:

The Department of Justice has defended in litigation the legal position that deliberative documents are not generally required in an administrative record, and thus has also defended the position that in such circumstances no privilege log reflecting such documents would need to be prepared. The [prior memorandum and U.S. Attorneys Bulletin] should not be read as casting doubt on this legal position. Obviously, specific statutory provisions and/or case law in the jurisdiction will play a significant role in determine the appropriate approach in a particular case. Agencies would likely benefit from having their own internal guidance regarding the contents and compilation of the record. An agency's guidance should, of course, be informed by applicable case law and the agency's experience and internal procedures.¹⁸⁴

Agencies have differed considerably in how they handle privileged documents and how they develop and implement internal guidance.

A number of agencies do not include privileged documents in a certified administrative record and disclose them only in the event of a FOIA request or litigation that requires a *Vaughn* or discovery index.¹⁸⁵ For example, EPA takes the view that privileged documents do not form a part of the administrative record. EPA excludes deliberative materials (covering most privileges) in the administrative record not on grounds of privilege but on the grounds of relevance “[b]ecause the actual subjective motivation of Agency decisionmakers is immaterial as a matter of law under *Overton Park*, documentation of the deliberations is also immaterial.”¹⁸⁶ For certified administrative record purposes, EPA considers a document “deliberative” and immaterial even if it has been made public, through FOIA or other means.¹⁸⁷ This approach enjoys substantial judicial support.¹⁸⁸ Under this approach, deliberative documents are excluded

¹⁸³ U.S. ATTY. BULL., *supra* note 153, at 9.

¹⁸⁴ Tenpas Memorandum, *supra* note 153.

¹⁸⁵ DOT*R; FTC*R. *See also* PTO*R; EBSA*R; STB*R. *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

¹⁸⁶ EPA*R; EPAADP, *supra* note 111, at 4 n. 4, 5 – 6.

¹⁸⁷ EPA*R; EPAADP, *supra* note 111, 10.

¹⁸⁸ EPAADP, *supra* note 111, 6, citing *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984). Deliberative process in that case involved transcripts of deliberations of a multi-member, which may be distinguishable as applicable only to transcripts of deliberations between members of a multi-member board. *See also* *New York v. Salazar*, 701 F. Supp. 2d 224, 236 (N.D.N.Y. 2010) (“While it may seem anomalous that a court must examine an agency decision and apply the controlling APA test without the benefit of all of the information that was before the agency, the weight of authority holds that ‘[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.’” (citing cases)).

from the certified administrative record because, for example, when a party challenges agency action as arbitrary and capricious, the reasonableness of the agency's action “is judged in accordance with its stated reasons.”¹⁸⁹

Discussions with EPA illuminated the ongoing problem of individuals or litigants requesting all documents “related to” a rulemaking under FOIA and receiving more than the rulemaking administrative record, leading to questions about completeness of the certified administrative record.¹⁹⁰ EPA points to another difficult situation where EPA and another agency are codefendants or co-respondents, it may be difficult to explain to opposing parties and the reviewing court why the same document (*e.g.*, an internal email) would be treated differently by different federal agencies, *e.g.*,

- one agency excludes the document from the record,
- another agency includes the document in the record, and
- a third agency puts the document in a “confidential” part of the record or privilege log.

Some agencies participate in substantial and large multi-agency regulatory portfolios, such as recent consumer finance regulations, that may create conflicting approaches or require substantial coordination to avoid conflicting approaches.¹⁹¹

In another approach, NOAA advises that privileged and protected documents are a part of the rulemaking record and “must be identified for the Administrative Record and listed on a Privilege Log. The Privilege Log, but not the documents, is then included in the Administrative Record prepared for the Court.”¹⁹² The documents are not provided to an opposing party “absent a court order to do so.”¹⁹³ NOAA specifically includes relevant internal communications as part of the certified administrative record because they are directly or indirectly considered.¹⁹⁴ NOAA recognizes also that such documents may be deliberative “in whole or in part.”¹⁹⁵ The CFTC has taken a similar view, stating that “if documents are part of the administrative record, then they are part of the administrative record, regardless of whether they are privileged.”¹⁹⁶

¹⁸⁹ *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279 (D.C. Cir. 1998) (“[T]he actual subjective motivation of agency decisionmakers is immaterial as a matter of law – unless there is a showing of bad faith or improper behavior.”). *See Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438, 1457-58 (1st Cir. 1992) (complete administrative record does not include privileged materials).

¹⁹⁰ Wehling Interview, *supra* note 43. Similarly, as the Administrative Conference initially observed in its Recommendation 83-4, *The Use of the Freedom of Information Act for Discovery Purposes*, there is also the potential for litigants to use FOIA in the hopes of obtaining “additional agency records for use in litigation.”¹⁹⁰

¹⁹¹ As the FDIC has pointed out, these portfolios also require significant interagency coordination of public comments. FDIC*R. *See, e.g.*, Department of the Treasury, Federal Reserve System, National Credit Union Administration, Consumer Finance Protection Bureau, Federal Housing Finance Agency, Appraisals for Higher-Priced Mortgage Loans, 78 Fed. Reg. 10,368 (Feb. 13, 2013).

¹⁹² NOAAG, *supra* note 124, at 8.

¹⁹³ *Id.* at 8.

¹⁹⁴ *Id.* at 9.

¹⁹⁵ NOAAG, *supra* note 124, at 9-11.

¹⁹⁶ CFTC*R.

At least one agency manages privileged documents in a consolidated rulemaking docket and record during the rulemaking, but limits public accessibility¹⁹⁷ while another includes privileged documents within its internal record and manages release of those documents on a case-by-case basis.¹⁹⁸ Some agencies with fewer broad-based rules appear to make only case-by-case determinations.¹⁹⁹ Other agencies simply follow litigation advice from the Department of Justice in the event that a rule is challenged.²⁰⁰ DOJ stated that it includes privileged documents in an administrative record for judicial review only as required by statute or court order though this internal practice should be distinguished from DOJ's role as a principal litigator and the ENRD guidance.²⁰¹

The choice between excluding privileged documents on relevance grounds and indexing but not including privileged documents in a certified administrative record is complex and the contours of the necessary analysis may not be evident until the agency is served with a complaint or petition. While judicial interpretation typically permits exclusion of privileged documents (whether on privilege or substantive definition), agencies also make decisions on exclusion or procedural inclusion based on broader policy (*e.g.*, favoring disclosure) and practicality (*e.g.*, cost of exclusion litigation against cost of inclusion) considerations.

Treatment of Deliberative Privileged Materials

The courts predominantly take a doctrinal position that deliberative privileged material does not form a part of an administrative record for judicial review. The courts recognized a hard and fast rule shortly after passage of the APA that “internal memoranda made during the decisional process . . . are never included in a [certified administrative] record.”²⁰² A more nuanced view has emerged over time, that “[agency] deliberations not part of the record are . . . immaterial as a matter of law.”²⁰³ The purpose of the deliberative privilege is to preserve the ability of agencies – and particularly multi-member commissions – to candidly discuss and decide, and to address concerns that requiring full public disclosure of privileged deliberative material would render “agency proceedings . . . useless both to the agency and to the courts.”²⁰⁴ Accordingly, “deliberative intra-agency memoranda and other such records are ordinarily privileged, and *need*

¹⁹⁷ ITC*R.

¹⁹⁸ FDIC*R.

¹⁹⁹ *See, e.g.*, VA*R.

²⁰⁰ DHS*R.

²⁰¹ DOJ*R.

²⁰² *Norris & Hirshberg v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947); *Tafas v. Dudas*, 530 F. Supp. 2d 789, 794 (E.D. Va. 2008) (“internal memoranda made during the decisional process . . . are never included in a record”) (quoting *Norris & Hirshberg v. SEC*).

²⁰³ *In re Subpoena Duces Tecum Service on Office of Comptroller of Currency*, 156 F.3d 1279 (D.C. Cir. 1998).

²⁰⁴ *San Luis Obispo Mothers for Peace v. Nuclear Reg. 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 certified administrative record “prevent[s] injury to the quality of agency decisions” by encouraging uninhibited and frank discussion of legal and policy matters).

not be included in the record.”²⁰⁵ Absent a showing of bad faith or improper behavior, the agency practice of excluding pre-decisional materials from the administrative record enjoys substantial judicial support.²⁰⁶

Assertion of privilege is a choice that the agency may make. While privileged material is doctrinally excludable from an administrative record, that doctrine must be squared with the practical realities of privilege litigation. Determination of privilege is an inherently judicial function, not an agency function and an agency decision to exclude privileged material from an administrative record is not determinative: “The common law – interpreted by United States courts in the light of reason and experience – governs a claim of privilege” unless superseded by the Constitution, statute, or rule promulgated under the Rules Enabling Act.²⁰⁷ Rather, it is the agency’s view of the general law of privilege applied to the documents that it possesses. Such a claim of presumptive privilege should receive no greater deference than any other claim of interpretation of the general law by an agency – its persuasive power.²⁰⁸ It is emphatically the “province and duty of [the] Court ‘to say what the law is’ with respect to the claim of privilege presented” in a particular case.²⁰⁹ Thus, judicial review of privilege “logs” – and the not infrequent *in camera* review of documents claims to be privileged – is a determination of whether the specific document is, in fact, privileged.²¹⁰

²⁰⁵ See, e.g., *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1549 (9th Cir. 1993) (“neither the internal deliberative process of the agency nor the mental processes of individual agency members” are proper components of the administrative record); *Amfac Resorts, LLC v. Dept. or the Interior*, 143 F. Supp. 2d 7, 13 (D. D.C. 2001) (“deliberative intra-agency memorand[a] are ordinarily privileged and need not be included in the record”); see also *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008); *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305 (S.D.N.Y. 2012). *But see* *NRDC v. Train*, 519 F.2d 287 (D.C. Cir. 1975) (possible improper exclusion of Administrator’s briefing book; remanded to agency).

²⁰⁶ See *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279 (D.C. Cir. 1998); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 789 F.2d 26, 44-45 (D. C. Cir. 1986) (en banc).

²⁰⁷ Fed. R. Evid. 501. This statutory rule was enacted in rejection of prior proposed amendments to the Federal Rules that would have established non-constitutional privileges under the Rules Enabling Act. P.L. 93-595, § 1, 88 Stat. 1933 (1975), as amended. The APA is not such a statute and an agency bears the burden of establishing that a specific statute alters this rule.

²⁰⁸ Deference may be proportional to the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” *United States v. Mead Corp.*, 533 U. S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944)).

²⁰⁹ *United States v. Nixon*, 418 U.S. 683, 705 (1974) (The generalized assertion of Executive privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial); *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (“[it] is emphatically the province and duty of the judicial department to say what the law is.”). Admittedly, *Nixon* was an extreme case, but it illustrates the point that privilege is a judicial determination and the most extreme documentary privilege is not absolute. The deliberative process privilege is a qualified privilege. E.g., *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000); *Cobell v. Norton*, 213 F.R.D. 1, 7 (D.D.C. 2003); *Northwest Env’tl. Advocates v. United States EPA*, 2009 U.S. Dist. LEXIS 10456 (D. Or. 2009) (on privilege only; citing *F.T.C. v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)).

²¹⁰ E.g., *Earthworks v. U.S. Dept. of the Interior*, 279 F.R.D. 180 (D. D.C. 2012); 2013 U.S. Dist. LEXIS 49873 (D.D.C. No. 1:09-cv-01972, Dk. Nos. 88-1, 88-2 (HHK/JMF), Apr. 2, 2013) (review of Department of the Interior mining royalty regulations). As Magistrate Judge Facciola pointed out:

4. Identifying and Segregating Privileged Materials

The most common privileges for an agency revolve around litigation as many rulemaking proceedings both consider potential litigation (generally) and are the product of litigation. Much of the defining case law for litigation privileges arises in the context of Freedom of Information Act cases where FOIA Exemption (5) “incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant.”²¹¹ The Supreme Court has construed Exemption 5 “to exempt those documents, and only those documents, normally privileged in the civil discovery context.”²¹² Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”²¹³ The most significant of such privileges are: the deliberative process privilege, the attorney-client privilege, the attorney work product privilege, and the presidential communications privilege.

- **Deliberative Process Privilege.** The administrative record contains the documentary record for judicial review, but courts will not intrude upon the deliberation of the agency. Treating administrative deliberation as somewhat analogous to judicial deliberation, one court has noted that “Judicial examination of [] transcripts [of agency deliberations] would represent an extraordinary intrusion into the realm of the agency.”²¹⁴ The deliberative-process privilege shields internal agency “advisory opinions, recommendations and deliberations” in order to “protect[] the decision making processes of government agencies.”²¹⁵ It protects from disclosure material that is predecisional – *i.e.*, “antecedent to the adoption of an agency policy,”²¹⁶ and deliberative – *i.e.*, “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.”²¹⁷ If an agency adopted a staff memorandum as the basis for

Review of privilege logs often discloses that the person doing the log may not understand the intricacies of the privileges being claimed. Perhaps the greatest deficiency is the failure to appreciate that the attorney-client privilege does not operate to insulate from disclosure every possible communication between an attorney and client. It should be obvious that communications from the attorney to client are not ipso facto protected. To the contrary, the privilege operates to shield communications from an attorney to a client “only if that communication is based on confidential information provided by the client.” *Mead Data Cent. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 255 (D.C. Cir. 1977).

D.D.C. No. 1:09-cv-01972, Dk. No. 88-1, at 2 – 3. *See also* *Conservation Force v. Salazar*, 851 F. Supp. 2d 39 (D. D.C. 2012) (Endangered Species Act permits; privilege asserted as to attorneys emails; review of privilege log; claims against privilege waived).

²¹¹ *Baker & Hostetler LLP v. Dep’t of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006).

²¹² *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

²¹³ 5 U.S.C. § 552(b)(5).

²¹⁴ *San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm’n*, 789 F.2d 26, 44, 45 (D.C. Cir. 1986) (en banc) (“We think the analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court would not fully perform its functions.”).

²¹⁵ *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted).

²¹⁶ *Jordan v. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc) (emphasis omitted), *overruled on other grounds* by *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), *overruled* by *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259 (2011).

²¹⁷ *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

its ruling, that memorandum would necessarily be included, as might factual material in a privileged document.²¹⁸

- **Presidential communications privilege.** The presidential communications privilege is a recognized privilege based on the necessity of candor from presidential advisers and to provide “[a] President and those who assist him . . . [with] freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.”²¹⁹ This privilege extends to communications authored or received in response to a solicitation by members of a presidential adviser’s staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.²²⁰
- **Attorney-client privilege.** “The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services. The privilege also protects communications from attorneys to their clients if the communications rest on confidential information obtained from the client.”²²¹ Within the United States Government, “the ‘client’ may be the agency and the attorney may be an agency lawyer.”²²²
- **Attorney work-product privilege.** The attorney work-product privilege protects “documents and tangible things that are prepared in anticipation of litigation or for trial” by an attorney.²²³ A document is prepared in anticipation of litigation when litigation is “foreseeable,” “even if no specific claim is contemplated,”²²⁴ but the “mere possibility” of litigation is not enough.²²⁵ The District of Columbia Circuit has distinguished between “neutral, objective analyses of agency regulations” and “more pointed documents” that “advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome.”²²⁶ As is common with other privileges, where the factual and opinion work product are so intertwined in a document that it is impossible to segregate, the entire document retains the mental impression of an attorney and cannot be disclosed.²²⁷

All of these privileges may implicate either an entire document or portions of a document. The inclusion or exclusion of privilege is not normally accomplished at the document level, but rather

²¹⁸ Nat’l Courier Ass’n v. Bd. of Governors, 516 F.2d 1229, 1241-43 (D.C. Cir. 1975).

²¹⁹ United States v. Nixon, 418 U.S. 683, 708 (1974).

²²⁰ See *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

²²¹ Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997) (citation and internal quotation marks omitted).

²²² *Id.* Some have challenged the notion that attorney-client privilege may apply to the government, but the overwhelming majority of court cases have applied the privilege and its application for present purposes is not doubted for present purposes.

²²³ FED. R. CIV. P. 26(b)(3); see also Tax Analysts, 117 F.3d at 620.

²²⁴ Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992).

²²⁵ Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980).

²²⁶ Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 127 (D.C. Cir. 1987) (citing Coastal States, 617 F.2d 854).

²²⁷ See, e.g., *In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 5 (D.D.C. 2002).

is parsed and segregated based on the information within the document. For example, “if internal agency documents themselves introduce ‘factual information not otherwise in the record’ [only] [] those portions of the documents [must] be included in the administrative record.”²²⁸ Notably, agencies may waive both segregation and privilege.

Segregation and release of privileged materials can raise unique practical problems, particularly where there are substantial volumes of materials. As one example, “draft” documents can pose a cumbersome problem. NOAA defines balanced benchmarks to require inclusion of “significant” drafts within the administrative record – “if ideas in the draft reflect significant input into the decision-making process. Significant input may exist, for example, if the document reflects alternative approaches, grounded in fact, science, or law, to resolve a particular issue or alternative interpretations of factual, scientific, or legal inputs.”²²⁹ NOAA excludes “[w]orking drafts (preliminary, interim, rough)” and “any drafts that contain only stylistic, typographical or grammatical edits, or other purely editorial suggestions in comment bubbles.”²³⁰ “Final draft documents with independent legal significance, such as final draft environmental impact statements, are to be included in the Administrative Record and will not be flagged for potential listing on the agency’s Privilege Log.”²³¹ If agencies prepare administrative record guidance, clearly defining such benchmarks in areas where materials are likely to be voluminous can ease record compilation.

Unsettled Privilege: Executive Review

Two examples of information that may initially be privileged but that presumably are considered in agency decision-making are (1) drafts and interagency and executive comments in review completed by Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA) and (2) *ex parte* contacts with outside interests through OMB the under Executive Order 12,866.

Executive Order 12,866 specifically advises *executive* agencies that they must make available to the public a variety of specific information, including: OMB-prompted or suggested changes between the draft submitted to OIRA for review and the final rule subsequently promulgated.²³² These internal documents, by temporal limitation in the Executive Order, do not constitute part of

²²⁸ Tamas, 530 F. Supp. 2d at 794 (quoting Nat’l Courier Ass’n v. Bd. Of Governors, 516 F.2d at 1242). While the administrative record is presumptively correct, the government bears the burden of establishing that specific documents or segregatable portions are privileged, it remains within the court’s authority to determine how to proceed, including whether to review the documents *in camera* or require filing and service under a protective order. *E.g.*, Jifry v. FAA, 370 F.3d 1174, 1181 (challenge by non-resident alien pilots of aviation regulations and revocation of airman’s certification; court reviewed whole record, including *ex parte in camera* review of the classified intelligence reports). For example, a court may enter an order requiring that specific documents or portions be served upon opposing counsel and filed under seal that limits the further distribution of the materials and restricts their use to the instant litigation, including provisions that preserve the confidentiality and privilege asserted over those documents.

²²⁹ NOAA, *supra* note 124, at 10 (emphasis in original). NOAA also excludes personal notes for the individual’s own use, working documents (such as cover sheets, meeting agendas) are generally excluded. *Id.* at 9.

²³⁰ *Id.* at 10.

²³¹ *Id.* at 10.

