

PUBLIC INVOLVEMENT IN PUBLIC HEALTH REGULATION

Quick Facts



Every day, federal agencies make decisions that affect public health. Here are three ways the public can get engaged with the decision-making process:

Provide comments on proposed rules

Agencies are required to provide the public with a meaningful opportunity to comment on new proposed regulations.¹ Any individual or entity may submit written comments, and in some cases, the public may have the option to present oral comments at a public hearing. Comment periods are typically 30 to 60 days and may be shorter or longer depending on the complexity of the proposal.² To find open opportunities for public comment, visit www.regulations.gov.

The Public Health Law Center maintains a **regulatory tracker** where you can find public comment opportunities on pending commercial tobacco control, food security, and other related action. Staff attorneys can also provide you with legal technical assistance for comment drafting.



Submitting a public comment allows an individual or entity to express support for or opposition to the proposed action, raise concerns about the proposed action, and provide the agency with additional relevant information. By law, an agency must respond to all significant comments.³

Request agency records

Any individual or entity can request agency records under the Freedom of Information Act (FOIA).⁴ FOIA compels agencies to automatically disclose certain documents and information, including frequently requested records.⁵ However, the agency may refuse to release records exempt from disclosure by law,⁶ and FOIA **does not** require an agency to do research, analyze data, answer written questions, or create records in response to a request.

Requesting records under FOIA is simple and informal: a) the request must be in writing and “reasonably describe” the records being sought,⁷ b) requesters may also specify the format in which they wish to receive the records,⁸ and c) the request must be submitted directly to the agency subject to the request. Review the agency’s website for agency-specific requirements prior to filing.

Petition for agency action

A petition allows the public to take initiative in shaping the regulatory agenda of an agency. All agencies are required to have a process for the public to petition the agency to issue, change, or repeal a rule.⁹ In the petition context, a “rule” includes rules, regulations, and agency guidance, with broader applicability than agency actions subject to the notice-and-comment process.¹⁰

Many agencies refer to this mechanism as a “rulemaking petition” or a “citizen petition.”¹¹ A rulemaking petition is different than a grassroots petition directed at a federal agency because under the law, agencies must respond to a rulemaking petition.¹² Different agencies may have specific regulations that set forth requirements for how the public may petition the agency and how the agency must respond.¹³ These requirements may include petition content requirements, filing procedures, opportunity for public comment, and timelines for agency response. Review the agency’s website, or contact the agency, to find agency-specific requirements prior to filing.

Need Help? Contact the Public Health Law Center.

If you would like technical assistance with providing a public comment, making a FOIA request, or creating a petition, please contact a staff attorney with the Public Health Law Center at (651) 290-7506 or email publichealthlawcenter@mitchellhamline.edu.

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Endnotes

- 1 5 U.S.C. § 553(c) (“the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”).
- 2 5 U.S.C. § 553(d); The Administrative Conference of the United States encourages agencies to provide at least 60 days for significant regulatory actions. Executive Order 12866 states that in most cases, comment periods should be 60 days at a minimum. Exec. Order No. 12866 § 6(a)(1), 58 Fed. Reg. 51735, 51740 (October 4, 1993).
- 3 See *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (“An agency must consider and respond to significant comments received during the period for public comment.”).
- 4 5 U.S.C. §§ 552 et seq.; see generally U.S. Dep’t of Justice, United States Department of Justice Guide to the Freedom of Information Act, at Exemption 5 (updated 2019), <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.
- 5 *Id.* FOIA applies to any “agency records” that are documents (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). The 1996 amendments to FOIA explicitly indicate that the term “record” and any other term used in FOIA in reference to information includes “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.” 5 U.S.C. § 552(f)(2).
- 6 5 U.S.C. § 552(b).
- 7 5 U.S.C. § 552(a)(3)(A). Identifying the records as specifically as possible may reduce copying costs, increase accuracy of the results, and may be processed more quickly than a general request for “all information” on a particular subject.
- 8 5 U.S.C. § 552(a)(3)(B).
- 9 See 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”); see also U.S. CONST. amend. 1 (“Congress shall make no law ... abridging the freedom ... to petition the Government for a redress of grievances.”).
- 10 5 U.S.C. § 551(4) (“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 or describing the organization, procedure, or practice requirements of an agency.”).
- 11 See, e.g., 21 C.F.R. § 10.30.
- 12 While the First Amendment only guarantees right of presentation, the Administrative Procedure Act (APA) requires a response. Compare 5 U.S.C. § 555(b) (“With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.”) and 5 U.S.C. § 555(e) (“Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.”), with *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979) (“the First Amendment does not impose any affirmative obligation on the government to listen, to respond.”), and *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984).
- 13 At minimum, the APA requires agencies to make publicly available their requirements for all formal and informal procedures. 5 U.S.C. § 552(a)(1)(B). For an overview of different rulemaking petition processes by agency and subject matter, see Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking Final Report to the Administrative Conference of the United States*, Appendix C (Nov. 5, 2014), <https://perma.cc/Z7Q8-WR7X>.