

How to effectively comment on regulations

August 2018

Adam Looney

Director, Center on Regulation and Markets

Senior Fellow, The Brookings Institution

How to Submit an Effective Comment on a Proposed Regulation

Americans have the right to participate in the regulatory process through notice and comment. The Executive branch, in turn, is required to receive those comments, to seriously consider them, and to fully respond. However, Americans rarely exercise their right to comment on Federal policies, and when they do, they often do not engage with the process effectively.

Commenting is an important way to have your voice heard on regulations that can have a large impact on your and other people's lives. Effective and relevant comments provide regulators with information to help them improve their rules, and may even impose a legal obligation on the agency to act reasonably in the face of compelling information. In addition, comments that reflect the perspective of individual persons are valuable to government agencies in several ways: they can show the agency unique situations that it hasn't contemplated in its evaluation of the policy; they can then explain how that unique situation will impact individual behavior in response to the policy change; they can express third person, value-based judgments on the policy that speak to their general opinion of whether the agency is heading in the right direction.

Comments are only effective, however, to the extent that they provide information directly relevant to analyzing the rule and its effects. Simply stating that you support or oppose a policy is not as persuasive as explaining how the policy would positively or negatively affect your specific situation. This guide will help you comment effectively by describing how to structure and what to include in your comments.

Regulations and the Rulemaking Process

Regulations are necessary to enforce and implement Congressional intent, but must be based on the law, and on facts and analysis. They are not based on voting or popularity. By executive order, regulators are required to consider evidence of the likely effectiveness of proposed regulations, including analysis of the rule's costs and benefits. The notice-and-comment process is one way for the general public to provide feedback and information to federal regulators to aid in their analysis and in the development of the rules.

By law, agencies must review all public comments received and, while they can categorize similar comments (e.g. identical chain/form letters), they are required to respond to all comments in the preamble of their final regulation whether they accept the suggestion or not. Agencies have to explain the rationale for not incorporating a comment (e.g. out of scope, no statutory authority) or, for those comments they find persuasive, they have to explain why they have decided to incorporate the suggestion. Regulations that are arbitrary or capricious—for instance, which ignore evidence and research contravening their purported effects and benefits—can be challenged in court. Therefore, your comments can have a real impact: they must be read and may even lead to changes in regulations.

How to Make Your Comments Effective

How should I structure my comment?

At the top of your comment, identify the document you are commenting on by its docket number, subject heading, federal register date and page number.

In your comment, you should include:

(1) an **introduction** where you explain why you are interested in the regulation, highlight any credentials or experience that may distinguish your comment from others, and whether you are commenting on your own behalf, on the behalf of another organization, or are endorsing or joining with another comment or commenter;

(2) a **background** where you clearly identify the issues within the regulatory action on which you are commenting, and list your recommendations upfront. If you are commenting on a particular word or phrase, or if you are responding to specific questions or requests for data, state this clearly and provide the relevant page number, column, and paragraph citation from the federal register document;

(3) **analysis** which lays out your detailed argument and evidence to support your recommendations;

(4) a **conclusion** which recaps your main argument and lists your recommendations again.

Your comment should also include **citations** for all information and research you relied on (chapter 5 in this [document](#) gives some tips on how to format citations).

What elements are effective? What should I include in my analysis?

The basic premise of notice-and-comment requirements is that even though the Executive Branch employs specialists with deep and specific knowledge, those specialists are not experts in how a given policy may affect a specific market, industry, activity, or person. Comments help make sure that the government is getting it right—or alert it when it’s not—by providing information that challenges the government’s assumptions where they’re inaccurate and to help the government understand what the right assumption would be. As former OIRA Administrator Cass Sunstein wrote “Democratization of the regulatory process, through public comment, has an epistemic value. It helps to collect dispersed knowledge and to bring it to bear on official choices.”

What information is helpful?

First, pay special attention to any in-notice prompts, such as questions or requests for data or evidence, within the proposed rule. Such prompts highlight areas the agency believes are important and get reliable attention from reviewers.

Second, consider whether the agency is required to regulate. Under a Presidential directive, Executive Order 12866, issued by President Bill Clinton in 1993, and maintained across both Republican and Democratic administrations to this day, Executive branch agencies are required to issue regulations in only three circumstances:

- (1) When a law, passed by Congress, requires it,
- (2) When it is necessary to interpret a law, passed by Congress; or
- (3) When a compelling public need makes issuing a regulation by the Executive Branch necessary, which occurs when problems can't be solved by the market. For example, when markets fail to protect or improve the health and safety of the public, the environment, or the well-being of the American people.