²³² Exec. Order No. 12,866, § 6(a)(3)(E).

the public regulatory docket of consideration, but are made public after a final rule is published. It would be anomalous to suggest that they would be excluded from the administrative record on the ground that they were not considered directly or indirectly by the agency. Several agencies responded that they ultimately include the record of changes on the public rulemaking docket, which presumably leads to inclusion of these documents in the administrative record for judicial review.²³³

Executive Order 12,866 provides also for OMB to conduct meetings at the request of private parties, more likely during consideration of a final rule, for the purpose of “listening” to the private party’s input.²³⁴ Agency staff nearly always attend such meetings; Presidential advisors occasionally attend; and OMB routinely accepts information and material from the private party, and passes that information to the agency. At least one agency considers staff notes taken at such meetings and any documentation received at such meetings to be part of the rulemaking record, but it is unclear if the agency considers such materials to be privileged or whether they are released to the public.²³⁵

The history of such contacts – and more generally *ex parte* communications in rulemaking – is fraught with debate over the balancing of the public need to know and the agency’s need to acquire expert advice. *Ex parte* communications do not appear to be *required* to be memorialized in a rulemaking administrative record.²³⁶ The relative values and complexity of the issues relating to *ex parte* communications can be the subject of a fuller debate, although an agency may be well served to memorialize such contacts, at least for its own purposes and as a buttress against claims of bias or impropriety.²³⁷

C. Compiling the Administrative Record

1. The Beginning of Compilation

Defining the scope of the rulemaking record and a possible administrative record raises important temporal questions, such as when a rulemaking record begins and what event sets in motion the compilation of a rulemaking record. This date at which the record begins may be difficult to establish – and may be established in hindsight – because the agency’s “consideration” of the substance of an issue may well begin prior to its determination to begin a rulemaking, the latter decision crossing the regulatory Rubicon triggering the imposition of APA procedural requirements for rulemaking and the assessment of rulemaking risks.

²³³ DOT*R; DHS*R (regarding the Federal Emergency Management Agency); EPA*R; EPAADP, *supra* note 111, at 11 – 12; PTO*R.

²³⁴ Exec. Order No. 12,866, § 6(b)(4)(D).

²³⁵ PTO*R.

²³⁶ *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (unless expressly forbidden by Congress, intra-executive contacts may take place, both during and after the public comment period), citing its own reluctance to expand the *ex parte* rule to rulemaking in *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1237 – 1238 (D.C. Cir. 1980); *Action for Children's Television v. FCC*, 564 F.2d 458, 474 – 77 (D.C. Cir. 1977) (both distinguishing informal rulemaking from “valuable privilege” adjudications for purposes of *ex parte* limitations).

²³⁷ *See infra* Section IV.D.

NOAA suggests starting the rulemaking record when the agency “begins to consider a concrete proposal for action” or “begins to move forward on a specific course of action.”²³⁸ Similarly, the Solicitor of Interior once suggested that a “Decision File should be created once consideration of a decision begins, which will vary based on the situation.”²³⁹ Each of these starting points suggests that some retrospective examination of documents leading to that event may be needed to document the considerations leading to that event. The beginning point, at a minimum, likely precedes publication of an advance notice of proposed rulemaking or publication of an entry in the *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*,²⁴⁰ both of which are indicators that the agency has *begun* considering a rulemaking.²⁴¹

The receipt of a petition for rulemaking,²⁴² on the other hand, clearly establishes an animating event for consideration of that petition and potential rulemaking in light of that petition. Receipt thus may animate the creation of a rulemaking record, and potentially an administrative record. Outside such a discrete animating event, agencies may have little external indication of an animating event.

2. Contemporaneous Compilation

Numerous agency responses indicate that agency officials are well advised to compile some rulemaking records contemporaneously with the development of the regulation, including EPA, DOI, and IRS.²⁴³ Foresight – particularly when a dedicated rulemaking record or decision file is created – simplifies future administrative record compilation, but requires advance planning, resources, and discipline.

Nearly every agency recognizes that it needs to compile some documents as the regulatory process progresses, and some define those contemporaneous files differently as “working files” from which the administrative record is later compiled (or, in reality, apparently “extracted”). Nonetheless, agencies do recognize that some “after the fact” compilation of an administrative record may be necessary and courts do not appear particularly concerned by post-decision compilation.²⁴⁴ Perhaps the more relevant question, from a practical perspective, is whether contemporaneous compilation benefits agencies.

²³⁸ NOAAG, *supra* note 124, at 11.

²³⁹ DOIS, *supra* note 142, at 4.

²⁴⁰ Office of Information and Regulatory Affairs, Office of Management and Budget, *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, <http://www.reginfo.gov/public/do/eAgendaMain> (last visited Mar. 8, 2013).

²⁴¹ See Section II.A.1.

²⁴² 5 U.S.C. § 553(e),

²⁴³ EPAADP, *supra* note 111, at 11; EPA*R; DOIS, *supra* note 142, at 2 (“Decision Files should be created contemporaneously with development of agency decisions, while administrative records evidence of the Department’s basis for defending agency decisions.”); IRS*R.

²⁴⁴ FDA, pointing out that even when it has compiled an administrative record contemporaneously, it must also seek additions after the fact to ensure completeness. FDA*R. See, e.g., *Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2008) (“That the agency compiled the record in this case after this litigation commenced does not alter the presumption that the agency has properly discharged this function” referring to the “presumption of honesty and integrity in those serving as agency adjudicators” (alterations omitted) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

NOAA makes clear that potential litigation can be a motivation for early compilation of the rulemaking and administrative record:

For any decision likely to be controversial or the subject of litigation, as a ‘best practice’ the [record] Custodian should strive to compile and organize documents contemporaneously with the agency decisionmaking 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.²⁴⁵

Many economically, policy or legally significant rulemakings will tend toward the former – a rational risk analysis may suggest the likelihood of litigation and the advantage of contemporaneous compilation. Potential jurisdictional defenses may forestall certification of an administrative record for judicial review, but may not ultimately obviate the need for the agency to provide the administrative record if a jurisdictional defense is unsuccessful or other legal challenges are based on the merits of an agency-decision.

In its informal suggestions on recordkeeping, DOJ’s ENRD placed a priority on compilation contemporaneous with the development of the rulemaking:

Optimally, an agency will compile the administrative record as documents and generation or receipt of materials occurs during the agency decision-making process. The record may be a contemporaneous record of the action. However, the agency may compile the administrative record after litigation has been initiated.²⁴⁶

The Solicitor of Interior has also suggested that contemporaneous rulemaking record compilation will benefit agencies through increased efficiency and performance if a certified administrative record is later required.²⁴⁷

EPA suggests that its administrative records are not “officially compiled” until a court “orders” the EPA to file the record in litigation.²⁴⁸ EPA nonetheless believes that it is “important to focus on the [rulemaking] record through the entire decisionmaking process and suggests, as a matter of efficiency, that some offices may choose to compile the record at the time of decision rather than waiting for litigation.”²⁴⁹

ENRD’s guidance suggested detailed steps for after-the-fact compilation, which could be modified to apply as well to contemporaneous compilation:

- Contact all agency people, including program personnel and attorneys, involved in the final agency action and ask them to search their files and agency files for documents and materials related to the final agency action and include agency people in field offices; where personnel involved in the final agency action are no longer employed by the agency, search the archives for documents and materials related to the final agency action. A former employee may be contacted for guidance about where to search.

²⁴⁵ NOAGG, *supra* note 140, at 12 n. 23.

²⁴⁶ U.S. ATTY. BULL., *supra* note 153, at 7. The Solicitor of the Interior suggests that the administrative record be “compiled as documents are generated or received during the decision-making process, making it a contemporaneous record of the decision.” DOIS, *supra* note 142, at 2.

²⁴⁷ *Id.*

²⁴⁸ EPAADP, *supra* note 111, at 11.

²⁴⁹ *Id.* at 11 n. 8.

- Contact agency units other than program personnel, such as congressional and correspondence components.
- Determine whether there are agency files relating to the final agency action. If there are such files, search them.
- If more than one agency was involved in the decision-making process, the lead agency should contact the other agencies to be sure the record contains all the documents and materials considered or relied on by the lead agency.
- Search a public docket room to determine whether there are relevant documents or materials.²⁵⁰

Non-contemporaneous compilation – or compilation only where necessary – may lead to difficulty in compiling a complete administrative record for a rulemaking. As the Department of Commerce’s Patent and Trademark Office pointed out, if personnel involved in the rulemaking are no longer employed by the agency the custodian may need to contact former employees (to the extent practicable) for guidance on where to search for documents, including email and document archives related to the rulemaking created by the former employee before his or her departure from the agency.²⁵¹ Personnel departures could effectively thwart an agency’s effort to compile an effective administrative record for judicial review by denying the agency access to past employee recollection of consideration.

Additionally, documents that are not contemporaneously controlled as part of a rulemaking record or decision file may be lost and not retrievable, a point that becomes even more challenging when multiple agencies contribute to consideration of the rulemaking by a principal agency.²⁵² Over time, these challenges may increase. This is of concern because there may continue to be legal challenges to rulemakings long past the general six year statute of limitations for actions against the United States (subject to a more specific statute),²⁵³ and an administrative record may be necessary to defend an agency decision dependent on a rule, such as an enforcement action, years beyond a limitation on direct review.²⁵⁴

One point made numerous times in guidance and agency responses, and that every agency should consider whether compiling rulemaking records contemporaneously or only compiling an administrative record upon demand: a specific custodian responsible for the process should be

²⁵⁰ U.S. ATTY. BULL., *supra* note 153, at 8.

²⁵¹ PTO Policy, *supra* note 102, at 2.

²⁵² *Id.* at 3.

²⁵³ 28 U.S.C. § 2401(a).

²⁵⁴ *See, e.g.,* Nazareth Hospital v. Sebelius, No. 10-3513, 2012 U.S. Dis. LEXIS 148745 (E.D. Pa., Oct. 16, 2012) (Department of Health and Human Services ordered to produce administrative record for interim final rule and final rule adopted in 2000 that underlay adjudication of hospital disproportionate share of low-income patients during 2002; court rejected argument that production of record would be “burdensome” without explanation of burden). *See also* Long Island Care at Home v. Coke, 551 U.S. 158 (2007) (efficacy of Department of Labor 1975 regulations reviewed in 2007 in third party litigation; Solicitor General as amicus for the United States; multiple agency considerations of revisions over more than 15 years).

designated, and that person should document the compilation process.²⁵⁵ Courts infrequently consider issues of whether the agency contemporaneously compiles a formal rulemaking record or compiles that record only post-hoc when needed as an administrative record for judicial review under the APA. In certain instances, however, post-hoc compilation might adversely affect expeditious judicial review.²⁵⁶

An agency must expend considerable effort and scarce resources to compile a full rulemaking record for every rulemaking that it undertakes. That expenditure must be balanced against the actual risk of litigation and subsequent requirement that it file an administrative record. The risk analysis is not easy to quantify and many agencies may find that litigation risks do not justify the compilation of voluminous records in each and every instance. An agency may have a limited litigation risk and very large and complex records. At the same time, some agencies compile a rulemaking record as a matter of routine because of the rulemaking frequency and to better manage internal processes. Accordingly, the balance that must be struck is best analyzed by the agency and its litigators, but the best practice remains for agencies to compile rulemaking records contemporaneously.²⁵⁷

3. Electronic Management of Record Compilation.

Administrative records historically were compilations of various papers – colloquially a “box with a bow.”²⁵⁸ Numerous changes over the past twenty years – such as implementation of the E-Government Act and E-FOIA Act and the development of electronic document management systems – have radically changed the nature of administrative recordkeeping. Agencies’ practices now vary widely, reflecting divergent needs and capacities for electronic recordkeeping and document management. EPA typifies the changing nature of the process:

EPA has maintained the official rulemaking administrative records in paper form, but with the increased use of electronic document management for both rulemaking and litigation, EPA is moving towards the retention of all rulemaking administrative records through its electronic docket management system (the Federal Docket Management System or FDMS).²⁵⁹

Some agencies retain rulemaking records in paper form, even as most of their daily operations are managed electronically, illustrating that the regulatory and recordkeeping processes are not inherently linked.²⁶⁰ Most agencies maintain elements of rulemaking records in paper and in electronic form.²⁶¹

²⁵⁵ U.S. ATTY. BULL., *supra* note 153, at 7; NOAAG, *supra* note 124, at 5; DOIS, *supra* note 142, at 3; NOAA*R. This process becomes more consolidated in electronic document systems where agency staff can directly designate documents to the record.

²⁵⁶ See Section IV.G.1.

²⁵⁷ *Cf.*, Florida Wildlife Federation v. Jackson, 853 F. Supp. 2d 1138 (N.D. Fla. 2012) (extensive record; 87,000 pages with multiple cross claims; known expectation of litigation).

²⁵⁸ Siciliano Interview, *supra* note 43.

²⁵⁹ EPA*R.

²⁶⁰ *E.g.*, IRS*R. This notion is distinctly different from the electronic filing of most tax returns and conversion of paper-filed returns to electronic form for use.

²⁶¹ *E.g.*, FDIC*R; DHS*R; VA*R; FERC*R; PRO&*R; MSPB*R; NOAA*R (noting that its administrative records are predominantly in paper form); MSHA*R; EBSA*R; WHD*R; ETA*R; TREAS*R; DOJ*R; FTC*R.

FDA offered several well-considered recommendations, such as that all records be maintained in portable document format (.pdf) as the rulemaking progresses. FDA also specifically suggested that a document with attachments be filed with the attachments as a primary document because it may become difficult to locate the attachments if they have been separated, and that the accession date on the document should reflect the actual date of the document not the date it was scanned or entered into the electronic system.²⁶² At a minimum, agencies can simplify management of a rulemaking record (and ultimately generation of an administrative record for judicial review if needed) by simply saving documents to a designated regulatory folder.²⁶³ That does not resolve all issues, however, as the diversity of material illustrates. The Department of Veterans Affairs (VA) suggested that a significant problem may exist with converting solely to a single electronic file format those working materials that are compiled through diverse information query (IQ) systems, such as VA's VAIQ document management system.²⁶⁴

Some agencies have transitioned to complete electronic rulemaking recordkeeping.²⁶⁵ Even completely electronic document management and rulemaking recordkeeping systems, however, may not obviate the need to retain physical or non-digitizable exhibits.²⁶⁶

Electronic file management can take a number of forms, from simple file saving on a shared drive to a dedicated electronic records management system. The Commodity Futures Trading Commission (CFTC), for example, utilizes a document management system, in which records are maintained in a searchable database.²⁶⁷ The ITC uses a complete electronic filing system for collecting and storing all of its adjudicatory filings and documents or, for its limited amount of rulemaking, rulemaking record compilation and indexing.²⁶⁸ Both the CFTC and ITC systems appear to have been designed for more general recordkeeping purposes and adapted for rulemaking record use.

²⁶² FDA*R.

²⁶³ See Section IV.B.

²⁶⁴ VA*R. Most agencies are likely to have an IQ system in place to manage executive document flow; whether that system was designed to generate .pdf documents may depend on the source and individual specifications of the system (including contractual limitations).

²⁶⁵ E.g., ITC*R (EDIS system; login required for access to publicly available records); CFTC*R.

²⁶⁶ E.g., CFTC*R; OSHA*R. OSHA notes that it receives and must consider particular safety products – e.g., respirators – that remain in their physical form and are part of the administrative record, but that it will insert a description of the exhibit in the administrative record. The Administrative Conference has previously recommended that agencies “include in the electronic docket a descriptive entry or photograph for all physical objects received during the comment period.” Recommendation 2011-1, *supra* note 16 (Recommendation 5).

²⁶⁷ CFTC*R. The CFTC also notes that, throughout the rulemaking, records are categorized by record types for ease of use, including Federal Register publications, comments, studies, open meeting transcripts, etc. *Id.* These categories may also assist in finding material more quickly rather than pure chronologic filing and indexing. The CFTC further notes that its rulemaking staff interface with its database, typically through a Sharepoint graphic user interface (GUI). The database is currently run in Concordance, but CFTC notes that it plans to switch to a more robust database software that includes endless facility for sorting and designating records by fields.

²⁶⁸ ITC*R. The ITC notes that documents entered into its Electronic Document Information System, such as those related to rulemaking, are indexed upon entry. See ITC, *Electronic Document Information System*, <https://edis.usitc.gov/edis3-external/app> (last visited Jan 13, 2013).

FDMS and *Regulations.gov* were developed to address the different and specific needs for public notice and the aggregation of public comments, but might be expanded for more general agency recordkeeping.²⁶⁹ FDMS, however, is only a medium-level security system and FDMS does not presently, at the time of this writing, plan to attempt to move FDMS to a high level of security; agencies must balance their use of FDMS with high security needs for specific data.²⁷⁰ This means that agencies must have their own systems for handling information that requires a higher level of security than available on FDMS. In another example, accessing FDMS and *Regulations.gov* illustrates a lower level of search capacity and functionality than is available in robust document management systems, such as word, context, and Boolean searches in forms like those commonly used in Westlaw and Lexis. The application of eDiscovery technologies and techniques – such as predictive coding – to administrative records is foreseeable as agencies, like private litigants, grapple with those litigation intricacies. These differences are development issues offered only as illustrative, and in no way critical, issues that agencies may need to consider as they respond to various pressures of litigation, funding, and substantive program management needs.

Questionnaire responses indicate wide variance in adoption of electronic document management systems and equally wide variance in application of electronic document management to rulemaking records and administrative records for judicial review. Rulemaking record compilation, administrative record filing with a court, and administrative record service on litigants do not appear to be the driving forces behind electronic document management systems, but may be the beneficiaries.

4. Indexing the Rulemaking Record

Only a few agencies appear to index a rulemaking record as it is developed, primarily for internal purposes.²⁷¹ Most agencies develop a formal index only when necessary for internal or judicial purposes.²⁷² Indexing of internal documents can be highly labor intensive, even if a full electronic document management system is in place, because important characteristics of each document must be identified and documented.

In complete electronic document management systems, metadata ascribed to each document, carefully planned and selected, may create a real-time functional equivalent of such indices at the

²⁶⁹ FDMS and *Regulations.gov* grew out of the public docket requirements of the E-Government Act, Pub. L. No. 107-347, § 207(d)(1). EPA, in Mar. 2012, “turned-on” the FDMS Records Module, allowing FDMS to serve as a NARA-recognized system of records. Since then, FDMS has begun updating records schedules and internal business practices that will allow EPA to utilize this system in a robust fashion. A number of other agencies have turned on the records module, including the Architectural and Transportation Barriers Compliance Board (ATBCB), Bureau of Ocean Energy Management (BOEM; Interior), Bureau of Safety and Environmental Enforcement (BSEE; Interior) Corporation for National and Community Service (CNCS), Consumer Product Safety Commission (CPSC), Department of the Interior, Federal Highway Administration (FHWA; Transportation), National Archives and Records Administration, and Office of Natural Resource Revenue (ONRR; DOI). Email to author from Eric Schultz, Program Officer, EPA Docket Center, US Environmental Protection Agency (Jan. 22, 2013) (copy on file).

²⁷⁰ *Id.*

²⁷¹ See, e.g., IRS*R (“Legal file is indexed as it is developed. Administrative record is indexed during development and in consultation with DOJ”); FERC*R. MSHA*R. See also STB*R.

²⁷² EPA*R; FDIC*R; DOT*R; VA*R; PTO*R; NOAA*R; WHD*R; ETA*R; EPAADP, *supra* note 111, at 11.

time of document creation.²⁷³ *Regulations.gov*, as the repository for most public comments on proposed rules, provides a simplified example. Upon creating a public rulemaking docket in FDMS, later to be released to *Regulations.gov*, agency managers must ascertain a docket number, and associate that docket number with the Regulatory Identification Number (RIN), any internal docket number, the name of the rulemaking, the deadline for submitting comments, and other specific information. The agency attributes, as metadata, this information to a proposed rule and each of the supporting documents submitted for public review and comment. Such data elements can form the basis for finding, organizing, and indexing the information contained in the electronic docket.

