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Petitions for Rulemaking: An Overview

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SUMMARY

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Petitions for Rulemaking: An Overview

The Administrative Procedure Act (APA), enacted in 1946, is known primarily for its procedural requirements for notice-and-comment rulemaking. Those requirements state that when issuing regulations, agencies must generally give public notice (i.e., issue a proposed rule), hold a public comment period, and publish a final rule.

A lesser known provision in the APA is a petition mechanism through which any interested party can request an agency to issue, amend, or repeal a rule (Section 553(e)). Such petitions are sometimes referred to as 553(e) petitions, petitions for rulemaking, petitions for reconsideration, administrative petitions, or citizens' petitions. The APA petition mechanism is a potentially efficient (and arguably underused) means for an individual or stakeholder to call on an agency to take a particular action.

> "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule" (5 U.S.C. §553(e)).

Although Section 553(e) is only one sentence in length and provides very little detail, other sections of the APA contain some additional requirements for agencies with regard to receiving, considering, and responding to rulemaking petitions. An agency is not necessarily required to grant the petition or take the requested action, but the APA does require the agency to consider the petition and respond and to do so "within a reasonable time." Notably, however, agencies have a great deal of discretion in determining the specifics of their procedures for receiving, considering, and responding to petitions. In 2014, the Administrative Conference of the United States (ACUS) found that "few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking" and that "how petitions are received and treated varies across—and even within—agencies."

The APA's requirement for a petition mechanism applies to all agencies covered by the APA, which includes executive agencies and independent regulatory agencies. The APA's definition of *rule* is broad and covers a variety of agency actions, including several types of actions that are not subject to the APA's notice-and-comment rulemaking procedures. Such actions include agency interpretive rules and policy statements—categories that are often colloquially referred to as "guidance documents"—and rules of agency organization, procedure, and practice. Thus, the petition mechanism could potentially be used for more than just rules that have undergone, or would be required to undergo, the APA's notice-and-comment procedures.

If an agency grants a petition for rulemaking—thus issuing, amending, or repealing a rule per request of the petitioner—any relevant procedural requirements for rulemaking or other type of action would still apply. Furthermore, in taking any action pursuant to a petition, the agency may act only within the delegated authority Congress has provided to it in statute.

This report briefly discusses the origin of the APA petition mechanism, outlines the mechanism's requirements for agencies, provides information from various outside sources about what may make an effective petition, discusses potential benefits to agencies and the public, and, finally, identifies some examples of statutory petition mechanisms that Congress created in addition to the APA's.

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Introduction

Federal rulemaking is one of the crucial methods through which public policy is established and implemented in the United States. Under the constitutional separation of powers system, Congress enacts statutes that often delegate rulemaking authority to federal agencies. Using that delegated authority, agencies issue regulations to implement those statutes and set the details of public policy.

To structure the ways in which agencies issue regulations pursuant to their delegated authority, Congress has created a statutory scheme of procedural controls.[1] The most significant of these controls is the Administrative Procedure Act (APA) of 1946, which generally requires agencies to issue a proposed rule and take public comment prior to issuing a final rule.[2] Congress designed these basic steps—which create the backbone of the federal rulemaking process—to allow for public input into federal agencies' policymaking decisions. As one scholar noted, "One of the APA's objectives was to open rulemaking to public participation, especially by those whose interests might be adversely affected by an agency's actions. Congress viewed hearing from such parties as a normal part of the legislative process, and therefore applicable to rulemaking."[3]

The APA's notice and comment requirements are possibly the best known and most significant mechanism allowing for public input into the rulemaking process. A lesser known procedural control that Congress created in the APA is a petition mechanism through which any interested party can request an agency to issue, amend, or repeal a rule.[4] An agency is not necessarily required to grant the petition or take the requested action, but the APA does require the agency to respond and to do so in a "reasonable time."[5] Thus, the APA petition mechanism is a potentially efficient (and arguably underused) means for an individual or stakeholder to call on an agency to take a particular action.[6]

This report briefly discusses the origin of the APA petition mechanism, outlines the mechanism's requirements for agencies, provides information from various outside sources about what may make an effective petition, discusses potential benefits to agencies and the public, and, finally,

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[1] See CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey. For a discussion of the role of rulemaking procedures as a means of congressional control over agencies, see Matthew D. McCubbins et al., "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization*, vol. 3, no. 2 (Fall 1987), pp. 243-277; and Matthew D. McCubbins et al., "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," *Virginia Law Review*, vol. 75, no. 2 (March 1989), pp. 431-482. See also CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

[2] The APA is Title 5, Sections 551 *et seq.*, of the *United States Code*. The APA's notice-and-comment rulemaking requirements are at Title 5, Section 553.