Finally, consider what information regulators are *required* to consider when designing and issuing new regulations. Under Executive Order 12866 when Executive branch agencies issue regulations they must assess all costs and benefits of the proposed rule and of all the possible/feasible regulatory alternatives (including the alternative of not issuing the regulation). If they are going to regulate, agencies must “comparison shop” for the best possible regulatory solutions. This is to ensure that the government only issues new regulatory policies under the following two circumstances:

1. the benefit of the new policy is greater than the costs associated with that new policy (what is also referred to as “net benefits”); and
2. that this new policy has net benefits greater than any other possible policy alternative (also known as “maximizing net benefits”). This is the approach Executive branch agencies are required to adopt when they are considering issuing a new regulatory policy.

Hence, as a commenter, your goal is to provide rigorous information regarding whether rulemaking is necessary, the costs and benefits of the proposed rules, and the benefits of other policy alternatives (including maintaining the status quo). For instance, in the case of a regulation you believe fails to maximize net benefits, your job is to draw on your own expertise, research, or evidence to persuade officials at the federal agency that the rule they've composed either has flaws, has ignored or undervalued evidence regarding the costs or benefits of the rule, or to provide specific ways for it to be changed or improved that would increase the net benefits of the rule.

The best way to go about making your argument is to assess the rule by the standards to which those officials are held by the Office of Information and Regulatory Affairs (this [document](#), [Circular A-4](#) outlines official best practices for regulators). If you can convince the agency that they've failed to follow their own rules, then your comment will be more likely to make a difference. Drawing on these best practices, here are considerations and evaluative criteria that will help you be an effective commenter:

Consider the problem that the regulation intends to address. Why is this regulation needed? What is the problem the agency is trying to address? In answering these questions, agencies must explain whether private markets or government institutions are unable or not currently addressing this problem. This is critical in justifying a new agency policy. Is the action

needed to address a market failure or to promote some other goal, such as protecting privacy, combating discrimination, ensuring the security of Americans, or eliminating duplicative government processes? If a law passed by Congress requires the agency to issue the regulation, this should be specifically described along with any flexibility the agency has in implementing the law. Perhaps most importantly, the agency must explain how the regulation will address the problem they believe needs to be fixed.

Consider whether agency regulations are based on the best available scientific, technical, economic, and other information. Such information is useful both when determining the need for the regulation and assessing the impacts of the regulation. More accurate and precise information leads to a better understanding of the problem and more effective regulatory outcomes. Scientists, economists, technical experts, and others can improve proposed rules or prevent regulatory flaws by lending their expert advice and opinion, citing published reports, or providing relevant data or evidence regarding the effects of a proposed rule or the need for the rule.

Consider whether the costs of the intended regulation are justified by its benefits. Regulations should be designed in a cost-effective manner. In doing so, each agency must consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity. Regulations should only be issued if the costs of the intended regulation are justified by its benefits. Are they?

Wherever possible, regulators are required to calculate the economic costs and benefits that the rule will impose on a community or on society as a whole. They must give special attention to the effects of the rule or program on small businesses, wages, and economic growth where they exist. Hence, these are important factors for regulators. Agencies must consider opportunity costs, those benefits that are sacrificed by not choosing alternatives to the rule, and should explain how they got their estimates of costs and benefits in sufficient detail to allow for them to be reproduced. Regulators should summarize, describe, and cite the relevant research, data, or analysis, and explain why it is relevant to the assessment of costs and benefits. When it's difficult to monetize costs, their impacts should be described qualitatively. Have regulators used the best possible evidence, data, and methods for assessing the costs and benefits or other impacts of the rule?

Consider whether regulations have been designed in a cost-effective manner. Each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

As a commenter, you may suggest alternatives to the proposed regulation (including the baseline case with no new regulation) and evaluate how they compare. Can the agency achieve the same outcomes at lower cost or while imposing a lower burden on society (in terms of time or effort)? If so, agencies are required to select approaches that maximize net benefits (i.e. minimize the cost for a given outcome).

Consider distributional analysis: Those who bear the costs of a rule and those who enjoy its benefits are not always the same people. Sometimes distributional impacts take the form of economic transfers, and you can describe them in monetized terms. The law requires agencies to consider the distributional effects of rules when creating them, and a rule may be invalid if it has disproportionate impact on a group or individual.