Certain indices, particularly chronological indices, are a natural outgrowth of the compilation process, particularly in electronic recordkeeping where saving a file automatically imbues the file with attributes such as the date (and often time) saved. In general, however, agencies do not appear to have standardized their indexing processes and the capture of related information about records. A notable exception is the IRS, which has taken a step in that direction by formalizing at least a framework for a standard index for its legal file.²⁷⁴ The CFTC and IRS (for its legal file) use different typologies of documents,²⁷⁵ while the Federal Energy Regulatory Commission (FERC) utilizes standardized indexing fields for defined document classes and types, and FTC and Mine Safety and Health Administration (MSHA) characterize document types by phase of the rulemaking process.²⁷⁶

The public availability of agency rulemaking record indices, prior to publication of the index of the administrative record for judicial review on PACER, is variable. Some agencies simply do not make decision or rulemaking record indices available except as filed in court in the event of litigation,²⁷⁷ but others make at least some portion of rulemaking record indexes available specifically upon request²⁷⁸ or only through FOIA,²⁷⁹ or on the agency's website, either generally²⁸⁰ or in specific instances,²⁸¹ or only through public inspection.²⁸² Notably, public indexes may not signal the existence of non-public or non-docket information that is also a part of the rulemaking record.

²⁷³ "Metadata" is underlying source and characterization data of the material in the system, and may include the origins and recipients, creation date, title, access, revision, privilege data, and complete audit trails, among other matters, for each document. With some practical adjustment, electronic record management systems could (theoretically) automatically generate certified administrative records and privilege logs (whether for FOIA or certified administrative record purposes) for agency review.

²⁷⁴ IRS*R. IRS Form 9506 provides the standard index for its legal file. IRS, *Published Guidance and Other Guidance to Taxpayers*, <http://www.irs.gov/irm/part32/index.html> (last visited Dec. 14, 2012) (Exhibit 32.1.9-3 to Chief Counsel Regulation Handbook).

²⁷⁵ Compare CFTC*R with IRS*R.

²⁷⁶ FTC*R; See 2003 Telemarketing Sales Rule Amendments, 16 C.F.R. part 310 (available at <http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/index.shtm> (last visited Feb. 1, 2013) (index). MSHA*R.

²⁷⁷ DOT*R; NOAA*R.

²⁷⁸ STB*R (available on request for a nominal fee). This appears to be a FOIA-related process.

²⁷⁹ EPA*R.

²⁸⁰ FDIC*R; FERC*R; ITC*R (through EDIS).

²⁸¹ FTC*R; 2003 Telemarketing Sales Rule Amendments, *supra* note 276.

²⁸² MSHA*R; EBSA*R.

Whether privileged documents are included in an administrative record raises additional issues. If, by definition, privileged documents are included in an administrative record, then the index of the record should theoretically include a privilege index; if, on the other hand, privileged documents, by definition, are excluded from the administrative record, it might be “unfair” to expect an agency to provide a privilege log of documents that are not in the record.²⁸³

The issue arises, however, because of the crossover from FOIA litigation of the “Vaughn” index. A *Vaughn* index briefly describes each withheld record and explains why the record was withheld.²⁸⁴ The purpose of the *Vaughn* index is to permit adequate adversarial testing of an agency’s claimed right to an exemption from disclosure. The index reflects a partial disclosure of information to permit such an informed challenge, because those who contest denials of FOIA requests are necessarily at a disadvantage as they have not seen the withheld documents. This is likewise true in administrative record litigation – a party cannot challenge the exclusion of documents possessed by an agency if the party does not normally know that the agency possesses them.

Some agencies have developed policies that affirmatively provide for the creation of privilege logs for administrative records.²⁸⁵ DOJ’s initial ENRD guidance was quite clear in its guidance to agencies that:

If documents and materials are determined to be privileged or protected, the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they are being withheld.²⁸⁶

As noted above, however, the Assistant Attorney General for ENRD has clarified that ENRD would defend the contrary position in litigation.²⁸⁷

A request for rulemaking record documents under FOIA, denied as to privileged documents and given a legal challenge, requires the creation of a *Vaughn* privilege index.²⁸⁸ An agency may acquire the greatest efficiencies by considering adoption of an index style that fits the needs of the administrative record for judicial review, the privilege index, and prospective *Vaughn* indices that might be prepared in response to FOIA litigation. Such a log might identify the documents,

²⁸³ *Tafas v. Dudas*, 530 F. Supp. 2d 786, 801 (E.D. Va. 2008), citing *Blue Ocean Institute v. Gutierrez*, 503 F. Supp. 2d 366, 372 n. 4 (D.D.C., 2007). Courts have declined to require an agency to produce a privilege log without a substantial showing similar to that required to supplement the record or adduce discovery. *See Nat. Ass’n of Chain Drug Stores v. Department of Health and Human Services*, 631 F. Supp. 2d 23 (D.D.C. 2009). *See* sections IV.D, IV.E.

²⁸⁴ *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

²⁸⁵ DOIS, *supra* note 142, at 12–13.

²⁸⁶ *See* U.S. ATTY. BULL., *supra* note 153, at 9; NOAA*R (To the extent that such documents were considered by the agency in reaching the decision, they are considered part of the Administrative Record, but may be indexed on a “Privilege Log.” The Privilege Log, but not the documents, are then included in the Administrative Record prepared for the Court.); NOAAAG, *supra* note 124, 9 – 11).

²⁸⁷ Tenpas Memorandum, *supra* note 153.

²⁸⁸ *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). *Vaughn* indexes are now a fully embedded FOIA process.

reflect withholding, and state the basis for withholding in sufficient detail for each document withheld to substantiate the claim of privilege or protection.²⁸⁹

Few agencies commit resources to advance indexing of privileged documents. The CFTC and ITC are worth noting as exceptions, both index privileged documents on full electronic document management systems in the routine management of all documents.²⁹⁰ While FDMS provides indexing capacity across the government, the mid-level security for FDMS poses a substantial concern that must be addressed by agencies considering use of the FDMS system for managing privileged or other sensitive documents.²⁹¹

D. Electronic Material

Electronic material – from the World Wide Web, computer programs and models, databases, electronic documents, and in other forms – form a growing component of federal rulemaking that may create easily overlooked issues for an agency’s rulemaking record. A simple example is the increasing use of the Internet as a source of information. NOAA suggests retaining a hard copy of any material accessed from the World Wide Web:

[T]he Administrative Record must contain a hard copy of the information presented on the relevant web pages, including the internet uniform resource locator (URL) and the date that it was downloaded, to ensure that the information relied on is preserved in the event that the web site content changes.²⁹²

As NOAA points out, the date of download is necessary to ensure that the information considered is the information captured during the time of consideration. Timely preservation is necessary because web pages and specific content may be evanescent and post-decision capture may be impossible.

Electronic resources can take forms that are substantially more complex. Computer models, accounting software, off-the-shelf computer programs used to analyze data (*e.g.*, IBM’s SPSS 18), spreadsheets, etc., might be made available to the public during a public comment period on at least some limited basis, agencies must also be concerned with presentation of this material in an administrative record for judicial review if the rule is challenged. While the source of data used in such resources, and perhaps the data itself, may be made publicly available, agencies need also to be concerned with whether the computer programs themselves must somehow be included in the rulemaking record for decision-making, in the administrative record for judicial review, or otherwise be made available to the public. Many agencies do not have standard practices for

²⁸⁹ NOAAG, *supra* note 124, at 14. See Memorandum from President Barack Obama, to the Heads of Executive Departments and Agencies, The Freedom of Information Act (FOIA), 74 Fed. Reg. 4683 (Jan. 26, 2009); Memorandum from Eric Holder, US Attorney Gen., to the Heads of Executive Dep’ts & Agencies, The Freedom of Information Act (FOIA) (Mar. 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

²⁹⁰ ITC*R; CFTC*R.

²⁹¹ Schultz E-mail, *supra* note 240.

²⁹² NOAAG, *supra* note 124, at 8. By way of illustration, some World Wide Web hyperlinked references (searching using Google, Bing, and Yahoo search engines) to Federal agency policies on the development of administrative records that no longer exist on the web generate a “Page Not Found” response when accessed.

handling such resources, but rather consult internally on this type of issue on a case-by-case basis.²⁹³

Agencies have devised a variety of ways to manage malleable electronic resources that permit varying levels of public access. Some agencies may not provide direct access to electronic resources, but might, for example, include a printout from a computer model in the electronic record to facilitate public access to the underlying data.²⁹⁴ Another approach is to store malleable electronic resources on, for example, a flash drive and to provide physical access to the drive in the docket room²⁹⁵ and such an electronic device might be an exhibit for purposes of the rulemaking record or administrative record for judicial review. More robust electronic information management systems may be able to store models, for example, as a digital file, with a record of data used by the model at a particular point in time and a system to track changes in model data.²⁹⁶ One agency has noted that its rulemaking records have contained malleable data in the past: when placed on an agency's website, the data is "locked down" in two senses: (1) no unauthorized person can modify data on the agency website due to the agency's general security and firewalls, and (2) any further modification would trigger electronic monitoring and would be known to the agency.²⁹⁷ These practices show that agencies can and should consider the malleable nature of electronic resources used in agency decision-making to ensure that the rulemaking record accurately reflects the information that was before the agency at the time of its decision. Certifying that type of information to a court poses greater challenges that might only be resolved by negotiation.

E. Protected Resources

Some material may present unique recordkeeping issues because, unlike with privileged documents, agencies may not waive requirements to protect information contained therein. Some obvious examples revolve on highly protected governmental information, but the vast majority of protected information issues arising in rulemaking revolve around copyright, personal information, and confidential business information. Each agency must consider also whether information must be managed to permit or restrict access to specific personnel, potentially including a record custodian.

1. Copyright

Agency analysis in the development of proposed and final rules, with increasing frequency, involves consideration of material that is protected by the complex law of copyright.²⁹⁸ In addition, agencies may incorporate by reference standards that have been promulgated by private

²⁹³ *E.g.*, NOAA*R; FDA*R.

²⁹⁴ OSHA*R. OSHA explains that when it submits such exhibits to the record, it also submits electronic reports from those databases to facilitate public access to the underlying data. The electronic files forming those exhibits are not currently available through FDMS.gov or regulations.gov, because the files are from legacy exhibits, and must be obtained by contacting the Docket Office. OSHA replied that it should be possible going forward to enable public access to such files.

²⁹⁵ DOT*R; EPA*R. Both DOT and EPA note that they store these materials on portable hard drives or flash drives for public access in their docket rooms. EPA further notes that as it moves to cloud storage space, these materials may be more accessible.

²⁹⁶ CFTC*R. The timestamp provides an element of an audit trail, recording all accessions to a file or subfile, including changes to the file or subfile.

²⁹⁷ *Id.* The agency's knowledge of any attempted manipulation of data is critical to data integrity.

²⁹⁸ *See generally* 17 U.S.C. § 101 ff; D. NIMMER, NIMMER ON COPYRIGHT (2012).

standard developing organizations that are copyrighted by those organizations.²⁹⁹ In either instance, the agency may be prohibited from “publishing” the material absent consent from the copyright owner.³⁰⁰ In short, copyrighted works may not be reproduced without consent of the copyright holder or payment of royalties and there is no exception to this rule for government agencies.³⁰¹

Agencies must decide how to include copyrighted background material in the rulemaking record, in an administrative record for judicial review, and in the public rulemaking docket. While the rulemaking record is internal to the agency, the administrative record filed with the court, or reproducing copyrighted work on an electronic docket pose different issues. Submission of copyrighted information by the public for consideration by the agency is a subset of this issue. Several agencies noted that they can manage copyrighted material in comments on FDMS, restricting public availability of such materials on *Regulations.gov*.³⁰²

NOAA generally includes all documents cited in its rulemaking within the rulemaking record, but cautions that this does not extend to all documents cited by someone else (*e.g.*, in public comments).³⁰³ When the public rulemaking docket contains copyrighted material, OSHA inserts a *Regulations.gov* entry that includes a banner page indicating that the user must contact the docket office to view the copyrighted material.³⁰⁴ The Department of Transportation (DOT) follows a similar practice.³⁰⁵ The FDA includes indicators of copyrighted material in the public rulemaking docket, such as a reproduction of the title page and cover page of a copyrighted book in portable document format, but retains the entire work in hard copy form.³⁰⁶ Each of these methods appears to present a reasonable means for inclusion of copyrighted material in a record without infringing upon the copyright holders rights to royalties.

The inclusion of copyrighted materials in an administrative record for judicial review may also require agency attention. As discussed later in this report, normal filing of documents with a court is now done through electronic means and most documents become available for public

²⁹⁹ See generally Administrative Conference of the United States, Recommendation 2011-5, Incorporation by Reference (Adopted Dec. 8, 2011), 77 Fed. Reg. 2257 (Jan. 17, 2012).

³⁰⁰ FDA particularly noted that use of copyrighted material posed continuing problems. FDA*R. NOAA also points out that scientific literature – *e.g.*, journals or texts – and other material must often be cited. NOAA*R.

³⁰¹ See generally, Memorandum from Randolph D. Moss, Acting Assistant Attorney Gen., Office of Legal Counsel, Dep’t of Justice, to the Gen. Counsel, Dep’t of Commerce, Whether and under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing “Fair Use” under Section 107 of the Copyright Act of 1976 (Apr. 30, 1999) available at <http://www.justice.gov/olc/pincusfinal430.htm>.

³⁰² EPA*R; MSHA*R.

³⁰³ NOAAAG, *supra* note 124 at 8.

³⁰⁴ OSHA*R. See also EBSA*R (does not post, but refers to reading room).

³⁰⁵ DOT*R.

³⁰⁶ FDA*R. FDA also suggested that best practices should include defining a federal agency-wide practice with respect to copyrighted materials and a determination of what is considered “fair use” to publish in a rulemaking. FDA*R. FDA provides a list of references on its docket for a proposed rule and direct access to non-copyrighted material, and with the notation of availability of access to hard copy of copyrighted material in its reading room only. See, *e.g.*, Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls For Human Food, 78 Fed. Reg. 3,646 (Jan. 16, 2013).

inspection on the Public Access to Court Electronic Records (PACER) system. Inclusion of an entire copyrighted work (or even a substantial part beyond fair use) in an electronic filing would permit the public to view and secondarily copy the material by only paying PACER fees, if any. A technique that seems to have gained some favor in litigation has the agency moving to file the documents separately from PACER, providing a full (purchased or licensed) copy to the court by manual submission, and serving a copy on opposing counsel. This technique limits both the agency's exposure and expense.

2. Personal Information

Protections for personal privacy information, whether under the Privacy Act³⁰⁷ or other statutes or voluntarily adopted by an agency,³⁰⁸ must be considered in rulemaking and administrative recordkeeping.³⁰⁹ Agency responses indicated not only an awareness of privacy issues, but also a firm commitment to ensuring that personal identifiable information is not released to the public without authorization.

A number of agencies specifically advise potential commenters that information provided in response to a notice of proposed rulemaking will be made public.³¹⁰ While most agencies post public comments directly, or permit automatic posting, on *Regulations.gov* or their own electronic dockets, some agencies, particularly those agencies predominantly engaged in transactions with individuals, first affirmatively strip comments of any personally identifiable information.³¹¹ Agencies otherwise will redact information that would violate the Privacy Act or other privacy statutes to comply with those laws.

3. Confidential Business Information

Confidential business information (CBI) or trade secrets³¹² provided to the agency during rulemaking proceedings, or gathered during ordinary enforcement actions or agency activities but

³⁰⁷ 5 U.S.C. § 552a. *See* 16 C.F.R. § 4.10 (FTC rules of practice).

³⁰⁸ OMB has suggested that agencies have discretion to implement more stringent protections for Personal Identifiable Information than the Privacy Act specifically requires. *See* OMB Memorandum M-07-16, Safeguarding Against and Responding to the Breach of Personally Identifiable Information (May 22, 2007).

³⁰⁹ *E.g.*, Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d – 1320d-8. *See generally*, Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act, 78 Fed. Reg. 5,566 (Jan. 25, 2013).

³¹⁰ *E.g.*, EPA*R; DHS*R; FTC*R. The Regulations.gov comment submission portal contains the specific warning: “Any information (*e.g.*, personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the Privacy and Use Notice, the Federal Register notice on which you are commenting, and the Web site of the Department or Agency.” REGULATIONS.GOV, *Privacy Notice*, www.regulations.gov/#!privacyNotice (last visited Feb. 4, 2013).

³¹¹ REGULATIONS.GOV, FAQ, *available at*: <http://www.regulations.gov/#!faqs> (last visited Mar. 10, 2013). *E.g.*, SSA*R; EBSA*R. EBSA also removes profanity. Some agencies have experienced insertion of obscene material and both profanity and obscenity may raise other issues.

³¹² *See* 18 U.S.C. § 1905. Parenthetically, it is worth noting that interagency disclosure of certain trade secrets is “authorized by law.” *See* Memorandum for the General Counsel, Office of Federal Housing Enterprise Oversight, Applicability of the Trade Secrets Act to Intragovernmental Exchange of Regulatory Information, from Randolph D. Moss, Acting Assistant, Attorney General, Office of Legal Counsel,

considered in a rulemaking on a similar or related subject, may pose a more significant problem for agencies. As a general proposition, executive agencies are instructed to establish a framework for designating, marking, safeguarding, and disseminating information designated as Controlled Unclassified Information (CUI), which includes confidential business information.³¹³ Historically, agencies have been more concerned with FOIA disclosures of CBI, though the use of CBI in rulemaking deserves attention.³¹⁴

Several agencies that regulate financial markets, trade and other technical areas in which CBI issues commonly arise have developed rules or guidance specifically for handling CBI.³¹⁵ These agencies may have introduced protections for CBI to assist in the acquisition of information necessary for developing regulations. Some agencies, such as the FTC, have specific statutory mandates to protect trade secret and commercial or financial information that is privileged or confidential.³¹⁶ Agency enforcement data is another example of information that may require agency protection from public disclosure.

Agencies do specifically caution the public that submission of confidential business information should not be included with public comments, some by regulation,³¹⁷ including specific procedures for requesting a protective order before the agency,³¹⁸ and some by notice with the proposed rule.³¹⁹ Treatment of CBI within the public rulemaking docket may vary. For example, DOT stated that they would notice the receipt of confidential business information on the public rulemaking docket, but maintain that information separately.³²⁰

Experience, at least by the author, has shown that submission of CBI may arise at any time and in contexts that may not be expected. Accordingly, agencies would be well advised to consider this possibility in advance of an actual submission.

Department of Justice (April 5, 1999), available at <http://www.justice.gov/olc/ofheoopfinsent.htm> (last visited Jan. 28, 2013).

³¹³ DHS*R; Exec. Order No. 13,556, 75 Fed. Reg. 216 (Nov. 4, 2010); Memorandum to the Heads of Executive Departments and Agencies, Designation and Sharing of Controlled Unclassified Information (CUI), 75 Fed. Reg. 68,675 (Nov. 4, 2010).

³¹⁴ See H. E. Kilgore, *Signed, Sealed, Protected: Solutions to Agency Handling of Confidential Business Information in Informal Rulemaking*, 56 ADMIN. L. REV. 519 (2004) [hereinafter Kilgore].

³¹⁵ CFTC*R; FTC*R; ITC*R; FERC*R. See also 18 C.F.R. §§ 388.107, 388.112 (FERC rules). EPA's implementing regulations and other statutes impose stringent procedures for the use and availability of information claimed to be CBI. See, e.g., 33 U.S.C. § 1318(b); 40 C.F.R. §§ 2.204, 2.205, 2.302(g).

³¹⁶ FTC*R (citing 15 U.S.C. § 46(f), and 16 C.F.R. §§ 4.9 - 4.10 (establishing procedures for seeking confidential treatment of privileged or confidential commercial or financial information submitted to the FTC). Kilgore, *supra* note 314, provides a more thorough exposition

³¹⁷ EPA*R (citing 40 C.F.R. § part 2, subpart B); FTC*R (citing FTC rule 4.9 – 4/10).

³¹⁸ STB*R (citing 49 C.F.R. § 1104.14, and noting that filers may provide a redacted version of the submission for public docketing). Additionally, DOT noted 14 C.F.R. § 11.35(b) (Federal Aviation Administration practice). DOT*R.