[3] David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa, AL: University of Alabama Press, 2000), p. 42.

[4] A comprehensive report on petitions for rulemaking was prepared for the consideration of the Administrative Conference of the United States (ACUS). See Jason A. Schwartz and Richard L. Revesz, *Petitions for Rulemaking*, November 5, 2014, https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Report%2520%255B11-5-14%255D.pdf. See also William V. Luneburg, "Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement," *Wisconsin Law Review*, vol. 1988, no. 1 (1988), pp. 1-64.

[5] 5 U.S.C. §555(b). See also Revesz, *Petitions for Rulemaking*.

[6] One observer described the APA petition process in 2015 as a "heretofore largely underutilized mechanism for citizen participation" (Reeve T. Bull, "Building a Framework for Governance: Retrospective Review and Rulemaking Petitions," *Administrative Law Review*, vol. 67, no. 2 [Spring 2015], p. 293).

identifies some examples of statutory petition mechanisms that Congress created in addition to the APA's.

APA Petition Mechanism: Historical Origins

The APA's petition mechanism essentially re-stated the right to petition the government established by the U.S. Constitution, which can be traced as far back as the Magna Carta and Declaration of Independence.

U.S. Constitution

The principles on which the APA's petition mechanism are based are generally traced by scholars to the Magna Carta and, in the American context, to the Declaration of Independence.[7] Though it was centuries old by the time of the American Revolution, the Magna Carta was a heavy influence on the colonists who declared their independence from Britain in the 1770s.[8] The Declaration of Independence, which relied on many of the stated rights and liberties granted under the Magna Carta, referenced the failure of the British government to respond to petitions by stating the following immediately after its list of grievances: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."[9] Thus, the implication was that the colonists had an inherent right to petition the king, as well as a right to a response.

Likely as a direct consequence of this perceived slight by the British government, the founders explicitly stated in the First Amendment of the U.S. Constitution that the people had a right to petition the government. Specifically, the First Amendment states that "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances."[10] Although the First Amendment establishes a right to petition the government, it goes no further in detailing whether or how the government shall respond.[11]

The Administrative Procedure Act

The lineage of this constitutional provision can be traced forward into the 20th century and directly to the APA itself.[12] The APA's petition mechanism, which allows interested persons to petition the government to take a rulemaking action, could easily be considered a more modern

[7] Harold C. Relyea, "Extending the Freedom of Information Concept," *Presidential Studies Quarterly*, vol. 8, no. 1 (Winter 1978), pp. 96-97.

[8] See Harry T. Dickinson, "Magna Carta in the American Revolution," in *Magna Carta: History, Context, and Influence*, ed. Lawrence Goldman (London: University of London School of Advanced Study, Institute of Historical Research, 2018), pp. 79-100.

[9] See https://www.archives.gov/founding-docs/declaration-transcript for a transcript of the Declaration of Independence.

[10] U.S. Const. amend. I.

[11] Some scholars have argued that historical evidence supports an obligation for the government to respond to such a petition. See Schwartz and Revesz, *Petitions for Rulemaking*, p. 8, for an overview of this debate. Their report also discusses the Supreme Court's interpretation of this constitutional provision; see pp. 7-8.

