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*Signed, Sealed, Protected: Solutions to Agency Handling of Confidential Business Information in Informal Rulemaking*

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Abstract by Melissa Sutton

The author examines the problems associated with the current spectrum of agency approaches for managing confidential business information (CBI) in informal rulemaking. The article begins with an overview of informal rulemaking and moves to a discussion of the current procedures in place to handle CBI that is submitted with comments to assist agencies in their rulemaking decisions.

The author points out that agency procedures for handling CBI sometimes fall under the rules established by the Freedom of Information Act (FOIA). The article discusses that while the FOIA has increased the transparency of the federal government by encouraging public participation in agency rulemaking, it has also created a conflict between an agency's duty to protect submitted CBI and the public's duty to monitor agency rulemaking. The article emphasizes that the FOIA does not cover how agencies should treat CBI when it is submitted as part of a comment during informal rulemaking, and as a result, federal agencies have developed their own non-FOIA rules for managing CBI in rulemaking, resulting in a variety of CBI-handling methods.

The article discusses the most common CBI-handling methods employed by agencies and details their insufficiencies. The first part of the article provides an overview of informal rulemaking and discusses the role of CBI in that process. The second part of the article examines the current procedures employed by agencies to handle CBI in rulemaking and discusses the potential problems associated with each procedure. The article then discusses the impact of the FOIA on agency rulemaking procedures. Part four of the article recommends the best practices that agencies should adopt to handle CBI in informal rulemaking. Finally, the article concludes that current agency techniques for managing CBI fail to address many of the problems created by CBI in rulemaking, and suggests that resolution to these problems is a necessary step toward maintaining legitimacy in notice-and-comment rulemaking.