³¹⁹ EPA*R; PTO*R.

³²⁰ DOT*R. DOT further notes that the information is kept in a separate file, and if a copy of the material is requested, the request is treated as any other request under the Freedom of Information Act, 5 U.S.C. § 552.

F. Closing and Retiring a Rulemaking Record.

1. Closing the Record

As a general proposition, the record closes at the time a final rule is signed or published.³²¹ Judicial decisions generally appear to impose a “stopping” rule that the administrative record “contains the materials compiled by agency that were before agency *at the time the decision was made.*”³²² This temporal limitation is important for two reasons – it ends the compilation (generally) of the record and it presumes that there is a specific decision event. Assessing whether information was “before” an agency decisionmaker may also include a cognitive element, not just a temporal one.

The rulemaking record should remain open so long as the rule is pending before the agency. Nonetheless, some agencies recognize that closing the record is not as simple as closing a file folder when a rule is signed.³²³ For example, an agency may choose to include in the administrative record for judicial review post-promulgation material that “bears directly upon the plausibility of certain predictions made by the administrator in promulgating the Regulations.”³²⁴ This is not to say, however, that a deficient record can be “cured by creating new supporting documents after the decision-maker has signed the decision.”³²⁵

³²¹ A major purpose of record cut-off provisions of 42 U.S.C. § 7607, for example, was to ensure that rulemaking process would be reviewed on basis of data and reasoning that were available to EPA at time decision was being made; date of promulgation of rule, is the date upon which rule is signed and released to public, not the date of publication in Federal Register. *American Petroleum Institute v Costle* 609 F.2d 20 (D.C. Cir. 1979). *See also* EPA*R; EPAADP, *supra* note 111, at 10, 7n.7; 21 C.F.R. § 10.3(a) (FDA); FDA*R; CFTC*R; VA*R; MSHA*R.

³²² *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), and *Env'tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981)); *Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 546 n. 4 (D.C. Cir. 1995) (noting with approval that the “whole record” contained all materials “pertaining to the [challenged] regulation”). Another court’s view was similarly restricted “to the administrative record as it existed at the time of the agency’s decision.” *Eugene Burger Mgmt. Corp. v. U.S. Dep't. of Hous. & Urban Dev.*, 192 F.R.D. 1, 4 (D.D.C. 1999).

³²³ The Solicitor of the Interior memorializes this point in policy. DOIS, *supra* note 142, at 4. *See also* EPAADP, *supra* note 111, at 10; EPA*R. EPA notes that some changes occur after signature: “clerical errors that do not affect the substance of the rule can be corrected without review and approval by the Administrator but substantive changes must be approved by the Administrator.” EPAADP, *supra* note 111, at 10 n.7. The author’s experience with several agencies illustrates slightly more expansive post-signature amendments. Historically, post signature changes have included planned removal of paginated tables of contents provided for the signatory and other reviewers’ convenience, planned updating of tabular information that does not substantive affect the decision, and correction of any found clerical errors. Also notable here is the long-standing and fully accepted practice that the editors at the Office of the Federal Register (OFR) may suggest, and subordinate agency officials may accept, technical corrections relating to OFR policies and printing procedures.

³²⁴ *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729, n. 10 (D.C. Cir. 1974). *See also* *Am. Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976) (“After promulgation, events indicating the truth or falsity of agency predictions should not be ignored.”). Some courts have allowed “extra-record evidence” in “cases where evidence arising after the agency action shows whether the decision was correct or not.” *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (*dicta*). This line of cases bears on whether the agency’s decision was a reasonable one in light of its ability to predict future events and thus should be limited to those rules that are predictive in nature.

³²⁵ NOAAG, *supra* note 124, at 11.

When the agency has made its decision, NOAA recommends appointment of a record custodian, who is to issue a memorandum alerting the appropriate agency personnel requesting that they compile and submit all documents associated with the agency decision.³²⁶ This compilation process should necessarily include a record of the compilation process, personnel, searches, etc.³²⁷

2. Presentation to the Decisionmaker

Invariably, the agencies suggest that they provide the regulatory text and preamble to the signatory, but beyond this minimum presentation practices vary widely. Some agencies may, in certain circumstances, present the entire record to the decisionmaker(s). Other agencies (or the previously noted agencies in other circumstances) include public comments and / or specific analyses, such as the Regulatory Impact Analysis under Executive Order 12,866, an Initial or Final Regulatory Impact Analysis under the Regulatory Flexibility Act, or privacy impact assessments under the Privacy Act. Nearly all agencies suggested that some form of memorandum, executive summary, briefing or other form of presentation summary is provided to the decisionmaker. A few may provide the decisionmaker with as little as the rule and preamble, together with an explanatory memorandum. A common, though often unstated, reality is that the decisionmaker may call upon his or her subordinates for any part of the rulemaking record at any time.³²⁸ No pattern appeared from the agency questionnaire responses, but the response indicates that the agencies do not present the entire rulemaking record to a decisionmaker, except in rare instances.

Time to Sign

The author's experience suggests that the amount of information reviewed is inversely proportional to the level at which the decision is made, *i.e.*, the higher the decision is made in the organizational pyramid, the more succinct the presentation; lower decisionmakers (often the record creator in adjudications) review more information. Thus, some organizations that are decentralized may present more information to an Assistant Secretary if that is the delegated signatory than to the Secretary if the Secretary has not delegated signatory authority, but this is not always the case. What is commonly called a "signature package" may include different documents depending on not only the structure and delegations of the agency, but also the preferences of the signatory.

All agencies probably use some system to track the movement of a signature package through whatever structure an agency utilizes (*e.g.*, an IQ system) that does not add substantive information to the presentation; some IQ systems may track notations of agreement by

³²⁶ *Id.* at 12.

³²⁷ *Id.* at 12.

³²⁸ As DOJ pointed out:

The response to this question varies depending on the specific facts and circumstances of the informal rulemaking proceeding at issue. The decisionmaker is provided any and all materials necessary to support the decisionmaker's informed, final decision. In some circumstances, the entire administrative record may be provided at the outset, while in other circumstances, the decisionmaker may initially be provided a portion of the record along with summary memorandum describing other portions that are then provided as requested or as appropriate under the circumstances.

DOJ*R.

subordinate officials while other systems may not. The author is aware of both types, but not aware of any animating distinction. Some “cover sheets” are highly detailed; others highly summary.

Questionnaire responses from several multi-member regulatory commissions suggest that more information is provided to the commission members, or is made available to commissioners, than in most executive agencies. Information is typically available to these decisionmakers through a document management / rulemaking record system (including the public rulemaking docket).³²⁹ As the CFTC pointed out:

One of the benefits of a web-based [rulemaking] record is that, throughout the rulemaking, our Commissioners and their legal assistants are able to access, read, and monitor the rulemaking record. By the time of the vote, the complete [rulemaking] record is available to them.³³⁰

The availability of the rulemaking record to the decisionmaker at any given moment thus may depend on the sophistication and capabilities of the agency’s document management system.

3. Retiring the Rulemaking Record

The final agency decision is not the end of a rulemaking record’s life cycle. Even the “non-judicial review” disposition of rulemaking records is important because agency, judicial, and public interest in the record of administrative decision-making continue to exist. Appropriate disposal of agency documents has historically not met these interests.³³¹

Agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA approval to control the accumulation of all agency records, not just rulemaking records of final agency rulemaking discussed here. These schedules provide for the timely transfer into the National Archives System of historically valuable records and authorize eventual disposal of all other records after the agency no longer needs them to conduct its business. Federal records may not be destroyed without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government’s activities, and whether or not such records have historical or other value.³³²

NARA guidance specifically suggests that a wide range of core agency documents – including legal opinions, legislative proposals, and precedent decisions – should be maintained as

³²⁹ *E.g.*, STB*R; ITC*R; FTC*R; CFTC*R; FERC*R. Some suggested slightly less, such as the FDIC, whose staff submits written recommendations to the Board of Directors and makes presentations in person at open meetings of the Board of Directors.

³³⁰ CFTC*R.

³³¹ *See* Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Managing Government Records, 76 Fed. Reg. 75,423 (Dec. 1, 2011); Memorandum for the Heads of Executive Departments and Agencies and Independent Agencies, Managing Government Records Directive, from Jeffrey D. Zients, Acting Director, Office of Management and Budget, and David S. Ferriero, Archivist of the United States, National Archives and Records Administration (Aug. 24, 2012), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf> (last visited Feb. 5, 2013).

³³² *See generally* National Archives and Records Administration, *Records Managers*, *available at* <http://www.archives.gov/records-mgmt/laws/> (last visited Feb. 5, 2013).

permanent records.³³³ The records of consideration of promulgation of a regulation – as law – would seem to deserve the same consideration. Many federal records disposition schedules intimate that the permanent records should be transferred to NARA five years after the conclusion of proceedings. The statute of limitation for direct review of most rulemakings, however, is six years.³³⁴ The potential for the need to recall a previously transferred rulemaking record file from NARA for certification to a court may be small but may adversely affect timely disposition of litigation. Agencies may wish to consider a longer retention cycle for rulemaking records before transfer to NARA.

IV. Judicial Review of Administrative Records

Judicial review of a final federal agency rules may be had in either the court of appeals or the district court depending on jurisdictional and procedural issues. Review in the district court, however, is much more like an appellate function because the “facts” normally tried are generally established in the certified administrative record and largely focused through the motions practice lens of summary judgment.³³⁵ A plaintiff in a district court or petitioner for review in a court of appeals effectively seeks a judgment invalidating the agency’s final rule based on the certified

³³³ NARA, DISPOSITION OF FEDERAL RECORDS: A RECORDS MANAGEMENT HANDBOOK, DISPOSITION OF FEDERAL RECORDS, 70 – 71, AND APPENDIX C. 161 – 167, available at <http://www.archives.gov/records-mgmt/pdf/dfp-2000.pdf> (last visited Oct. 20, 2012). NARA advises that an agency is responsible for assessing legal value of documents, and provides:

Examples of records with legal value include formal decisions and legal opinions; documents containing evidence of actions in particular cases, such as claims papers and legal dockets; and documents involving legal agreements, such as leases, titles, and contracts. They also include records relating to criminal investigations, workers' compensation, exposure to hazardous material, and the issuance of licenses and permits. Still other examples include records relating to loans, subsidies, and grants; entitlement programs such as food stamps and social security; and survivor benefits in Government pension and other programs.

Id. at 71. The guidance does not reference records relating to the promulgation of legislative rules.

³³⁴ 28 U.S.C. § 2401(a).

³³⁵ *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (“[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law.”). One anomaly deserves attention: The summary judgment rule, FED. R. CIV. P. 56, serves as the common *mechanism* for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review. D.C. CIR. RULE 7(m) (motions). The certified administrative record normally establishes the “material facts” insofar as a party seeks a determination that a rule is in violation of law under any APA standard; “[t]he entire case is a question of law” and the “complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion[s] to be drawn about the agency action.” *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Some judges have pointed out the anomaly of styling a motion for “summary judgment” when the pleadings more accurately seek the court’s review of an administrative decision and the proper denomination is a “motion for judgment on the record” because “the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *University Medical Center, Inc. v. Sebelius*, 856 F. Supp. 2d 66, 76 (D.D.C. 2012) (Judge Bates) (citing *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985)). The rules of the United States Court of Federal Claims make this much clearer. *See* RCFC 52.1(c).

administrative record.³³⁶ The courts limit the review “to the record actually before the agency . . . to guard against courts using new evidence to ‘convert the ‘arbitrary and capricious’ standard into effectively de novo review.”³³⁷

The process of certification, how the administrative record for judicial review is actually handled, the judicial presumption of the administrative record’s regularity with challenges to that presumption, and the application of remedies in “record” cases pose significant issues for agencies, litigants and the courts. Many of the issues discussed here reflect the adaptation of the existing rules of procedure to the rapidly changing electronic environments of agency and court practice.

A. Certification of the Administrative Record for Judicial Review

1. Preparation of the Administrative Record for Judicial Review

Whether historically in paper form or contemporaneously in electronic form, certification of the administrative record for judicial review has necessarily included a judgment on the organization of the record for filing, conforming an index to that organization, the ministerial step of sequentially paginating the documents for simplified citation, and conforming the index to that pagination.³³⁸ These functions are common but not universal and local requirements and negotiated stipulations may alter the common preparation. Documents are routinely filed with the court in portable document format (.pdf) through the court systems electronic case management and filing system. Courts not infrequently accommodate filing of large administrative records on separate media.³³⁹

³³⁶ The certified administrative record serves functions that go beyond the presentation of evidence considered by the agency. The D.C. Circuit has specifically pointed to the certified administrative record as a facial basis for structuring whether a petitioner or appellant has constitutional standing to challenge the agency action. D.C. CIR. R. 28(A)(7). *See* *Ams. for Safe Access v. Drug Enforcement Admin.*, No. 11-1265, 2013 U.S. App. LEXIS 1407 (D.C. Cir., Jan. 22, 2013).

³³⁷ *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009) (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000)).

³³⁸ The historical “Bates stamp” applied to paginate paper records has a similar function in portable document format (.pdf). The now universal case management / electronic case filing system (CM/ECF) utilized by the United States courts requires filing of documents in .pdf format. Size limitations on document size may vary. *See, e.g.*, CM/ECF-DC V5.1.1 (10mb maximum merge document size). The concept of certification was introduced to the Administrative Conference of the United States in its project on Legal Considerations in e-Rulemaking. *See* Administrative Conference of the United States, *Legal Considerations in e-Rulemaking*, <http://www.acus.gov/research-projects/legal-considerations-e-rulemaking> (last visited Mar. 26, 2012).

³³⁹ *See, e.g.*, *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation, & Enforcement*, 871 F. Supp. 2d 1312, 1315 n.1 (S.D. Ala. 2012) (“The summary judgment briefing is accompanied by an administrative record spanning more than 10,000 pages. That administrative record was not electronically filed, but was instead conventionally filed in the form of a DVD, which also included an index in an Excel spreadsheet containing hyperlinks to specific documents and segments of the record.”); *Chamber of Commerce v. NLRB*, No. 11-cv-2262, Doc. 28 (D. D.C. filed Feb. 28, 2012) (notice of filing by agency counsel; no separate certification; “notice of the filing in electronic copy on DVD-ROM of the certified rulemaking record concerning the promulgation of the Final Rule at issue in the above-captioned matter. The Board’s certification of the rulemaking record and an index of the rulemaking record are included in the electronic copy on the DVD-ROM of the Administrative Record.”); *Grunewald v. Jarvis*, No. 1:12-cv-1738, Doc. 11 (D. D.C. filed Nov. 30, 2012) (counsel for the United States notice of filing: Department of the Interior, National Park Service record; “... due to the volume of documents comprising the

Administrative records may be organized chronologically, or by subject, or a combination of both, such as by subject with a chronological sub-organization. The critical point is that the purpose of organizing an administrative record is to ease access to the material by individuals who are *not* familiar with the substance or content of that administrative record.³⁴⁰

Certification of an administrative record to a court by an executive agency represented by DOJ may involve significant communication between the agency and DOJ regarding the contours of the administrative record that it possesses and the requirements of a court's local rules and scheduling order³⁴¹ or standing order, as many agencies acknowledge.³⁴² Agencies with independent litigating authority (particularly independent agencies) are likely to file a certified administrative record through their individual General Counsel Offices, which may create a wider variety of practice in the preparation of administrative records for judicial review.³⁴³

The Federal Rules of Appellate Procedure provide that certified administrative records in review of certain final agency action may be amended by stipulation or the court may order a supplemental record.³⁴⁴ Amendment of a certified administrative record, however, poses a conceptual problem: once an agency official has certified to the best of his or her knowledge that the certified administrative record filed is the administrative record considered, other than to correct errors, a second such filing calls into question the validity of the first certification. The agencies and the courts do not appear to be troubled by this theoretical or conceptual problem, but

administrative record, and pursuant to LCvR 5.4(c), Federal Defendant is, ..., manually lodging with this Court a certified copy of the Administrative Record for the captioned case on DVD. The certification of ... is attached to this Notice as Exhibit 1. A PDF file of the record index is attached to this Notice as Exhibit 2. An additional index of documents excluded from the administrative record under privilege is attached as Exhibit 3. In addition, a copy of the DVD, which includes the record index, has on this date been transmitted to counsel for Plaintiffs by next business day delivery.”)

³⁴⁰ Numerous courts have been critical of certified administrative record organization and this criticism is not confined to rulemaking records. *E.g.*, *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 158 (3d Cir. 2004) (“We recognize the able District Court was presented with a confusing administrative record.”); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 13 (D.D.C. 2004) (“Let me just say at the outset that the administrative record in this case is one of the most confusing, jumbled records this Court has ever *seen*. Indeed, the only thing that is clear is that confusion abounds.”); *Nat. Res. Def. Council v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979); *Sierra Club v. Costle*, 657 F.2d 298, 410 & n.540 (D.C. Cir. 1981) (“We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages.”). *See also* *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1167 (D.C. Cir. 1995) (“Given the confusing administrative record – perhaps caused by the intersection of the FOIA actions and the contract announcements – and the interrelationship between the two legal questions, we think the preferable course is to remand so that we can have one considered and complete statement of the Air Force’s position on McDonnell Douglas’ claim.”).

³⁴¹ FED. R. CIV. P. 16(b).

³⁴² *E.g.*, EPA*R; IRS*R; DOT*R; DHS*R; VA*R.

³⁴³ Whether an agency has independent litigating authority and its attorneys file the certified administrative record directly may naturally create wider variance within the certification process because of the more diverse practices of agencies without the nominal oversight (and repetitive filings) by DOJ. Whether this diversity of litigating authority creates a burden on the courts or other issues is beyond the scope of this study.

³⁴⁴ FED. R. APP. P. 16(b). Although the rules technically apply to review of specific agency orders, 28 U.S.C. § 2112, the process is adaptable to petitions for review of rulemaking.

it raises questions regarding the presumption of regularity and may foster disagreements over supplementation. Careful agency planning can avoid converting this theoretical or potential problem into a litigation issue.

Moreover, agencies and litigants utilize a combination of rules to provide the court with the most convenient form of the administrative record for review.

2. The Certifying Official

Certification of the administrative record requires the certifying official to submit to the court an affidavit of completeness and correctness, and this function may be performed by a variety of individuals at a variety of levels. The certification affidavit may, depending on policy and court, include a description of the limitations on documents placed in the record.³⁴⁵ Certification is largely a ministerial function. The key to certification is that the certifying individual can swear to the compilation, completeness and correctness of the administrative record being certified, which may rely on the performance of subordinate officials.³⁴⁶

In some instances, appointees that manage the substantive program make the certification, while in other agencies career officials, such as the records management officer or the designated record custodian, perform certification. EPA, for example, assigns certification authority organizationally, recommending that the record be certified by the highest-level career manager with oversight responsibility for the action for which the record is developed.³⁴⁷ STB, on the other hand, delegates certification of the administrative record to their records management

³⁴⁵ See, e.g., *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 372 n.4 (D.D.C. 2007) (certified record eschews internal documents).

