



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ACUS is an independent federal agency that develops recommendations to improve administrative process and procedure. ACUS also arranges for the interchange of useful information to carry out its mission. ACUS Information Interchange Bulletins are intended to help agencies and the public understand the administrative process. They should not be relied upon as legal documents.

Information Interchange Bulletin No. 009

Recordkeeping in Informal Rulemaking

Agencies undertake informal rulemaking by developing a proposed rule; publishing a notice of proposed rulemaking; giving interested persons an opportunity to submit data, views, or arguments; considering public submissions; and publishing a final rule in the *Federal Register* (5 U.S.C. § 553). Most final rules are then subject to challenge in the federal courts (5 U.S.C. § 702).

Agency officials create, receive, and consider many kinds of materials throughout this process, including notices, public comments and other submissions, transcripts or recordings of oral presentations, ex parte communications, reports and recommendations, scientific research and underlying data, and other materials as required by law. As described below, officials compile various collections of materials for different purposes throughout the rulemaking process.

Rulemaking Record

PURPOSE	Officials often maintain an ongoing record of rulemaking-related materials to manage the rulemaking process and prepare records for the other purposes described here.
CONTENTS	ACUS recommends that officials include all materials listed above and other materials that officials with substantive responsibilities meaningfully considered in connection with the rulemaking.
LOCATION	Agencies maintain rulemaking records according to their own internal practices.

Administrative Record for Judicial Review

PURPOSE	When a litigant challenges an agency's rule, the court reviews the "whole record" for the rulemaking (5 U.S.C. § 702).
CONTENTS	The administrative record includes anything the agency considered in arriving at its final rulemaking decision, regardless of whether it considered the material before or after the close of the comment period.
LOCATION	Agencies file administrative records with the court along with an affidavit attesting to the record's accuracy and completeness. Administrative records are generally available on PACER, an electronic public access service of the federal courts.

Records Management

The Federal Records Act requires agencies to take steps to preserve "official" records and deposit them with the National Archives and Records Administration. Agencies should consult the Act and NARA rules to determine their obligations with respect to rulemaking materials.

Public Rulemaking Docket

PURPOSE	Agencies use rulemaking dockets to provide the public a meaningful opportunity to participate in the rulemaking process by submitting data, views, or arguments.
CONTENTS	The E-Government Act requires agencies to maintain an electronic docket for each rulemaking that includes public submissions and other materials required by agency rule or practice. Agencies can also use dockets to disclose "critical factual material" (IIB-005). Some information may be subject to legal limitations, such as classified material, protected personal information, and confidential commercial information. Information may also be protected protected under the attorney-client, work product, or deliberative process privileges.
LOCATION	Electronic dockets are available on regulations.gov or agency websites. Some agencies provide access to dockets or to materials that are non-electronic, copyrighted, or sensitive in reading rooms.

Agency Litigation Page

Some agencies make substantive court filings and court opinions in litigation over agency rulemakings available to the public on their websites.

Additional Resources

ACUS Rec. [2020-6](#), *Agency Litigation Webpages*
ACUS Rec. [2020-2](#), *Protected Materials in Public Rulemaking Dockets*
ACUS Rec. [2018-6](#), *Improving Access to Regulations.gov's Rulemaking Dockets*
ACUS Rec. [2014-4](#), *"Ex Parte" Communications in Informal Rulemaking*
ACUS Rec. [2013-4](#), *Administrative Record in Informal Rulemaking*
ACUS Rec. [2013-3](#), *Science in the Administrative Process*
ACUS Rec. [2011-8](#), *Agency Innovations in E-Rulemaking*
ACUS Rec. [2011-2](#), *Rulemaking Comments*
ACUS Rec. [2011-1](#), *Legal Considerations in E-Rulemaking*