[12] For an overview of the use of administrative petitions before the APA, see Daniel Carpenter, "On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America," in *Administrative Law from the Inside Out: Essays on Themes in the Word of Jerry L. Mashaw*, ed. Nicholas R. Parillo (New York: Cambridge University Press, 2017), pp. 349-372; and Maggie McKinley, "Petitioning and the Making of the Administrative State," *Yale Law Journal*, vol. 127, no. 6 (April 2018), pp. 1538-1637.

application of the constitutional right to petition. One scholar described the APA as "the bill of rights for the new regulatory state" that "defined the relationship between government and governed."[13] The petition mechanism appears to fit within that characterization. Indeed, the APA's legislative history confirms the link: "Every agency possessing rule-making authority will be required to set up procedures for the receipt, consideration, and disposition of these petitions. The right of petition is written into the Constitution itself. This subsection confirms that right where Congress has delegated legislative powers to administrative agencies."[14]

Congress enacted the APA in 1946 following a large expansion of the federal government's size and authorities during the Franklin D. Roosevelt Administration's New Deal. The APA is considered by most observers to be a compromise between two groups in Congress: conservatives who were wary of the rapid growth of the administrative state and liberals who wanted to protect the ability of agencies to exercise their delegated administrative power.[15] This balance was reflected in the foreword to the compiled legislative history of the APA, in which Senate Judiciary Committee Chairman Pat McCarran stated that although the APA "is brief, it is a comprehensive charger of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those in whom the law may impinge."[16]

The petition mechanism, like other elements of the APA, can be contextualized by considering this balancing act between these two main perspectives on the administrative process reforms of the 1930s and 1940s. Many conservatives in Congress who believed that the rapid expansion of the government in the New Deal had the potential to threaten individual rights saw a petition mechanism as a way to provide individuals a means through which they could address grievances directly to government agencies.[17] Some liberals in Congress who were generally more trusting of regulatory agencies and wanted to protect recently enacted New Deal programs were willing to agree to a petition mechanism, but they were cautious about how much would be required of agencies to respond.[18] The petition provision that was ultimately included in the final version of the APA can be seen as a compromise between these two sides and is discussed in detail below.

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[13] George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," *Northwestern University Law Review*, vol. 90, no. 4 (1996), p. 1678.

[14] U.S. Congress, Senate, *Administrative Procedure Act: Legislative History*, 79th Cong., 2nd sess., July 26, 1946, S.Doc. 79-248 (Washington: GPO, 1946), p. 359. This Senate document was printed approximately six weeks after the APA was enacted and was intended to serve as a compilation of its legislative history. The document contains the text of the APA, a Senate Judiciary Committee print on the legislation from June 1945, transcripts of House Judiciary Committee hearings from June 1945, committee reports from the House and Senate Judiciary Committees, and the floor proceedings from the *Congressional Record* in 1946 when the House and Senate each considered and passed the APA. Throughout this report, unless otherwise indicated, when the APA's "legislative history" is referenced, this Senate document is the subject of the reference. This particular quoted material was from the portion of S. Doc. 79-248 excerpting the floor proceedings during the consideration of the APA in the House of Representatives on May 24, 1946. The statement was from Representative Francis Walter, one of the main proponents of legislation addressing administrative procedure (*Congressional Record*, vol. 92 [1946], p. 5651).

[15] See, for example, Shepherd, "Fierce Compromise;" and Roni Elias, "The Legislative History of the Administrative Procedure Act," *Fordham Environmental Law Review*, vol. 27, no. 2 (2015).

[16] S.Doc. 79-248, p. III. See footnote 14 for information on this legislative history document.

[17] Shepherd, "Fierce Compromise."

[18] Shepherd, "Fierce Compromise." An earlier version of legislation had a provision that would have allowed any person whom a rule affected to petition the agency for elimination of the rule. Some individuals raised concerns that such a procedure would potentially endlessly engage agencies and forestall agencies from issuing new regulations. The general counsel of the Securities and Exchange Commission, for example, testified on an earlier bill that "I am very much concerned at the prospect of our Commission, for example, being required to spend its time over months and

APA Petition Mechanism: Overview and Requirements

> "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule" (5 U.S.C. §553(e)).

Section 553(e) of the APA states, "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Such petitions are sometimes referred to as 553(e) petitions, petitions for rulemaking, petitions for reconsideration, administrative petitions, or citizens' petitions.

