



When Will They Listen?

Public Comment and Highly Salient Regulations

STUART SHAPIRO

Professor, Rutgers University

The opportunity to comment on proposed rules was supposed to imbue a fundamentally administrative process with democratic input by giving the public a chance to influence regulatory decisions. In a new study for the Mercatus Center, Rutgers University professor Stuart Shapiro finds that while federal agencies are quite responsive to comments requesting clarification, they are less likely to make substantive changes in response to comments and least likely to respond positively to comments challenging the legal foundations of regulations that garner significant public attention.

For the complete study, visit the Mercatus Center website at mercatus.org.

Background

Agency response to comments, particularly with respect to politically salient rules, is more nuanced and complex than critics of the process have argued, sometimes dismissing it as Kabuki theater. The response, however, falls far short of the role envisioned at the dawn of the regulatory era for the comment process, that of injecting significant democratic input into the administrative state.

- The study examines 12 economically significant regulations with an impact of at least \$100 million, where good data on costs and benefits were available that permitted analysis. The 12 rules studied provided 708 separate issues, which served as observations in the dataset.
- These rules spanned seven agencies, including the Environmental Protection Agency, the Department of Energy, the Department of Transportation, the Department of Health and Human Services, the Food and Drug Administration, the Occupational Safety and Health Administration, and the Department of Justice.

Findings

The comment process might be more likely to work as intended in the case of salient regulations, when political oversight is plentiful. While agencies were more open to responding positively to comments requesting clarification, they also responded positively to 38 percent of comments requesting substantive changes on politically salient regulations.

- Agencies were generally willing to clarify confusion in their proposals, agreeing with comments requesting clarification 54 percent of the time—the highest rate of agreement of any class of comment.
- Agencies were less likely to make substantive changes, agreeing with fewer than two out of five such comments. This was true regardless of whether the commenter wished for more stringent regulation (when the agency disagreed 65 percent of the time) or less stringent regulation (when the agency disagreed 59 percent of the time). It did not make a difference if the issue was raised by multiple commenters. Nor was there any difference in response across agencies.
- Agencies were least likely to agree with comments with a legal basis, agreeing only 14 percent of the time. Economic comments resulted in agreement 29 percent of the time.

TABLE 1. Agency agreement rates

Comment type	Agency agreement (%)
Clarification	54
More stringent regulation	35
Less stringent regulation	41
Economic basis	29
Legal basis	14

- Comments addressing legal concerns generated the longest responses, but agencies also tended to provide longer responses when an issue was raised by multiple comments than when responding to an issue raised by a single comment.

Conclusion

For the most salient rules examined in this article, the results are more complex than supposed by those who dismiss public comment out of hand. Why agencies respond positively to a non-trivial portion of substantive comments on salient rules is an open question.

- One explanation is that in salient rules, where political oversight is likely plentiful, the public comment process is most likely to work as intended.
- It is also possible that agencies concentrate more on strategic behavior on highly salient rules. As Shapiro noted in his 2007 paper in *Public Administration Review*, agencies may “over-propose” rules so that they can appear responsive when the public uproar over their proposal emerges.
- They may also search for issues from commenters that don’t cut at the heart of the rule so that they can appear responsive while keeping their initial proposals intact.