³⁴⁶ DOJ*R; The certification itself may clarify the content of the administrative record being certified. A recent SEC certification provided that, “[p]ursuant to Section 25(a)(2) of the Securities Exchange Act and Rule 17(b) of the Federal Rules of Appellate Procedure, the Securities and Exchange Commission (“Commission”) certifies that the record listed below includes all information considered by the Commission in formulating its Final Rule, Conflict Minerals, Release No. 34-67716 (Aug. 22, 2012), published at 77 Fed. Reg. 56,274 (Sept. 12, 2012), with the exception of materials readily available such as books, treatises, statutes, rules, cases, orders, Commission releases, no-action letters, and certain historical materials.” *Nat’l Ass’n of Mfr.s v. SEC*, D.C. Cir. No. 12-1422, Doc. No. 1408603 (Filed Dec. 6, 2012). Multiple certifications might be needed in joint agency actions. E.g., *Nat. Mining Assoc. v. Jackson*, No. 1:10-cv-1220, Doc. 54 (D.D.C. filed Apr. 1, 2011) (counsel for the United States notice of filing multiple administrative records); Doc. 54-1 (EPA certification of index; “the documents identified in the attached index constitute the administrative record that the [EPA] and the U.S. Army Corps of Engineers considered when they issued the ‘EPA/Corps of Engineers Enhanced Coordination Process for Pending Clean Water Act Permits Involving Appalachian Surface Coal Mining.’”); 54-3 (EPA certification of index; “the documents identified in the attached index constitute the administrative record that the [EPA] considered in connection with the application of the Multi-criteria Integrated Resource Assessment tool to its analysis of applications for ... permits ... associated with seventy-nine surface coal mining projects identified in a ... letter ...”).

³⁴⁷ EPA*R; EPAADP, *supra* note 111, at 12. See also DHS*R (FEMA Division Head with responsibility for the program); DOT*R (dual certification by function: “In addition to the certificate of authenticity provided by the U.S. DOT’s public docket office, the agency official in the office of primary interest assigned to compile the record will also certify it.”); NOAA*R (headquarters office certifications are signed at the office “Director” level; regional offices by the “Regional Administrator” generally). In all of the agencies responding, the certifying officer is a career appointee.

officer.³⁴⁸ Some agencies ensure certification of an administrative record at a higher level, such as by the agency's official record keeper for all purposes (*e.g.*, Executive Secretary).³⁴⁹

At the staff level, regulatory program directors also certify administrative records.³⁵⁰ This process may contribute to consistency and institutional understanding if the agency must certify multiple administrative records over time. Attorney certification, practiced by some agencies, may improve agency review of the administrative record because the responsible attorney is also an officer of the court and may understand more clearly the responsibility of certification.³⁵¹ Attorney certification, however, poses some risks that conflict of interest issues may arise if the scope of the certified administrative record is challenged.³⁵²

The variance in designation of the certifying official is not as significant as it might appear – for all but one agency respondent to the questionnaire; the certifying official appears to be a career appointee with either functional or organizational oversight of the development and compilation of the administrative record.³⁵³ Some combination of program, management, and legal participants in the regulatory process should naturally be consulted in the development and compilation of the administrative record and, given requisite knowledge or supervisory responsibility, variance within that team of who actually certifies does not appear to pose significantly problems. Potential attorney conflicts of interest present a notable exception.

B. Filing and Transmittal Rules and Practices of the Courts.

The transfer of an administrative record from the agency to a court in litigation depends, in large part, on the rules and practices of the court. The processes in the courts of appeals and district courts do not differ as much in judicial review of final agency action as the processes differ in routine litigation because both are acting in an appellate function. Manner of filing must serve two goals: (1) convenience of the court and the parties and (2) public availability. Notably, the courts' electronic filing system accommodates portable document format (.pdf) files, while *Regulations.gov* and other government electronic docket management systems may be able to accommodate varied original – or “native” – file formats.

1. District Local Rules and Practice

Plaintiffs not infrequently seek pre-enforcement judicial review of final rules in the United States District Courts, but few district courts hear significant numbers of such cases or have promulgated local rules to manage such cases. The United States District Court for the District of Columbia, where many such cases are filed, exempts administrative records from electronic filing, both generically³⁵⁴ and particularly in relation to portions that are difficult to reduce to an

³⁴⁸ STB*R.

³⁴⁹ FDIC*R; ITC*R; CFTC*R; FTC*R; FERC*R; MSPB*R.

³⁵⁰ VA*R (Director for Office of Regulation Policy and Management, in coordination with responsible staff attorney); OSHA*R (Deputy Director of OSHA Technical Data Center); MSHA*R (Director of the Office of Standards, Regulations, and Variances); WHD*R (Director, Division of Regulations, Legislation, and Interpretation).

³⁵¹ IRS*R; PTO*R.

³⁵² See U.S. ATTY. BULL. *supra* note 153.

³⁵³ The Department of Labor, Employment and Training Administration, notes records are certified by its Assistant Secretary, a political appointee. ETA*R.

³⁵⁴ D. D.C. LCvR 5.4(e)(1): “(A) exceed 500 pages (including administrative records and records of state court proceedings); or (B) are not in a format that readily permits electronic filing, such as large maps,

EM/ECF image for filing.³⁵⁵ For the most part, however, other district court rules and practices are silent on filing of a certified administrative record. Perhaps this is for the same reason that many agencies have not developed guidance on the compilation of administrative records – lack of need.³⁵⁶

Most independent agencies may certify records in a traditional manner,³⁵⁷ but at least two agencies have undertaken unique certification and filing systems that deserve note. The CFTC innovatively advocated for an internet-based administrative record by moving the United States District Court to permit it to designate the record held and organized on the CFTC website, with electronic links, as the certified administrative record.³⁵⁸ A second attempt to certify the index of its online administrative record was not successful.³⁵⁹ The district court declined and required the CFTC to file the full record, noting:

charts, video tapes, and similar materials; or (C) are illegible when scanned into electronic format; or (D) are filed under seal, may be filed in paper form.” (emphasis added). A Notice of Filing accompanies large documents which are filed in paper format. D. D.C. LCvR 5.4. The court routinely advises on EM/ECF limitations: individual .pdf files should not exceed 10MB in size (approximately 60 – 70 pages per scanned document scanned at 250-300 dpi (dots per inch)), which leads to separating records into parts as separate documents.

³⁵⁵ D. D.C. LCvR 5.4(e)(1)(B), (C). The concept of a joint appendix is also utilized in the district court. *E.g.*, *Nat’l Restaurant Assoc. v. Solis*, No. 1:11-cv-1116, Doc. 29 (D.D.C. filed Jan. 20, 2012) (Department of Labor index of joint appendix; “Pursuant to LCvR 7(n), Plaintiffs, in conjunction with Defendants, hereby submit to the Court the following Joint Appendix of ‘those portions of the administrative record that are cited or otherwise relied upon in any memorandum in support of or in opposition to’ Defendants’ Motion ... and/or Plaintiffs’ Cross-Motion”).

³⁵⁶ Exceptions, however, can be found. The local rules of the United States District Court for the Northern District of California provide:

In actions for District Court review on an administrative record, the defendant must serve and file an answer, together with a certified copy of the transcript of the administrative record, within 90 days of receipt of service of the summons and complaint. Within 28 days of receipt of defendant’s answer, plaintiff must file a motion for summary judgment pursuant to Civil L.R. 7-2 and Fed. R. Civ. P. 56. Defendant must serve and file any opposition or counter-motion within 28 days of service of plaintiff’s motion. Plaintiff may serve and file a reply within 14 days after service of defendant’s opposition or counter-motion. Unless the Court orders otherwise, upon the conclusion of this briefing schedule, the matter will be deemed submitted for decision by the District Court without oral argument.

N.D. Cal. Civil L.R. 16-5.

³⁵⁷ *E.g.*, FERC*R (record compiled from eLibrary docket sheets, certified by the Secretary of the Commission, and sent to the court).

³⁵⁸ Consent Motion Leave to File Index of Rulemaking Record in Lieu of the Record Itself , No. 11-cv-02146 (RLW), Dk. No. 28 (D.D.C. Feb. 29, 2012); Minute Order Granting Consent Motion, No. 11-cv-02146 (RLW) (D.D.C. Mar. 1, 2012). For convenience, the website referred by the CFTC is: CFTC, Index of Record for the Rule Regarding Position Limits for Futures and Swaps, *available at*: http://www.cftc.gov/LawRegulation/RulemakingRecords/rmf_111811 (last visited Mar. 10, 2013). *See also* *Int’l Swaps & Derivatives Ass’n. v. CFTC*, 2012 U.S. Dist. LEXIS 139788 (D.D.C. Sept. 28, 2012).

³⁵⁹ *In Investment Co. Institute v. Commodity Futures Trading Commission*, No. 1-12-cv-00612, the CFTC filed a consent motion to “file a Certified Index of the CFTC’s rulemaking record in lieu of the record itself” noting that “In addition, an advantage of this approach is that there is a public, web-based version of the CFTC’s full administrative record, not just the certified list, that is available to both the parties and to this Court, with descriptions of documents and hyperlinks to each document.” The CFTC also argued that this procedure was being utilized in *Int’l Swaps & Derivatives Ass’n. v. CFTC*, No. 11-cv-2146 (RLW),

Since the web-based version of the CFTC's full administrative record resides on the CFTC website and is subject to modification or change without the knowledge or consent of the parties or the Court, the Court orders the CFTC to file the Administrative Record in full on ECF to ensure the integrity of the Administrative Record.³⁶⁰

The CFTC points out that the website record must be “locked down” and cannot change without notice to, and perhaps approval of, the court.³⁶¹ The CFTC submitted that an important advantage of this approach is that it uses hyperlinks to actual record documents and is seamless.³⁶²

In both cases, counsel for the plaintiffs consented to the motion and the certified administrative record was not extensive.³⁶³ Neither case, moreover, focused on the content of the administrative record or whether the CFTC considered the relevant evidence or premised its decision on sufficient evidence. While this innovative approach may be replicable, it requires careful scrutiny. One note of caution is appropriate: the CFTC developed this system on a relatively small scale, and while the capability may be scalable, the government-wide FDMS and *Regulations.gov*, however, do not yet have this capability and the program office has indicated that this capability is not in its current planning.³⁶⁴ The FTC has noted a similar process of certifying a complete index to the documents contained on its rulemaking docket on its website.³⁶⁵

2. Court of Appeals Rules and Practices

Generally, the process of filing of a certified administrative record may be managed under Federal Rules of Appellate Procedure Rules 16 and 17, or Rule 30.³⁶⁶ Rule 16 reiterates the

2012 U.S. Dist. LEXIS 139788. Consent Motion for Leave to File Index of Rulemaking Record in Lieu of Record Itself, No. 1-12-cv-00612, Dk. No. 14 (D.D.C. June 18, 2012). *See* <http://www.cftc.gov/LawRegulation/RulemakingRecords/CPOCTARecords/index.htm> (Index of Record for the Rule Regarding Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations). *See also* *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 2012 U.S. Dist. LEXIS 175941 (Dec. 12, 2012).

³⁶⁰ Minute Order, No. 1-12-cv-00612 (D.D.C. June 19, 2012). The CFTC filed the full certified administrative record. Notice of Filing of Administrative Record, No. 1-12-cv-00612, Dk. No. 30 (D.D.C. July 20, 2012).

³⁶¹ CFTC*R.

³⁶² CFTC*R.

³⁶³ While the CFTC may have believed that the administrative record under consideration were large, both are comparatively small. Some certified administrative records can run multiple hundreds of thousands of pages. In both of these cases, it would appear that the administrative records, reduced to nominal page formats, would only be a few thousand pages in length. Courts rarely note the volume. Courts rarely note the volume. *See, e.g.,* *Coal. for a Sustainable 520 v. U.S. Dep't of Transp.*, 881 F. Supp. 2d 1243, 1247 n. 1 (W.D. Wash. 2012) (NEPA challenge, record provided on portable hard drive; paper copy of the index comprises 4,153 pages; four key documents provided in 14 file boxes of binders; final EIS totaled 34 3-inch binders of 500 to nearly 800 pages each).

³⁶⁴ Schultz Interview, *supra* note 43.

³⁶⁵ FTC*R. The FTC refers to its Telemarketing Sales Rule, 68 Fed. Reg. 4,580 (Jan. 29, 2003).

³⁶⁶ 28 U.S.C. § 2112 specifically governs judicial review of agency orders and delegates, specifically, authority for the courts to adopt rules of practice and procedure under 28 U.S.C. § 2072. Rules 16 and 17 were derived under this authority and thus speak to agency orders. Exceptions, such as FED. R. APP. P. 15 (governing orders of the National Labor Relations Board), do not materially affect the general rule.

general notion that a record contains the decision to be reviewed, any findings or report on which it is based, and the pleadings, evidence, and other parts of the proceedings before the agency.³⁶⁷ Rule 17 manages the filing of a “certified copy of the entire record or parts designated by the parties”³⁶⁸ or “a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.”³⁶⁹ The agency is required to file that record with the clerk within 40 days after service with a petition for review.³⁷⁰ Rule 30, on the other hand, provides for the parties to file a joint appendix of those portions of the record cited by the parties.³⁷¹ Both of these approaches are adaptable to the review of a certified administrative record of a rulemaking, although the former was historically geared toward review of agency adjudications and the latter is generally geared toward review of decisions of the district court.

The Courts of Appeals have taken somewhat different approaches to filling in the gaps of filing in local rules and these approaches guide the actual use of certified administrative records in litigation. For example, the District of Columbia Circuit, where a preponderance of petitions for review of rulemakings are filed, requires agencies to transmit a certified list of the contents of the administrative record within 40 days of service of the petition for review and no other portion of the record unless the court so requests.³⁷² In most cases transmission of the actual record will

³⁶⁷ FED. R. APP. P. 16(a).

³⁶⁸ FED. R. APP. P. 17(b)(1)(A). *See* 5 U.S.C. § 706.

³⁶⁹ FED. R. APP. P. 17(b)(1)(B), (2). The advisory committee notes on the original adoption in 1967 reflect the point of the diversity of issues presented and the limited or no role played by an administrative record, permitting parties to stipulate that neither the record nor a certified list of its contents be filed. The 1998 revisions go further to reflect that less the whole record may be filed when the parties disagree on which parts are relevant, in which case the agency must file all parts listed by all parties. *See, e.g., Nat’l Ass’n of Mfr.s v. SEC*, No. 12-1422, Doc. No. 1408603 (D.C. Cir. filed Dec. 6, 2012) (“Certificate Listing and Describing the Record before the Securities and Exchange Commission; “Pursuant to Section 25(a)(2) of the Securities Exchange Act and Rule 17(b) of the Federal Rules of Appellate Procedure, the [SEC] certifies that the record listed below includes all information considered by the [SEC] in formulating its Final Rule, Conflict Minerals, Release No. 34-67716 (August 22, 2012), published at 77 Fed. Reg. 56,274 (September 12, 2012), with the exception of materials readily available such as books, treatises, statutes, rules, cases, orders, Commission releases, no-action letters, and certain historical materials.”).

³⁷⁰ FED. R. APP. P. 17(a). The rule recognizes the *fait accompli* of statutes that may change this requirement, but these are few and the time frame itself is an issue only in limited circumstances. *See infra*, Section IV.G.1 (stays).

³⁷¹ FED. R. APP. P. 30(b) encourages the parties to agree on the contents of the joint appendix but imposes designation requirements on an appellant within 14 days after filing of the record.

³⁷² D.C. CIR. R. 17. This limitation initially simplifies the process for all parties and the court. The D.C. Circuit handbook provides a rationale, albeit outmoded:

Because of a lack of storage space, the record before the administrative agency is not transmitted to this Court at the time of docketing; only a certified index to the record is submitted by the agency. Any party to the proceeding may, by motion, subsequently request that part or all of the record be transmitted to the Court, or the Court on its own may require transmission of the record. It is the duty of the agency to maintain the record so that it can be transmitted to the Court with a minimum of delay.

United States Court of Appeals for the District of Columbia Circuit, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES (As amended through Dec. 1, 2011) at 22 – 23. The handbook, however, is also inconsistent with the Appellate Rules and the Local Rule by providing that agency submits the certified index to the record within 45 days of the filing of the petition for review or application for enforcement.” *Id.* The Fifth Circuit requires any agency failing to file the record within 40 days, must request an

be unnecessary because the parties must file an appendix to their prime or opening brief containing those documents necessary for the court's review. Notably, however, the agency must still serve the other parties with the full record.³⁷³ The D. C. Circuit has also utilized a deferred appendix.³⁷⁴

The Federal Circuit requires the agency to retain the record and file a certified list or index unless the court orders otherwise.³⁷⁵ The Federal Circuit recognizes also the commercially delicate information that is filed with agencies such as the Patent Office or the Court of Federal Claims and, by rule, continues protective orders previously entered as well as provides for motion practice to manage protective orders.³⁷⁶

The Tenth Circuit permits either a complete record filing or a two-stage process of filing a certified list and later filing the complete record within 21 days of the agency filing a responsive brief.³⁷⁷ The Ninth Circuit has the most complex local rules and standing orders, but is silent on filing the certified administrative record – rather, the Ninth Circuit local rules provide highly specific direction on the excerpts from the record to be filed with opening briefs.³⁷⁸

3. Adaptation and Amendment

The rules of procedure have been adapted from adjudications (agency and district court) to meet the needs of review of agency rules, just as the rules have begun to adapt to electronic filing.

extension of time and provide specific reasons justifying the delay and that the court clerk may grant an extension for no more than 30 days. After an extension expires, the court may order production of the record. 5TH CIR. R. 17. This should rarely be a problem unless the agency compiles the record only after service and the record is voluminous.

³⁷³ Service of a complete record would necessarily include service of material that has been incorporated by reference into the text of regulations, which may require the agency to purchase sufficient copies to serve all parties. *See generally* Administrative Conference Recommendation 2011-5, *Incorporation by Reference*, *supra* note 299 and accompanying text. Filing of a standard poses a different problem in that filing of material on the public rulemaking docket amounts to republication that may violate the copyright holder's statutory rights to license use, which agencies have recognized. *See supra* Section III.E.1 and accompanying text. Reference and bibliography of generally available works in the preambular explanation of a rule poses substantially less difficult issues.

³⁷⁴ *See, e.g., Nat'l Ass'n of Mfr.s v. SEC*, No. 12-1422, D.C. Cir. No. 12-1422, Doc. No. 1406287 (D.C. Cir. filed Nov. 21, 2012) (“Pursuant to Fed. R. App. P. 30(c), this Court's Local Rule 30(c), and the Clerk's Order of October 22, 2012, Petitioners ... state that they have agreed with the [SEC] to utilize a deferred joint appendix. As explained in Petitioners' Consent Motion to Expedite, Petitioners have proposed, with Respondent's consent, that the joint appendix will be filed on Mar. 27, 2013, two days after the filing of Petitioners' Reply Brief.”), Doc. No. 1427358 (joint appendix, filed Mar. 26, 2013).

³⁷⁵ FED. CIR. R. 17(A). The Federal Circuit, with its patent docket, requires the Director of the Patent Office to file the certified list and a copy of the decision or order under appeal no later than 40 days after receiving the notice of appeal, and the court deems this to comply with the requirements of 35 U.S.C. § 143 and 15 U.S.C. § 1071(a)(3) for sending a certified record to the court. FED. CIR. R. 17(B)(1).

³⁷⁶ FED. CIR. R. 11 (d)–(g).

³⁷⁷ 10TH CIR. R. 17.1. The Tenth Circuit also requires that if a hard copy of the record is filed, it must be assembled as required by Tenth Circuit Rule 11.3 and *electronic* copies forwarded under Tenth Circuit Rule 11.4 unless other arrangements are made with the clerk of court. 10th Cir. R. 17.2. *See also* United States Court of Appeals for the Tenth Circuit, PRACTITIONER'S GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, at 32 (emphasis added).

³⁷⁸ 9TH CIR. R. 17-1.1 – 17-1.9.

This is not surprising, as several courts admit, because the courts found themselves overwhelmed with paper filing that had little to do with the substance of the cases under review. Like the courts' divorce from "legal length" paper thirty years ago, efficiency has some immediate benefits in cost reduction – in this case, the non-judicial function of electronic warehousing.