Determine whether existing agency regulations have created, or contributed to, the problem. Prior to issuing an altogether new regulation, agencies must first determine whether existing regulations are the source of the problem. It may be that existing regulations are outdated, no longer applicable, or are restricting market-based solutions and, therefore, are the cause of the problem that a new regulation is intending to fix. It may be these existing regulations need to be altogether repealed or modified so they work better.

Consider agencies theoretical framework: Agencies should provide a coherent theory, consistent with economic behavior, that explains why a problem exists and how their regulation will solve it. Explain any flaws in the agencies underlying theory, and what the implications are in terms of outcomes.

Assess the legality and necessity of the rule: All federal regulations should be born out of legislation created by congress, be unique in what they achieve, and consistent and compatible with other regulations.

Your expert comments can help improve proposed rules, prevent bad rules from being finalized, or provide grounds for legal challenge. Indeed, these legal implications elevate the importance of your comments. The “arbitrary-and-capricious” standard is frequently viewed as requiring an agency to demonstrate that it engaged in reasoned decision making. As Sunstein observes, “whenever an agency fails to calculate costs and benefits and to show that the latter justify the former, a litigant might contend that it has acted arbitrarily.” In particular, in a 2016 report, the Congressional Research Service (CRS) identified several agency regulatory actions that the courts found to be “arbitrary and capricious”:

- contradicting the “expert record evidence” without explanation
- “fail[ing] to provide any coherent explanation for its decision”
- failing to consider circumstances that “warrant different treatment for different parties”
- reaching a conclusion that contradicts the underlying record
- failing to consider a relevant and important factor in making a decision
- issuing a rule that was based on “pure political compromise, not reasoned scientific endeavor”
- failing to “exercise sufficiently independent judgment” by deferring to private parties
- utilizing a model for studying risk that was inconsistent with the underlying data.

In short, effective, relevant, well-founded comments are valued by regulators and supported in the courts.

The Mechanics of the Public Comment Process

In order to have your voice heard in the notice-and-comment rulemaking process, you will have to identify the rule in question, prepare an effective comment, and submit your comment on the right website and during the comment window.

Where can I find what agency regulations are out for public comment?

The **Federal Register** ([federalregister.gov](https://www.federalregister.gov))—the official journal of the Federal government—is an essential publication announcing news from Federal agencies. There are two types of regulatory documents in an issue of the *Federal Register* that you can comment on: Notices and Proposed Rules. Agencies sometimes issue a “**notice**” such as, “advance notices of proposed rulemaking” (ANPRM) or “requests for information,” to formally request input from the public on a specific policy they are considering developing into a regulation even before it is issued as a proposed rule. A “**proposed rule**” or “notice of proposed rulemaking” or NPRM, is the stage of rulemaking during which agencies formally open rules to public comment.

To find notices and proposed rules, go to [federalregister.gov](https://www.federalregister.gov), where, below the search bar on the home page you can filter the documents in the current issue to view notices or proposed rules. You can also search for a specific rule using a keyword, Regulation Identifier Number (RIN), or agency name. Once you’ve selected a document you will be able to read the full proposal and see important information you’ll need to submit an effective comment on time. **The preamble of the proposed rule identifies the date by which comments must be submitted for the agency to consider them.**

How do I submit public comments on a proposed regulation?

[Regulations.gov](https://www.regulations.gov) is the official site for public comments on regulations. Regardless of where it is in the rulemaking process, every rule has a **docket folder**, containing all of the agency’s relevant rulemaking materials (e.g, the proposed rule, studies on the rule, supporting documents, public comments, hearing notices, extensions of comment period, and eventually, the final rule), and every document published in in the *Federal Register* will link to its docket folder at [regulations.gov](https://www.regulations.gov).

There are two ways to submit a comment: (1) click on “Submit a formal comment” at the top right hand corner of the document page in the federal register; (2) copy and paste the docket number on the right hand side of the document into the search bar on [regulations.gov](https://www.regulations.gov), click on the result (this will take you to the docket folder), then click “Comment Now!” You can choose to type your comment directly into the text box provided or upload another file.

You can also search for proposed rules currently open for comment directly on [regulations.gov](https://www.regulations.gov). Click advanced search on the homepage and select the appropriate filters (Open for Comment, Proposed Rule or Notice, Rulemaking). You can also narrow your selections by agency, keyword, posting date, and more. Clicking on a rule takes you to its docket folder. Click “Comment Now!” to comment.