

Why Public Comments Matter

Public Commenting is an important opportunity to make your voice heard. It is essential to providing input in the development of effective rules and regulations that serve your community. Comments also create a record that lawyers can use to challenge harmful rules.

What is a comment?



The public has a legal right to provide input on certain proposed government actions. For example, federal agencies are required to provide an opportunity for public comment when proposing a new rule or regulation. Public commenting can also occur on the local and state levels of government. A comment can be as brief as a sentence, address specific aspects, or respond to all aspects of a proposed regulation.

Who can comment?



Anyone can comment. Special qualifications are not needed. If you or your community may be impacted, make your voice heard!

When can I comment? What happens after?



The announcement of a proposed rule or regulation generally indicates the length of time you have to submit comments (usually 30-60 days). Federal rules and regulations will always be announced in the Federal Register which can be found at www.federalregister.gov. After the comment period closes, federal agencies must *consider* comments before publishing a final rule, which may *change* the proposed rule based on the comments received. While federal agencies are not required to respond to all comments, they are required to consider and respond to substantial and unique comments.

Your Chance to Influence Regulations



- Commenting is an opportunity to influence or **change** the rule or regulation and make your voice heard. Federal agencies are required to consider your comments before making final decisions.



- Commenting is an important way to share your **expertise** as the issues involved may be complex. Provide **data**, facts, or articles if available.



- Commenting makes better regulations. Your comments make sure that **legal requirements**, **facts**, **unintended consequences**, or **errors** are not overlooked.



- Commenting ensures that **on-the-ground experiences** are taken into account. You may be personally affected by this issue or work with people that are affected. Share this important **perspective**.



- Commenting is your chance to point out issues, offer **alternatives** and substitute language, and help decision-makers identify **solutions** they may not have initially considered.



- Commenting helps decision-makers determine the **level of acceptance** or resistance in the public. In this way, decision-makers can respond to people's needs, grievances, and preferences.

Medicare Coverage of Next-Generation Sequencing

While interpreting National Coverage Determinations, a federal agency proposed that Medicare would only cover next-generation sequencing for patients with advanced stages of cancer. The patient and provider community wrote to the agency to express concerns that this determination wrongly excluded early-stage cancer patients. In response, the agency decided to reopen and revise the interpretation to address the community's concerns.

Access to Prescription Drugs in Alabama

In 2018, Alabama was about to scale back coverage standards for prescription drugs that must be covered by health insurers. After considering comments that detailed the consequences of these cuts and their impact on individuals that need comprehensive access to drugs, the Alabama Department of Insurance withdrew the proposal and ultimately made no changes.

Comments Help Build the Case for Lawsuits



- Even if your comments do not end up changing the regulation, they are important for potential **litigation**. Your comments help create the **administrative record** that a federal agency or decision-maker has to consider when finalizing a rule or regulation.



- Government agencies are **required** to consider public comments. If the agency has failed to adequately consider the comments it received, a judge may **invalidate the rule**.

Medicaid Work Requirements

Multiple states have sought and received permission from the federal government to implement work requirements as a condition of eligibility in their Medicaid programs. In legal challenges to these policies, a court ruled that the federal government acted in an “arbitrary and capricious” manner in approving requests to waive Medicaid law and implement work requirements. The significant number of public comments submitted in response to work requirements played a crucial role in the decisions.

In the Kentucky case (*Stewart v. Azar*), the judge cited directly to public comments and stated that the government failed to adequately consider the significant public comments received which asserted that work requirements would “significantly reduce low-income people’s participation in health coverage programs.” The judge found that ignoring these comments required the approval of work requirements to be overturned, and agreed with commenters that the health care needs of low-income individuals is the primary purpose of the Medicaid program. In the Arkansas case (*Gresham v. Azar*), the judge struck down work requirements on similar reasoning: “Not only did [the federal government] fail to address whether coverage loss would occur as predicted, but they also ignored that commenters had projected that such loss would happen.”

Need Help with Your Comments?

If you need assistance with researching and drafting your comment, consider reaching out to the Center for Health Law and Policy Innovation at chlpi@law.harvard.edu.



CENTER *for* **HEALTH LAW**
and **POLICY INNOVATION**
HARVARD LAW SCHOOL

Sources:

1. ELIZABETH D. MULLIN, THE ART OF COMMENTING: HOW TO INFLUENCE ENVIRONMENTAL DECISIONMAKING WITH EFFECTIVE COMMENTS, 2ND EDITION (Env't. L. Inst. 2013).
2. Regulations.gov
3. HHS.gov/Regulations
4. *Stewart v. Azar*, 2018 U.S. Dist. LEXIS 108862 (D. DC. 2018).
5. *Gresham v. Azar*, 2018 U.S. Dist. LEXIS 51496 (D. DC. 2019).