The Judicial Conference Standing Committee on Rules of Practice and Procedure has begun considering the effects of its Case Management/Electronic Case Filing (CM/ECF) operations on the rules of practice and procedure.³⁷⁹ The Standing Committee may wish to consider whether the number of cases challenging regulations, and the more complex and voluminous regulatory certified administrative records, warrant some adjustment in the rules of procedure to formally ensure early service of a complete certified administrative record on the parties and a designation process that will avoid burdening the courts. Consideration may be particularly apt with the universal availability of Electronic Management / Electronic Case Filing (EM/ECF).

C. Presumption of Regularity and Piercing the Record

The courts routinely "presume" the regularity of a record and that is the embarkation point for review. An agency enjoys a presumption that it properly designated the administrative record absent clear evidence to the contrary, but the agency does not unilaterally determine what constitutes the administrative record.³⁸⁰ This presumption has been more broadly established by the Supreme Court: "[i]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."³⁸¹

To rebut the presumption of regularity in the agency's administrative record, even at the most fundamental level of innocent negligence, a party seeking to supplement the record must, for example, "put forth concrete evidence that the documents it seeks to 'add' to the record were actually before the decisionmakers."³⁸² Conclusory statements will not suffice; rather, the plaintiff "must identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record."³⁸³ As discussed below, cases in which a party rebuts the presumption and the certified administrative record is pierced are limited.

³⁷⁹ See, e.g., Report of the Judicial Conference Committee on Rules of Practice and Procedure, Agenda E-19, Rules at 2 (March 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST03-2012.pdf> (last visited Feb. 10, 2013); Memorandum from Judge Jeffrey S. Sutton, Chair, Advisory Comm. on Appellate Rules, to Judge Mark R. Kravitz, Chair, Standing Comm. on Rules of Practice & Procedure, Report of Advisory Committee on Appellate Rules, 5, 32(16) – 34(18) (Dec. 7, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/API2-2011.pdf>. (last visited Feb. 10, 2013).

³⁸⁰ Bar MK Ranches, 994 F.2d at 739-40 (stating that the administrative record enjoys the same presumption of regularity afforded to other established administrative procedures); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1324 (D.C. Cir. 1984) (noting that "[i]n discharging their obligation to monitor agency action, courts review a record compiled by the agency").

³⁸¹ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926)); *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (citing *United States v. Morgan*, 313 U.S. 409, 421 (1941)); accord *United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001).

³⁸² E.g., *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010) (denying motions to complete and supplement certified administrative record).

³⁸³ *Id.* (quoting *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006)) (internal quotation marks and emphasis omitted). "If an agency did not include materials that were part of its record, whether by design or accident, then supplementation is appropriate."

D. Introduction of Additional Material into an Administrative Record for Judicial Review

Against the presumption that the agency has properly designated the certified administrative record, litigants may seek to introduce additional material into the court's review of the agency rule. For example, a litigant might justify its argument for inclusion of supplemental materials based on the standard of review, such as by arguing that the agency decision is not rational given all of the evidence given that the agency failed to consider relevant evidence. Supplementation of the record designated by the agency is a highly limited. Introduction of new material into an administrative record for judicial review is generally divisible into two categories:

- (1) Completion of the certified administrative record with material possessed and considered by the agency but not included in the certified administrative record, and
- (2) Supplementation of the certified administrative record with material that was not considered by the agency.

Courts appear to apply somewhat variable standards for the "strong showing" *Overton Park* indicates is needed to overcome the presumption of regularity,³⁸⁴ although decisions tend to focus on a short list of common fact-specific instances:

- (1) the agency (a) deliberately or negligently excluded documents that may have been adverse to its decision, or (b) relied on documents not in the record,
- (2) if background information was needed to determine (a) whether the agency considered all the relevant factors, and (b) explained its decision;
- (3) if the agency failed to (a) explain administrative action so as to frustrate judicial review, or (b) explain technical terms or complex subjects; or
- (4) plaintiffs or petitioners have shown bad faith or improper behavior on the part of the agency.³⁸⁵

³⁸⁴ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

³⁸⁵ For example, the United States Court of Appeals for the District of Columbia Circuit has formally recognized factors (1)(a), (2)(a), and (3)(a). *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (citing *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)) (internal quotation marks omitted) (citing *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996). *See also* *Medina Cty Env. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687 (5th Cir. 2010) (following *American Wildlands*). The Ninth Circuit has recognized "four narrowly construed circumstances" (1)(b), (2)(a), (b), and (4). *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). *See also* *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006). The Second Circuit recognizes a variation of factors (3)(a) and (4). *See also* *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2nd Cir. 1997) (strong showing in support of a claim of bad faith or improper behavior on the part of the agency decisionmaker or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice).

An argument can be made for a much longer list of eight exceptions *E.g.*, *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 – 98 (D.D.C. 2005) and *Pac. Shores Subdivision v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1 (D.D.C. 2006), (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)). In *Esch*, the court of appeals did not adopt the eight factors, but merely noted that they had been catalogued, citing *Stark & Wald, Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 345 (1984). *Esch*, 876 F.2d at 991 n.166. Extra record review is different from extra record supplementation of the administrative record. For example, two of the eight categories are pervasive to the judicial review of the administrative decision, not merely issues of piercing or

1. Completion: Existing Material Held by the Agency but Not Included

Rebutting the presumption of administrative regularity to “complete” the certified administrative record, some courts have noted, requires that the prospective new materials were before the agency *decisionmaker*: it is not enough to show that these materials existed somewhere within the agency,³⁸⁶ because interpreting the word “before” so broadly as to encompass any potentially relevant document existing within the agency files could render judicial review meaningless.³⁸⁷ These conceptions of how specifically a record must be “before” the agency decisionmaker may reflect the realities of many adjudications, but fail to reflect the realities of a senior (often Cabinet) official responsible for executive management of massive government programs retaining responsibility for the final decision on significant and major regulatory activities. It is not enough to show that these materials were somewhere within the agency,³⁸⁸ because “interpreting the word ‘before’ so broadly as to encompass any potentially relevant document existing within the agency ... would render judicial review meaningless.”³⁸⁹

Materials “before” the agency must be “considered” in conjunction with the judicial interpretation of “directly or indirectly” as that phrase has been appended to the concept of the agency’s consideration. Courts of appeals and district courts seem to have modified the concept

supplementing the certified record: when agency action is not adequately explained in the record before the court, and when the agency failed to consider factors which are relevant to its final decision. One factor reaches the issue of completeness: when an agency considered evidence that it failed to include in the record. Two factors reach discrete issues already stated as exceptions: when a case is so complex that a court needs more evidence to enable it to understand the issues clearly, and in cases where evidence arising after the agency action shows whether the decision was correct or not. Another factor is not an administrative record issue at all because there is no final agency action upon which an administrative record is based: cases where agencies are sued for a failure to take action. One factor is entirely subject matter oriented and the subject of much result-oriented debate: cases arising under the National Environmental Policy Act. *See also* Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929 (1993) (arguing that courts should treat the record rule less deferentially in NEPA cases). Part of this issue, as noted above, is driven by the consideration-driven nature of NEPA decisions themselves. Finally, the last *Esch* factor deals with “mixed” cases – those where the plaintiff seeks interim or non-APA relief in conjunction with APA relief: cases where relief is at issue, especially at the preliminary injunction stage. Thus, the extended *Esch* factors do not add substance within the context of certified administrative record review and the D.C. Circuit itself has thrice narrowed its exceptions. *See* *Dania Beach, American Wildlands, and James Madison Ltd, supra*. Despite this rejection, however, *Esch* continues to be cited in opinions in the D.C. Circuit. *E.g.*, *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44 (D.C. Cir. 2013).

³⁸⁶ *See* *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006); *see also* *New York v. Shalala*, 1996 U.S. Dist. LEXIS 2261, 1996 WL 87240.

³⁸⁷ *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 n.7 (D.D.C. 2003), *summary judgment granted, in part, denied in part*, 246 F. Supp. 2d 27 (D.D.C. 2003), *vacated* *Fund for Animals, Inc. v. Hogan*, 2005 U.S. App. LEXIS 23827 (D.C. Cir. Nov. 4, 2005).

³⁸⁸ *See* *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (citing *Overton Park v. Volpe*, 401 U.S. 402, 419 (1971), and *Env’tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981)); *Pers. Watercraft Indus. Ass’n v. Dep’t of Commerce*, 48 F.3d 540, 546 n. 4 (D.C. Cir. 1995) (noting with approval that the “whole record” contained all materials “pertaining to the [challenged] regulation”). Another court’s view was similarly restricted “to the administrative record as it existed at the time of the agency’s decision.” *Eugene Burger Mgmt. Corp. v. U.S. Dep’t. of Hous. & Urban Dev.*, 192 F.R.D. 1, 4 (D.D.C. 1999). *See also* *Pac. Shores Subd. v. Army Corp of Eng’rs*, 448 F. Supp. 2d 1, 5-6.

³⁸⁹ *Fund for Animals v. Williams, supra*.

of consideration to encompass indirect consideration, in part at least, in light of the reality that agency heads act through subordinates and subordinate decisionmakers prior to the agency head making a final decision.³⁹⁰ For regulatory purposes, the notion that the entire administrative record must be physically present “before” the deciding official is simply impractical: Secretaries of departments of the Executive Branch, to use the extreme example, work through information summarized by subordinates.³⁹¹

Completion of a certified administrative record against negligence may depend on the nature of the document and the circumstances. A public comment, for example, that was in the possession of the agency and held by the agency but not placed in the record because the commenter failed to comply with a technical requirement in the request for comments, may be added to the record.³⁹² On the other hand, documents cited to the agency from parallel litigation against the agency (and in the agency’s possession) over the same substance before a parallel regional office within the agency *may* be considered by the court, even if not in the certified administrative record.³⁹³ These cases represent two different remedies – completion and supplementation, respectively – both requiring defense and judicial decision.

As noted above, completeness in a certified administrative record is subject to substantial agency interpretation and the risk of incompleteness may rise with delayed compilation of an administrative record. At the same time, completeness of a certified administrative record may be better defended with a recitation of the means by which the administrative record was compiled and certified.

2. Supplementation: Extra-Record Evidence Not Considered by the Agency

Evidence that was not held, and therefore not considered, by the agency poses a different type of issue, particularly in the context of rulemaking because of the expansive nature of the facts and policy issues that must be considered in implementing a legislative delegation. As a general

³⁹⁰ *E.g.*, *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (“The complete administrative record consists of all documents and materials directly or indirectly considered by the agency”, citing district court cases); *Thompson v. United States Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (stating the administrative record includes all documents and materials directly or indirectly considered by agency decisionmakers);

³⁹¹ The practice of providing the decisionmaker with a final rule and some summary is prevalent. *See supra* Section III.F.2.

³⁹² *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 211-12 (D.C. Cir. 2011) (consultant hand delivered comment to the designated agency employee but failed to make the required advance call for security purposes considered hypertechnical and the comment admitted to the record by the court: “[W]e have little doubt that the CMS employee to whom the hospital consultant tendered his comment letter could have refused to accept it based on the consultant’s failure to call the prescribed telephone number. But since the CMS employee accepted the letter without objection, the agency may not now complain about the consultant’s failure to call the number listed in the NPRM. The district court thus did not abuse its discretion in supplementing the 2007 rulemaking record with the consultant’s letter.” The comment (required to be submitted to maintain standing), the agency failed to consider it, and, therefore, the court vacated the district court judgment, and remand with instructions to vacate challenged portions of the 2007 and 2008 rules and remand to the Secretary.).

³⁹³ *See Am. Wild Horse Pres. Campaign v. Salazar*, 859 F. Supp. 2d 33 (D.D.C. 2012) (order denying motion to strike expert declarations and any reference to them in the plaintiffs’ motion for summary judgment; declarations had been filed in previous litigation on similar agency action; court could consider on summary judgment). The effect of the ruling makes irrelevant whether the documents are technically made part of the certified administrative record.

proposition, of course, courts should not consider evidence that the agency never had a chance to review,³⁹⁴ particularly because the rulemaking process is open-ended and public participation is a key element of the process, as contrasted with the more narrowly focused, party-oriented adjudications. However, there are several potential justifications that might permit the court to consider evidence that was not before the agency.

Technical or background information necessary for effective judicial review. Occasionally, a court may need more information to determine whether the agency considered all of the relevant factors and the record is complete.³⁹⁵ Sometimes, courts need additional background information simply to understand the final rule and its administrative record.³⁹⁶ Courts have allowed agencies to submit declarations that “illuminate[]” or “explain” the administrative record, as opposed to declarations that “advance new rationalizations for the agency’s action.”³⁹⁷ Explanation is limited to the four corners of the decision – any new material may not provide a new rationale for the decision;³⁹⁸ it must be limited to explaining the background facts that “clarif[y]” the certified administrative record.³⁹⁹

If, on the other hand, an affidavit is needed to clarify “the decisionmakers’ action at the time it occurred,”⁴⁰⁰ a more significant problem has been broached. If the agency’s decision is not clear from the text of a regulation, its preamble, and its record – even if no new rationale is provided – then the court must consider whether fair notice has been given or whether there is a rational or logical connection between the facts and the choices made. If new rationales are

³⁹⁴ *Edwards v. United States Dep’t of Justice*, 43 F.3d 312, 314 (7th Cir. 1995).

³⁹⁵ The Ninth Circuit appears to take a somewhat liberal approach to this problem, noting that a court may consider “substantive evidence going to the merits of the agency’s action where such evidence is necessary as background to determine the sufficiency of the agency’s consideration.” *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988). This may be because “it will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not.” *ASARCO, Inc. v. U.S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

³⁹⁶ A highly technical rule may utilize language (and acronyms and initializations, for example) that is not self-explanatory and never explained in the certified administrative record for the simple reason that those writing the rule and those affected by the rule have no need to explain what for them is daily usage, but a generalist judge or practitioner may be tempted to question that rule simply because of its technical denseness. Briefs, like rules, can be dense. *See Honeywell International v. EPA*, D.C. Cir. Nos. 10-1347, 10-1348, 10-1349, 10-1350 (Jan. 22, 2013) (“We frown on excessive use of acronyms, but in a case involving a 24-letter word, we think it appropriate to use HCFCs for hydrochlorofluorocarbons.”); *Nat’l Ass’n. of Regulatory Util. v. Dept. of Energy*, 680 F. 3d 819, 820n.1 (D.C. Cir, 2012) (“We also remind the parties that our Handbook of Practice and Internal Procedures states that ‘parties are strongly urged to limit the use of acronyms’ and ‘should avoid using acronyms that are not widely known.’”).

³⁹⁷ *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 82 (2d Cir. 2006).

³⁹⁸ *See Env’tl. Def. Fund v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (“The new material should be merely explanatory of the original record and should contain no new rationalizations.”). *See also* *Sierra Club v. Marsh*, 976 F.2d 763, 772-73 (1st Cir. 1992) (same); *Sierra Club v. United States Army Corps of Eng’rs*, 771 F.2d 409, 413 (8th Cir. 1985) (“Any new materials submitted should . . . be merely explanatory of the original record and should contain no new rationalizations for the agency’s deci-sion.”); *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977) (finding that the “augmenting materials were merely explanatory of the original record” and “[n]o new rationalization . . . was offered.”).

³⁹⁹ *Bunker Hill*, 572 F.2d at 1292.

⁴⁰⁰ *Sierra Club v. Marsh*, 976 F.2d 763, 772-73 (1st Cir. 1992) (citing cases).

included, they should be disregarded. “If the agency action, once explained by the proper agency official, is not sustainable on the record itself, the proper judicial approach has been to vacate the action and to remand ... to the agency for further consideration.”⁴⁰¹ Ultimately, the decision returns to whether the final rule is sustainable on the basis of the certified administrative record.

A decision may also rarely be accompanied by an administrative record that so inadequately explains or supports the decision as to frustrate judicial review of the decision.⁴⁰² Some courts have taken the position that an administrative record “should be supplemented only if the existing record is insufficient to permit meaningful review.”⁴⁰³ In each case, the agency runs the significant risk that the rule will be vacated and remanded.

Information supporting predictive judgments. On occasion, perhaps with increasing frequency as regulatory actions become more predictive,⁴⁰⁴ evidence may come into existence after the agency acted that demonstrates that the agency’s actions were right or wrong. This potential category of information probably does not reach the use of “post-decision information as a new rationalization either for sustaining or attacking the Agency’s decision,”⁴⁰⁵ particularly when predictive judgments form part of the basis for the agency’s ultimate decision. Post-decision information that indicates whether the agency’s predictions were accurate might therefore constitute a substantive exception to the limitation of the court’s consideration to the administrative record.⁴⁰⁶ Additionally, a few cases suggest that the post-promulgation enforcement history of a rule may supplement a certified administrative record of the rule to give it meaning.⁴⁰⁷

⁴⁰¹ *Id.* at 773, citing *Costle*, 657 F.2d at 285; accord *Camp*, 411 U.S. at 143; and *Asarco, Inc.*, 616 F.2d at 1159.

⁴⁰² Even rarer is a record obviously deficient and the agency recalcitrant. *But see, e.g.*, *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26 (N.D. Tex. 1981) (126-page record that was incomplete on its face).

⁴⁰³ *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009); *see Levine v. United States*, 453 F.3d 1348, 1350 (Fed. Cir. 2006); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1338 (Fed. Cir. 2001). The Administrative Conference has recognized, however, that the record on direct review by courts of appeals “can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.” Administrative Conference of the United States, Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action* ¶ 5(a), 40 Fed. Reg. 27,926 (July 2, 1975).

⁴⁰⁴ Courts are more deferential to predictive judgment based on agency expertise. *Nat’l Tel. Coop. Ass’n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009) “[That review is narrow] is particularly true with regard to an agency’s predictive judgments about the likely economic effects of a rule.”

⁴⁰⁵ *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006), citing *Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980).

⁴⁰⁶ *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 516 – 17 (2002) (decision notes post-decisional facts in analysis of effects on competition). *See, e.g.*, *American Mining Congress v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985), citing *Stark & Wall, Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 Ad. L. Rev. 333, 343-4 (1984), cataloguing that evidence coming into existence after the agency acted demonstrates that the actions were right or wrong, the court is forced as a practical matter to examine the material, whether or not motions to supplement the record are granted. *See also American Petroleum Institute v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976), cert. denied, 430 U.S. 922, (1977).

⁴⁰⁷ *E.g.*, *Edison Electric Institute v. OSHA*, 849 F.2d 611, 618 (D.C. Cir. 1988) (agency submission of citations showing application).

Information demonstrating bad faith on the part of the decisionmaker. Finally, an assertion of bad faith or impropriety may call into question the entirety of a proceeding. The standard for disqualification of an administrative decisionmaker in rulemaking – not merely that an official has taken a public position, expressed strong views, or holds an underlying philosophy, but “an unalterably closed mind on matters critical to the disposition of the proceeding”⁴⁰⁸ – differs substantially from the standard for recusal in adjudication. As the Attorney General’s Manual originally pointed out:

The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.... Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.⁴⁰⁹

Beyond the administrative record and on the cusp of supplementation the record by documents or discovery by deposition or interrogatory – or testimony.⁴¹⁰ “Bias,” like prejudgment, is substantively different in rulemaking from “bias” in adjudication: the former are legislative in nature, where some bias is given as a policy requisite, while the latter involves a much higher standard of independence from bias.⁴¹¹

Courts may consider impropriety or supplementation as separate questions. The first question is whether the complainant or petitioner has provided a sufficient showing of impropriety to warrant consideration of supplementation. As one jurist has pointed out in collecting cases, “What constitutes a strong preliminary showing of bad faith or improper behavior, however, is a matter that the courts have been reluctant to define, preferring in the main simply to declare that on the facts of a given case, the showing has not, or occasionally has, been made.”⁴¹² The second question is whether the information provided by the petitioner or

⁴⁰⁸ *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980); *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Mere allegations that it appeared that the agency had a hostile attitude, or unwillingness to correct errors, or severity of action, or had a predetermined agenda, simply do not meet this standard. *See James Madison Ltd.*, 82 F.3d at 1095.

⁴⁰⁹ A.G.’S MANUAL, *supra* note 11, at 14. *See United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-46 (1973).

⁴¹⁰ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). (“And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.” (citing *Shaughnessy v. Accardi*, 349 U.S. 280 (1955)).

⁴¹¹ *See Ass’n of Nat. Advertisers, Inc. v. FTC*, 627 F. 2d 1151 (D.C. Cir. 1979), *cert. denied* 447 U.S. 921 (1980) (comparing recusal standards applicable to rulemaking versus adjudication).

⁴¹² *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 230-231 (E.D.N.Y. 2006) (citing *Latecoere Intern., Inc. v. U.S. Dep’t of Navy*, 19 F.3d 1342, 1357 (11th Cir. 1994) (bad faith shown); *TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002) (bad faith not shown), *aff’d*, 369 U.S. App. D.C. 85, 433 F.3d 852 (D.C. Cir. 2006); *Amfac Resorts, LLC v. United States DOI*, 143 F. Supp. 2d 7, 13-14 (D.D.C. 2001) (bad faith not shown), *aff’d in part, rev’d in part on other grounds*, 350 U.S. App. D.C. 191, 282 F.3d 818 (D.C. Cir. 2002), *vacated on other grounds sub nom.*, *Nat’l Park Hospitality Ass’n v. DOI*, 538 U.S. 803, 123 S.

complainant that was not considered by the agency is sufficient to justify supplementation of the record, or remand to the agency, or vacatur.

E. Discovery Beyond Administrative Records

In *Overton Park*, the Supreme Court suggested that when further explanation is necessary to determine if the agency acted arbitrarily and capriciously, a reviewing court “may require the administrative officials who participated in the decision to give testimony explaining their action.”⁴¹³ The Court subsequently backed away from routinely compelling testimony of the agency decisionmakers,⁴¹⁴ making clear that remand to the agency is the preferred course, and that testimony will be ordered only in “rare circumstances.”⁴¹⁵

The “no discovery” concept has long been embedded in the procedural rules for exemptions from initial disclosures.⁴¹⁶ It is also embedded in the local rules of some courts where judicial review of administrative records is relatively common; for example, the United States District Court for the District of Columbia exempts actions for review on administrative records from the parties’ duty to confer on pretrial management and scheduling⁴¹⁷ and initial discovery disclosures.⁴¹⁸ The rules otherwise appear to leave open this possibility, but it remains highly limited by the very nature of the review as the courts have noted.

Courts have carved out limited exceptions to the ‘no discovery’ rule. The most significant exceptions come into play when a plaintiff or petitioner can make a “strong showing of bad faith or improper behavior” or when the record is so bare that it prevents effective judicial review.⁴¹⁹ A claim of “bad faith” must be based on more than hearsay in a single affidavit.⁴²⁰ For example, colorable allegations of ethical violations may precipitate discovery to determine the validity of the allegations.⁴²¹ This discovery reaches propriety of the action rather than APA review of the rule itself.

Ct. 2026, 155 L. Ed. 2d 1017 (2003); *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1282-84 (W.D. Wis. 1997) (distinct possibility of improper political influence shown)).

⁴¹³ *Overton Park*, 401 U.S. at 420. The Court remanded the case for review “to be based on the full administrative record that was before the Secretary at the time he made his decision, *Id.* at 419-420, but indicated that some discovery might be required if “additional explanation” of the Secretary’s decision was necessary. *Id.* at 420-421. *See also* *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1973).

⁴¹⁴ *See* *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

⁴¹⁵ *Florida Power & Light*, 470 U.S. at 744.

⁴¹⁶ FED. R. CIV. P. 26(a)(1)(B) (exempts “an action for review on an administrative record”).

⁴¹⁷ D. D.C. LCvR. RULE 16.3(b) (exemption from pretrial conference for action for review on an administrative record).

⁴¹⁸ D. D.C. LCvR. RULE 26.2(a)(1) (exemption from initial disclosure requirements for action for review on an administrative record).

⁴¹⁹ *See* *Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997-98 (D.C. Cir. 1990).

⁴²⁰ *E.g.*, *Commercial Drapery Contractors, Inc., v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998).

⁴²¹ *E.g.*, *Citizens Against Casino Gambling in Erie Cnty. v. Stevens*, 2012 U.S. Dist. LEXIS 87144 at *18 – *27 (W.D. N.Y. June 23, 2012) (discovery considered but denied on basis of record regarding conflict of interest and participation of official in interpretation of statute for the purpose of adjudication of permit; allegation that Associate Solicitor of Interior had a personal relationship (later married) counsel for permit party; allegation sufficient to raise, but not necessarily resolve issue).

In some direct cases, a court may order discovery to determine whether an agency submitted the full administrative record.⁴²² Some discovery may also be appropriate when a plaintiff makes a sufficient showing that the certified administrative record is not complete and that the decision was inadequately explained.⁴²³ The remedy for a finding that the record is not complete or the decision was inadequately explained is remand, rather than deposition of the agency decisionmaker.⁴²⁴

F. Public Sources and Practicality of Judicial Notice

Numerous public sources are considered by agencies in the promulgation of rules, including authorizing programmatic statutes, congressional committee reports and hearings, and the Congressional Record; extant regulations in the Code of Federal Regulations, rules and notices in the Federal Register; judicial decisions; administrative decisions; Government Accountability Office and Inspector General reports; and a host of other government documents. The question of whether these documents must be included within an administrative record may arise.

As the purpose of the certified administrative record is to define for the court the material considered by the agency and to permit judicial review of the lawfulness of a rule, direct inclusion of readily available materials in the certified administrative record may not be necessary. The most obvious alternative is that a court may take judicial notice of legislative and adjudicative facts – a fact “not subject to reasonable dispute in that it is either (1) generally known within the [district or circuit] or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”⁴²⁵

Acts of Congress in slightly different forms constitute prima facie evidence and evidence of the law. Rarely are Acts of Congress or excerpts of United States Code included in an administrative record or certified administrative record. Additionally, Congress has stipulated that the contents of the *Federal Register* shall be judicially noticed.⁴²⁶ Moreover, regulations are law, not facts, and thus citation (particularly in rule preambles) may be all that is required.⁴²⁷

Legislative histories, including committee reports and the Congressional Record, are public records capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned, the court may properly take judicial notice of the undisputable facts contained therein.⁴²⁸ Testimony before Congress might be judicially noticed “to determine what

⁴²² See *Dopico v. Goldschmidt*, 687 F.2d 644, 654- (2d Cir. 1982) (“Determining what constitutes an agency’s informational base is vital, for review must be based on the whole administrative record,.... We think that the District Court could not properly grant summary judgment when such a basic factual issue was in dispute, without at least permitting plaintiffs some limited discovery to explore whether some portions of the full record were not supplied to the Court.”).

⁴²³ *Tenneco Oil Co. v. Dept. of Energy*, 475 F. Supp. 299, at 317 (1979).

⁴²⁴ *Cnty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990).

⁴²⁵ FED. R. EVID. 201. The contours between legislative and adjudicative facts, and the precise edges of judicial notice, do not appear to affect notice of government documents.

⁴²⁶ 44 U.S.C. § 1507.

⁴²⁷ See also *A&E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) (regulatory preamble “explained the medical and scientific premises for the changes” to the regulations; no need to include copy of preamble in administrative record because the APA does not require public documents to be made part of the record; formal adjudication).

⁴²⁸ *Bolton v. United States Nursing Corp.*, No. C 12-04466 LB, 2012 U.S. Dist. LEXIS 152387, at *6 n. 4 (N.D. Cal. Oct. 21, 2012).

statements were contained,” (*i.e.*, considered) but “not for the truth of the matters asserted” (the determination vested in the agency).⁴²⁹ Legislative history is frequently cited in regulatory preambles and often included in administrative records for judicial review, but it is not clear that this is more than a convenience.

Judicial precedent itself is frequently cited and not reproduced in a rulemaking record or administrative record for judicial review because citation constitutes legal argument, not facts.⁴³⁰ Judgments, and many litigation documents filed with a court (and some not filed with the court), may be judicially noticed, but agency inclusion of a full copy of these documents in the administrative record for judicial review may prove the most accessible for the court, the parties, and the public.

The D.C. Circuit has explained that policy documents and reports from the General Accountability Office “are judicially cognizable apart from the record as authorities marshaled in support of a legal argument.”⁴³¹ These materials may all be readily available, but should official permanent legal documents be reproduced and filed with the court in a certified administrative record? On the one hand, these materials may be important for understanding an agency’s decision. On the other hand, it may not be necessary or wise for agencies to regularly reproduce public documents that are readily available. A proper balance might be to cite readily available the law in preambles or published bibliographies and, for the convenience of the court, provide the appropriate references in the certified index.

Other official documents might be judicially noticed, but judicial notice under Evidence Rule 201 is less satisfactory with respect to investigative documents, such as GAO and IG reports.⁴³² Factual reports developed for the purpose of fact may be judicially noticed, but a simpler

⁴²⁹ Transcripts of Congressional hearing testimony are public records, which courts have found to be subject to judicial notice. *See In re Moody's Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 504 (S.D.N.Y. 2009); *see also Johnson & Johnson v. Am. Nat. Red Cross*, 528 F. Supp. 2d 462, 464 n. 1 (S.D.N.Y. 2008); *but see Whiting v. AARP*, 637 F.3d 355, 364 (D.C. Cir. 2011) (district court did not abuse its discretion in denying a motion to take judicial notice of congressional materials relating to the Senate Finance Committee investigation of AARP's health insurance practices).

⁴³⁰ “The employer associations ask us to consider documents not appearing in the administrative record, including expert declarations, a deposition transcript, a wage calculation, House and Senate bills, a public law, government documents, and a judicial opinion. Some of the documents submitted by the employer associations — *i.e.*, the judicial opinion, the bills and public law, and the government documents— constitute legal authority or present facts that are judicially noticeable. FED. R. EVID. 201(b); *e.g.*, *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 705 n. 5 (3d Cir. 2004) (judicial notice of documents from agency’s website). Those documents have been considered to the extent that they are relevant to the issues before us.” *La. Forestry Ass’n v. Solis*, 2012 U.S. Dist. LEXIS 117061, at *19 – 20 (E.D. Pa. Aug. 20, 2012).

⁴³¹ *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998).

⁴³² While a court might take judicial notice of the existence of a GAO or IG report and that the GAO or IG reached certain conclusions as “not subject to reasonable dispute ... the authenticity of which is undisputed” that does not establish the veracity and accuracy of the facts contained within the report, *i.e.*, that the facts that the GAO or IG believed to be true, and upon which they reached conclusions, are not subject to reasonable dispute. *See County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 78 (D.D.C. 2008) (declining to take judicial notice of Inspector General's report where the “Court knows nothing about the investigative process which led to the report's conclusions, and it cannot access the report's validity”). Crucially, judicial notice would not establish that the agency considered those facts as such in the rulemaking. To establish the agency’s consideration of such reports, the agency should include GAO and IG reports within a certified administrative record.

mechanism that would appear to satisfy administrative record requirements, and may be acceptable to the court and litigants, would be to cite such documents in preambles or published bibliographies and provide appropriate references in the certified record index. In that way, an agency could limit their record reproductions to those materials that are not readily accessible, with the consent of the court and agreement of opposing litigants.

G. Judicial Remedies

Judicial remedies when an administrative record for judicial review does not meet the standards of the APA are limited by the scope of the courts review. Preenforcement review of a rule deserves specific consideration⁴³³ because it may be necessary to resolve issues quickly, such as staying the effect of the rule. Beyond consideration of a stay, a court may permit the agency to supplement the record for its review, remand the rule to the agency, and vacate the rule. The remedies imposed depend on the quality of the agency's certified administrative record.

1. Stays

If litigation is commenced immediately upon publication of a final rule, litigants may ask a court to maintain the status quo during the litigation. The APA provides specifically for this interim relief:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.⁴³⁴

In the courts of appeals, the process for requesting a stay is clearly delineated: a petitioner must first seek a stay from the agency, and if the agency denies the request, the petitioner must move the court for relief (including the "relevant parts of the record").⁴³⁵ Litigants may use the same process for requesting a stay before a district judge, and many litigants style a motion as one for a preliminary injunction.⁴³⁶ Although not required by the APA, and if time permits, litigants may find it useful to follow the appellate procedure of making the request first to the agency, thereby giving the district court a more detailed record of proceeding.

The default minimum effective date period for a final rule is only 30 days, although agencies may set a longer time before a rule becomes effective, and may set "compliance" dates that are much later to accommodate the nature of the regulations being implemented and the needs for

⁴³³ ACUS has previously considered preenforcement review issues. *See* Administrative Conference of the United States, Recommendation 93-4: Improving the Environment for Agency Rulemaking (adopted Dec. 9, 1993), 59 Fed. Reg. 4,670 (Feb. 1, 1994); correction 59 Fed. Reg. 8,507 (Feb. 22, 1994); *see also* Administrative Conference of the United States, Recommendation 74-4: Preenforcement Judicial Review of Rules of General Applicability (Adopted May 30-31, 1974), 39 Fed. Reg. 23,044 (June 26, 1974).

⁴³⁴ 5 U.S.C. § 705. The general stay statute may be overridden by specific statutes. *See* Clean Air Act (requiring petition for reconsideration as predicate for judicial review). *E.g.*, *Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 152-55 (D.D.C. 2011) (stays under the APA, 5 U.S.C. § 705, and Clean Air Act, 42 U.S.C. § 7607(d)(7)(B)); denying motion to dismiss, 833 F. Supp. 2d 11 (D.D.C. 2012) (same; cross motions for summary judgment).

⁴³⁵ FED. R. APP. P. 18(a).

⁴³⁶ FED. R. CIV. P. 65. *See* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

regulated parties to take actions prior to the regulations actually being applied.⁴³⁷ Pre-enforcement review of regulations may necessitate rapid certification of the administrative record to the court. The theoretical maximum for filing at least an index of the certified administrative record, on the other hand, in the court of appeals, is 40 days.⁴³⁸ This potential temporal discord can significantly affect litigation.⁴³⁹

Although a stay of a rule serves different functions from an injunction from enforcing a rule, both preserve the status quo pending resolution of the pre-enforcement litigation and apply the familiar four-part test:

- petitioner is likely to succeed on the merits,
- petitioner is likely to suffer irreparable harm in the absence of preliminary relief,
- the balance of equities tips in petitioner's favor, and
- an injunction or stay is in the public interest.⁴⁴⁰

When, however, a rule becomes effective, the status quo changes, the balance of equities may shift somewhat toward the government, and the public interest in an injunction or stay may decline. If the agency does not make the administrative record available to the litigants and court in those cases where claims are based on the content of the administrative record (such as consideration of relevant facts), a plaintiff may not have the opportunity to make some record-based claims for preliminary relief. Courts have fashioned interim relief to preserve the status quo until an agency submits an administrative record for judicial review.⁴⁴¹ The real issue is the accessibility of the record for review by the parties and the court when necessary, and a court may specifically request that an extensive record be provided in particular formats.⁴⁴²

If an agency cannot provide its administrative record for judicial review in a timely fashion, it runs the risk that its rule will be delayed. The potential for a judicial stay of a rule effective date provides another incentive for agencies to maintain rulemaking records as the rulemaking proceeds.

⁴³⁷ 5 U.S.C. § 553(d).

⁴³⁸ FED. R. APP. P. 17(a).

⁴³⁹ *See, e.g.*, *Charter Operators of Alaska v. Blank*, 844 F. Supp. 2d 122, 126 (D.D.C. 2012) (administrative record had not been assembled and the court felt it was premature to rule on the merits).

⁴⁴⁰ *Winter*, *supra* note 436; *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127 (9th Cir. 2011) (affirming sliding scale post-*Winter*); *Davis v. Pension Ben. Guar. Corp.*, 571 F. 3d 1288 (D.C. Cir. 2009) (standards for injunction); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (standards for stay); D.C. CIR. R. 18; D.C. Circuit Handbook of Practice and Internal Procedures 32 (2010). *Cf. Nken v. Holder*, 556 U.S. 418 (2009) (specific provision in Immigration and Nationality Act).

⁴⁴¹ *E.g.*, *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203 (D.D.C. 2012) (example of court granting temporary restraining order pending remand without vacatur while agency compiles administrative record of agency summary adjudication and suspension; denying preliminary injunction).

⁴⁴² *E.g.*, *Latin Americans for Social and Economic Development v. Federal Highway Administration*, 2012 U.S. Dist. Lexis 48452 *7 n.5 (E.D. MI 2012) (timing not an issue; 130,000 page Detroit, Michigan, U.S. / Windsor, Ontario, Canada international crossing NEPA administrative record furnished on an external hard drive containing the administrative record in an electronic form with a searchable index at the courts request).

2. Remand

As noted previously, a court may permit an agency to supplement its administrative record for judicial review, and rarely may permit a plaintiff or petitioner to do so.⁴⁴³ This process is not so much a remedy as an interim procedure for assuring the completeness and correctness of the administrative record, but, in doing moving to supplement its own record, the agency also may raise questions about completeness.⁴⁴⁴ ENRD guidance has cautioned that failure to adequately prepare and present an administrative record for judicial review has direct consequences: “[i]f the court decides the record is not complete, it should remand the matter to the agency. It may, however, allow extra-record discovery, including depositions of agency personnel, and may allow court testimony of agency personnel.”⁴⁴⁵ Remand for record building purposes does not ultimately determine the effectiveness of the rule, but it may postpone effectiveness and does prolong doubt about the efficacy of the rule. That uncertainty should caution agencies to ensure that an administrative record for judicial review is complete and accurate upon filing.

3. Setting Aside and Injunction

Ultimately, if a court finds that an administrative record is so incomplete or defective that it affects the ultimate legality of the rule itself, the court must fashion a final remedy. Some confusion exists again on terminology and a permanent injunction is not infrequently entered when a district court finds that an agency rule has been unlawfully promulgated. Rather, the district court should “hold unlawful and set aside agency action”⁴⁴⁶ as the D.C. Circuit has recently noted.⁴⁴⁷ A permanent injunction may reach the application of a rule to a specific party without setting aside the rule, but the APA authorizes the court to set aside the rule.

Setting aside a rule on the basis of an incomplete or defective record may appear harsh, and has historically been mitigated by permitting a rule to remain in effect despite remand of the rule to the agency for further consideration. The D.C. Circuit has applied an additional two part standard in the past: traditionally, the decision whether to vacate or just to remand without vacatur has been based on a balancing of “the seriousness of the [rule’s] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.”⁴⁴⁸ “Disruptive consequences” appears well related to

⁴⁴³ See Section IV.D.

⁴⁴⁴ U.S. ATTY. BULL., *supra* note 153, at 10.

⁴⁴⁵ *Id.*

⁴⁴⁶ 5 U.S.C. § 706(2).

⁴⁴⁷ See *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1222 (D.C. Cir. 2012) (“We therefore vacate the graphic warning requirements and remand to the agency. In so doing, we also vacate the permanent injunction issued by the district court, in furtherance of our obligation to ‘set aside’ the unlawful regulation. See, e.g., *N. Air Cargo v. United States Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) (“It was quite anomalous [for the district court] to issue an injunction. When a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is to identify a legal error and then remand to the agency, because the role of the district court in such situations is to act as an appellate tribunal.”)).

⁴⁴⁸ *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150 – 51 (internal quotation marks omitted) (D.C. Cir. 1993). See *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012); *N. Air Cargo v. United States Postal Serv.*, 674 F.3d 852 (D.C. Cir. 2012); *Elec. Privacy Info. Ctr. v. United States Dep’t of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011); *Apache Corp. v. FERC*, 627 F.3d 1220 (D.C. Cir. 2010); *Int’l Union v. MSHA*, 626 F.3d 84 (D.C. Cir. 2010); *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009).

the balancing of the harm factors in a stay or injunctive relief setting. Where a rule has been allowed to become effective, the harm of vacatur to the agency is greater, while vacatur of a rule that has not become effective will not impose as great a harm.⁴⁴⁹ Adoption of this equitable approach, however, is not uniform or unanimous, with several judges expressing a view that the APA permits the court to “set aside” a rule unlawfully promulgated and not less.⁴⁵⁰

In the final analysis, the agency bears the responsibility for the development, compilation, and certification of the administrative record to the court. When the agency fails to meet the standards set by judicial interpretation of the APA, the agency runs a decided risk that a court will set aside the final rule and return it to the agency. Depending on the depth of the administrative record deficiencies, the agency may lose an extended period of time in implementing its policy choices and expend considerably more effort repromulgating its preferred policy rule. Throughout that period, the affected parties will have no certain course to which to conform their conduct.

⁴⁴⁹ Compare *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (vacatur would be “an invitation to chaos” because “[t]he egg has been scrambled and there is no apparent way to restore the status quo ante”), with *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (SEC stayed rule pending litigation; rule vacated).

⁴⁵⁰ E.g., *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring); *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (separate opinion of Randolph, J.) (explaining his view that courts holding an administrative rule or order unlawful must vacate the agency action in light of APA § 706(2)).

V. Recommendations

As discussed in the Report, judicial review of final agency regulations is now presumed to be based on the Administrative Procedure Act (APA) requirement that a court “review the whole record or those parts of it cited by a party”⁴⁵¹ created by the agency whose decision is being reviewed. The record on judicial review – an administrative record – is to be composed of all material, not more nor less, than the agency considered in promulgating a rule. Over the past two decades, the scope of materials “considered” has exploded with the creation of new analytical requirements, electronic public comment processes, and information contained in electronic systems, including the World Wide Web. Agencies and courts have also considered definitional and functional exceptions to a general rule of inclusiveness. Based on the report and the agency practices surveyed, the following best practices are commended for consideration:

Rulemaking Record:

1. In the absence of a specific statutory requirement to the contrary, the agency rulemaking record in informal rulemaking should contain:
 - a. all notices pertaining to the rulemaking and any documents referred to therein;
 - b. comments and other documents submitted to the agency;
 - c. any transcripts of oral presentations made in the course of a rulemaking;
 - d. reports of any advisory committees;
 - e. copies or an index of all factual material, studies, and reports not included in the forgoing and considered by agency personnel in formulating the proposed or final rule; and other material required by statute, executive order, or agency rule to be made public or considered in connection with the rulemaking; and
 - f. any other materials related to the rule.
2. Agencies should manage their rulemaking records to achieve maximum disclosure to the public.

Process:

3. An agency should, subject to resource limitations and based on a risk assessment, compile a rulemaking record as the rulemaking proceeding progresses, not after a decision is made or after a complaint is filed in a United States District Court or a petition for review is filed in a United States Court of Appeals. As the Department of Justice’s Environment and Natural Resources Division suggested to its clients over a decade ago, “Optimally, an agency will compile the administrative record as documents and generation or receipt of materials occurs during the agency decision-making process. The record may be a contemporaneous record of the action.” A number of agencies have extolled the virtues of this approach.
4. Agencies should designate a program official as the record keeper or custodian of a rulemaking record as soon the agency determines that an informal rulemaking proceeding will be undertaken.
5. Agencies should include in the agency-held rulemaking record all documents considered directly or indirectly without judgment as to the “relevance” or “reliance”, or whether the documents are privileged, protected, or otherwise restricted, on those documents to create a “whole” record. The definitions used by agencies in existing guidance may lead to the

⁴⁵¹ 5 U.S.C. § 706.

exclusion of documents from a rulemaking record before such exclusion from an administrative record may be appropriate.

6. Agencies should maximize the utilization of *Regulations.gov* (or an agency-specific public rulemaking docket) to publish all documents considered in the decision file, consistent with ACUS Recommendations 2011-2, Rulemaking Comments; 2011-1, Legal Considerations in e-Rulemaking; 90-5, Federal Agency Electronic Records Management and Archives.

Non-Public Documents & Rulemaking Record for Decision:

7. Agencies should maintain in a separate rulemaking record all documents and communications not published on *Regulations.gov* (or an agency-specific docket), including all privileged, protected, or otherwise restricted material, and any other material considered by the agency or its staff in formulating the rule, to permit further analysis to determine whether the documents or analysis are to be included in an administrative record for judicial review.
8. Agencies should consider the sum of the public rulemaking docket and the segregated rulemaking record file as the administrative record for the purpose of decision under the Administrative Procedure Act, unless otherwise required by statute, or explicitly provided for in regulations.

Indexing:

9. Agencies should, to the extent feasible, index the documents in an agency-held rulemaking record prior to the decision of the signatory authority for that final rule. Some agencies provide the index to the signatory.
10. Agencies should consider contemporaneously indexing administrative records, consistent with the consolidated requirements for FOIA, privilege, and FRA purposes, to the extent feasible.
 - a. If the agency uses, or develops, an electronic document management system, the system's document metadata should be configured to include all of the elements of a privilege index, and FOIA *Vaughn* index, and to permit extraction of documents and indices for FOIA, privilege, and Federal Records Act purposes. Some independent agencies, such as the CFTC and ITC, appear to have developed the basis for this capability and agencies should be mindful of its potential.
 - b. Agencies that have not developed an electronic document management system might, as FDA suggests, use the simple solution of maintaining documents in portable document format (.pdf). A simple electronic folder may suffice.

Guidance:

11. Agencies should provide guidance to staff on the scope of the rulemaking record and the means for compiling the rulemaking record consistent with these best practices. Agencies may find examples of useful guidance in the guidance and practices of other agencies. *Passim.*

Certification of Administrative Record to a Court:

12. The administrative record certified to the court on judicial review of informal rulemaking should contain all of the materials in the rulemaking record as set forth above, except:
 - a. materials for which disclosure is prohibited by law or that are otherwise protected from disclosure; and

- b. materials that the agency has determined are subject to withholding on the basis of legal privilege in the forum for review, and that it sees fit to withhold.
13. Agencies should specify in the certification affidavit accompanying the transmittal of a certified administrative record to a court:
- a. Whether the agency has applied a definition of “relevance” or “reliance” to the parameters of the content of the administrative record being certified;
 - b. Whether the administrative record contains privileged or protected material; and
 - c. Whether any other limitation is placed on the administrative record.
14. Agencies should be prepared to file and serve on opposing parties at least an index of the administrative record promptly after the filing of petition for review or complaint, subject to the agency’s evaluation of the risk of litigation, to permit opposing parties and the court to assess the administrative record within a reasonable time.

Publication:

15. Agencies may wish to consider publishing at least the index to the administrative record and the certification affidavit on their websites at the time of or after the administrative record is served on opposing parties or filed with a court. Agencies may wish to publish the index to a rulemaking record.

Permanent Records:

16. The National Archives and Records Administration (NARA) should consider clarifying whether rulemaking records in informal rulemaking, and administrative records, if any, qualify as permanent records to be transferred to NARA as a unified record pursuant to the agency’s disposition schedule.

Appendix A: Questionnaire Responses and Identifying Acronyms

Set out below are the sources of the response, organized alphabetically by Department and agency, the date received by the consultant from ACUS or otherwise, and the acronym used throughout the report for that response.

Department of Commerce, ACUS Questionnaire Response (Jan. 13, 2013) (DOC*R),

Patent and Trademark Office, ACUS Questionnaire Response (Jan. 13, 2013) (PTO*R),

National Oceanic and Atmospheric Administration, ACUS Questionnaire Response (Jan. 13, 2013) (NOAA*R);

Department of Health and Human Services,

Centers for Disease Control and Prevention (CDC), ACUS Questionnaire Response (Jan. 27, 2013) (CDC*R),

Centers for Medicare and Medicaid Services, ACUS Questionnaire Response (Jan. 27, 2013) (CMMS*R),

National Institutes of Health, ACUS Questionnaire Response (Jan. 27, 2013) (NIH*R),

Food and Drug Administration, ACUS Questionnaire Response (Jan. 27, 2013) (FDA*R),

Substance Abuse and Mental Health Services Administration, ACUS Questionnaire Response (Jan. 27, 2013) (SAMHSA*R);

Department of Homeland Security, ACUS Questionnaire Response (Dec. 3, 2012) (DHS*R);

Department of Justice, ACUS Questionnaire Response (Jan. 19, 2013) (DOJ*R);

Department of Labor, ACUS Questionnaire Response (Jan. 17, 2013) (DOL*R);

Occupational Health and Safety Administration, ACUS Questionnaire Response (Dec. 5, 2012) (OSHA*R);

Mine Safety and Health Administration, ACUS Questionnaire Response (Jan. 17, 2013) (MSHA*R);

Employment Benefits Safety Administration, ACUS Questionnaire Response (Jan. 17, 2013) (EBSA*R);

Wage and Hour Division, ACUS Questionnaire Response (Jan. 17, 2013) (WHD*R);

Employment and Training Administration, ACUS Questionnaire Response (Jan. 17, 2013) (ETA*R);

Department of Transportation (DOT), ACUS Questionnaire Response (Nov. 30, 2012, amended Dec. 12, 2012) (DOT*R),

Surface Transportation Board, ACUS Questionnaire Response (Nov. 30, 2012) (STB*R);

Department of the Treasury, ACUS Questionnaire Response (Jan. 18, 2013) (DOT*R);

Internal Revenue Service, ACUS Questionnaire Response (Nov. 26, 2012) (IRS*R);

Department of Veterans Affairs, ACUS Questionnaire Response (Dec. 5, 2012) (DVA*R);
Environmental Protection Agency, ACUS Questionnaire Response (Nov. 30, 2012) (EPA*R);
Commodity Futures Trading Commission, ACUS Questionnaire Response (Dec. 3, 2012) (CFTC*R);
Federal Deposit Insurance Corporation, ACUS Questionnaire Response (Nov. 29, 2012) (FDIC*R);
Federal Energy Regulatory Commission, ACUS Questionnaire Response (Jan. 7, 2013) (FERC*R);
Federal Trade Commission, ACUS Questionnaire Response (Dec. 12, 2012) (FTC*R);
International Trade Commission, ACUS Questionnaire Response (Nov. 28, 2012) (ITC*R);
Merit Systems Protection Board, ACUS Questionnaire Response (Jan. 11, 2013) (MSPB*R);
Social Security Administration, ACUS Questionnaire Response (Jan. 28, 2013) (SSA*R).

Appendix B: Transmittal and Agency Survey Questionnaire

November 1, 2012

Dear Conference Member:

The Administrative Conference's Committee on Judicial Review has recently started a project on administrative records in informal rulemaking. It is of great importance that the often disparate record gathering practices be evaluated and best practices circulated. A critical aspect of this project is surveying federal agencies to find out when and how agencies (or their components) compile rulemaking-related administrative records for use internally and for judicial review.

As a member of the Conference, I ask for your assistance on this important research project. Attached please find a brief survey to circulate to relevant officials within your agency. We recognize that agency record practices may differ and that multiple components or offices may have rulemaking authority or otherwise are involved in informal rulemaking. We would appreciate responses from all officials who have regulatory responsibilities. **Responses to the attached survey—together with any related written materials—should be completed by November 30, 2012.** Please return your survey by email to Stephanie Tatham, statham@acus.gov, Staff Counsel to the Committee on Judicial Review. If mailing hard copies, use the ACUS mailing address, 1120 20th Street NW, Suite 706 South, Washington, DC 20036.

If you have any questions about the survey or the Administrative Record project, please feel free to contact Stephanie at (202)480-2089 or our consultant, Mr. Leland E. (Lee) Beck, at lebeck365@gmail.com or his personal cell phone: (240)674-6839. Lee may be in touch to follow up on this request or with questions relating to the survey responses.

Our success in this and all Conference projects depends on our members. Thank you in advance for your help on this project. Your feedback and suggestions are welcome.

Sincerely,



Paul R. Verkuil

Chairman



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Survey of Agency Administrative Records Practices

The Administrative Conference of the United States (ACUS) is an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures. ACUS is currently studying administrative records in informal rulemaking. A critical aspect of this project is surveying federal agencies to find out when and how various agencies (or their components) compile rulemaking-related administrative records for use internally and for judicial review. The final report will include analysis of the key issues and a set of recommendations to highlight innovative methods and best practices, as well as suggestions of potential improvements across the federal government.

Background Information: In the Administrative Procedure Act (APA), Congress directed courts to “review the whole record or those parts of it cited by a party” to determine the lawfulness of agency action. 5 U.S.C. § 706. Informal agency proceedings where reviewable by statute or that are final agency actions under 5 U.S.C. § 704 are also subject to “on the record” review. Because the phrase “the whole record” is not defined in the APA, this survey examines how agencies have worked to implement the concept in informal decision-making, and more specifically informal rulemaking.

A rule is defined in the APA as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy....” 5 U.S.C. § 551(4). We are interested in records for agency rules adopted where Congress delegated regulatory authority to an agency head without requiring “formal” proceedings including a “hearing on the record” under the procedures of 5 U.S.C. §§ 556-57, and where instead agencies act through the “informal” notice and comment proceedings set forth in 5 U.S.C. § 553.

Agencies, and components within agencies, manage the development of administrative records in a wide variety of ways. ACUS’s goal is to survey and compare agency practices and make suggestions for future best practices. ACUS intends to showcase the diversity of agencies practices and to credit the best practices of individual agencies, as well as to offer a more general assessment of lessons learned. Please note that ACUS records are subject to disclosure requirements in the Freedom of Information Act. 5 U.S.C. § 552.

ACUS requests your assistance in completing the attached survey by November 30, 2012.

- Please direct this survey to the components or offices within your agency that engage in informal rulemaking.
- Please copy and distribute this survey as necessary to help develop a complete picture of your agency’s practices and policies. If applicable, an explanation of the relationship between policies in multiple components and headquarters would be helpful.
- Please provide copies of any related management directives (in hard copy or electronic format) such as regulations, guidance documents, policies, manuals, and memoranda, with your responses.
- Please return your response to Stephanie J. Tatham, ACUS Staff Counsel, at statham@acus.gov. If mailing hard copies of documents, ACUS’s mailing address is: 1120 20th Street, N.W., Suite 706 South, Washington, DC 20036.

We are providing this survey in Microsoft Word format so that you may expand your responses as needed. Please feel free to contact us with questions, concerns, or comments that do not fit neatly into your response.

Contacts:

Stephanie J. Tatham, ACUS Staff Counsel, at statham@acus.gov or (202) 480-2089

Leland E. Beck, ACUS Consultant, at LEBeck365@gmail.com or (240) 674-6839



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Survey of Agency Informal Rulemaking Administrative Records Practices	
Respondent Name:	Date:
Agency:	ACUS USE
Respondent Component (if applicable):	
Email:	
Phone:	
1. Administrative Record Development Policies:	
A. Does your agency or component have established regulations / guidance / policy / manuals / memoranda* on how to develop and retain an administrative record of final agency action, or that affect record compilation?	
B. Why did your agency or component develop this regulations / guidance / policy / manual / memoranda (if known)?	
2. Compilation of Administrative Records:	
A. Do you compile administrative records as the agency rulemaking proceeding advances, at the conclusion of proceedings (either for the decision-maker or otherwise), or only if necessary for certification to a court in litigation? If so, please explain.	
B. Does your agency have a "stopping rule" or regulations / guidance / policy / manuals / memoranda* for when to close the administrative record? If so, please explain.	

*Please provide any related documentation and indicate the date of last revision.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Survey of Agency Informal Rulemaking Administrative Records Practices

Respondent Name:

Date:

3. Contents of an Administrative Record: *A variety of documents historically have been included in administrative records for informal rulemaking. Does your agency have established regulations / guidance / policy / manuals / memoranda or use a checklist* for rulemaking administrative record contents?*

4. Statutory Requirements: *A number of statutes define the requirements for an administrative record in informal rulemaking, or either require or prohibit a decision-maker from considering specific matters in reaching a final administrative decision.¹*

A. *What, if any, statutes inform your agency's definition of the administrative record?*

B. *What, if any, statutes constrain your decisionmaker's final agency action?²*

5. Record Keeping:

A. *Does your agency or component develop and retain rulemaking administrative records in paper form, electronic form, or a combination of both formats?*

B. *If electronically, how does your agency or component compile the electronic file(s)? Please describe this system. For example, does it have an electronic document management system, segregated folder, and/or individual who serves as the designated electronic docket manager?*

C. *Does the rulemaking record used by the agency internally, whether electronic or paper, vary from the record accessible to the public through Regulations.gov? If so, how?*

¹ For example, several statutes define the concept of the administrative record in specified agency proceedings. See, e.g., Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(e)(1)(B); Consumer Product Safety Act, 15 U.S.C. § 2060(a); Clean Air Act, 42 U.S.C. § 7607(d)(7)(A).

² For example, the Securities Exchange Act and Investment Company Act of 1940, 15 U.S.C. §§ 78c(f), 80a-2(c), respectively (agency required to consider the rule's effect upon efficiency, competition, and capital formation); 49 U.S.C. § 31137(a) (agency required to ensure in regulations on use of monitoring devices in commercial vehicles that the devices are not used to harass vehicle operators).

*Please provide any related documentation and indicate the date of last revision.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Survey of Agency Informal Rulemaking Administrative Records Practices

Respondent Name:

Date:

6. Administrative Indexing:

- A. *When does your agency or component index the rulemaking administrative record? For example, do you index the record as it is developed or only at the end of the rulemaking process, if necessary?*
- B. *Is there a standardized index that you use?*
- C. *Are administrative record indices available to the public and, if so, how are they accessed by the public?*

7. Privileged Documents:

- A. *Does your agency or component (as applicable) index privileged documents considered in the development of the decision in its administrative record in informal rulemaking and, if so, how?*
- B. *Does your agency or component have a policy on inclusion of privileged documents in a rulemaking administrative record, or are privileged documents only included or disclosed if a Freedom of Information Act request or litigation requires a Vaughn or discovery index?*

8. Specific Types of Information: *Does your agency or component have procedures for handling specific types of documents in administrative records for informal rulemaking, such as:*

- A. *Copyrighted material?*
- B. *Computer programs, models, and malleable data?*
- C. *Personal privacy information (e.g. Privacy Act, HIPPA) in agency files?*
- D. *Personal privacy information (e.g. Privacy Act, HIPPA) provided to the agency during proceedings?*
- E. *Confidential business information or trade secrets provided to the agency during proceedings?*
- F. *Other?*

**Please provide any related documentation and indicate the date of last revision.*



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Survey of Agency Informal Rulemaking Administrative Records Practices

Respondent Name:

Date:

9. Presentation to Agency Deciding Official(s): ACUS recognizes diversity in the portions of rulemaking administrative records provided to the decisionmaker ultimately responsible for the final agency action. Please describe how your agency / component provides the administrative record to the official(s) making the decision (e.g., record in its entirety, portion of the record, summary memorandum, index, etc.).

10. Presentation of Certified Administrative Record to Court:

- A. When a rulemaking is challenged in court, how does your agency compile or stipulate the rulemaking administrative record for certification to the court?
- B. Does your agency have established regulations / guidance / policy / manuals / memoranda* on record certification? If so, please explain.
- C. Who is the appropriate official (by name and title) in your agency or component to certify administrative records for purposes of judicial review?
- D. Are there particular materials or types of materials (e.g., computer models, copyrighted work, etc.) that are difficult or unwieldy to provide to courts or litigation parties? If so, how are such materials included in the certified administrative record?

11. Other Issues:

- A. What issues has your agency or component found most problematic in relation to rulemaking administrative records for agency decisionmaking or judicial review?
- B. Do you have suggestions or recommendations for best practices relating to rulemaking administrative records for judicial review?

Thank you!

*Please provide any related documentation and indicate the date of last revision.