Scope of the Petition Mechanism

The APA's requirement for a petition mechanism applies to all agencies covered by the APA, which includes executive agencies and independent regulatory agencies.[19]

Section 553(e) states that the right to petition applies to any "interested person." The *Attorney General's Manual on the Administrative Procedure Act*, which was published in 1947 and provides the executive branch's interpretation of the APA,[20] states that the right to petition "must be accorded to any 'interested person'" and that "it will be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment or repeal of a rule."[21]

The scope of agency actions that are covered by the right to petition is wide-ranging.[22] The APA's definition of *rule* is broad and covers a variety of agency actions, including several types of actions that are not subject to the APA's notice-and-comment rulemaking procedures.[23] Such actions include agency interpretive rules and policy statements—categories that are often colloquially referred to as "guidance documents"—and rules of agency organization, procedure, and practice.[24] Thus, the petition mechanism could potentially be used for more than just rules

possibly years going over all of its existing rules and holding public hearings at the request of anybody who may assert that he is affected by the rules." U.S. Congress, House Committee on the Judiciary, Subcommittee no. 4, *Administrative Law: Hearings before Subcommittee no. 4 of the Committee on the Judiciary on H.R. 4236, H.R. 6198, and H.R. 6324*, 76th Cong., 1st sess., March 17 and April 5, 1939; quoted in Shepherd, "Fierce Compromise," p. 1599.

[19] See 5 U.S.C. 551(1) for the APA definition of *agency*. Independent regulatory agencies are exempted from some rulemaking requirements contained in other sources, including Executive Order 12866 and the Unfunded Mandates Reform Act of 1995 (P.L. 104-4), but they are covered by the APA.

[20] For a compilation of the relevant congressional documents comprising the legislative history of the APA, see also S.Doc. 79-248. See also explanation of this document in footnote 14.

[21] U.S. Attorney General Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act*, 1947, p. 38.

[22] The *Attorney General's Manual* acknowledged the broad application of the petition mechanism: "Section 4(d) applies not only to substantive rules but also to interpretations and statements of general policy, and to organizational and procedural rules" (p. 38). See also Schwartz and Revesz, *Petitions for Rulemaking*, pp. 27-28.

[23] For a discussion of the APA's definition of rule, see CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey.

[24] See Sean Croston, "The Petition Is Mightier Than the Sword: Rediscovering an Old Weapon in the Battles over 'Regulation Through Guidance,'" *Administrative Law Review*, vol. 63, no. 2 (Spring 2011), pp. 381-399, stating that "the APA's right to petition for a rule extends as broadly as its definition of 'rule.' … Thus, nonbinding agency statements that simply interpret law or prescribe policy—otherwise known as interpretive rules or policy statements (the two most common forms of agency guidance documents)—are rules under the APA" (p. 388).

that have undergone, or would be required to undergo, the APA's notice-and-comment procedures.

Interaction with APA Rulemaking Procedures

If an agency grants a petition requesting that it issue, amend, or repeal a rule, any relevant procedural requirements for rulemaking or other type of action would still apply. The *Attorney General's Manual* states, "If the agency is inclined to grant the petition, the nature of the proposed rule would determine whether public rule making proceedings under section 4(a) and (b) are required."[25] In other words, a rulemaking action is not subject to, or exempt from, any procedural requirements as a result of the action having been taken pursuant to a petition under the APA—it does not provide an alternative means for an agency to take an action without going through otherwise-required procedures. Rather, the granting of the petition merely serves as a starting point for the agency to take an action. If the nature of the action requires notice-and-comment rulemaking, for example, the agency must still engage in those procedures.[26]

In any action an agency chooses to take pursuant to a petition, the agency may act only within the delegated authority that Congress has provided to it in statute.[27] A petition can serve only as a procedural mechanism that could cause or encourage an agency to take action under its established authority.[28]

Agency Consideration and Response to Petitions

Although Section 553(e) is only one sentence in length and provides very little detail, other sections of the APA contain some additional requirements for agencies with regard to receiving, considering, and responding to matters presented to them, including rulemaking petitions. Those requirements are discussed below. Notably, however, agencies have a great deal of discretion in determining the specifics of their procedures for receiving, considering, and responding to petitions.

Submission and Consideration of Petitions

Whereas the constitutional right to petition under the First Amendment does not require the government to consider or respond to a petition—as described by one scholar, "it is little more than the right to make a clamor"[29]—the legislative history of the APA's petition mechanism stated that Congress did not intend for agencies to consider petitions "in a merely pro forma manner."[30]

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[25] *Attorney General's Manual*, p. 38.

[26] See Schwartz and Revesz, *Petitions for Rulemaking*, p. 26, footnote 144, and p. 67.

[27] Under the APA, courts are authorized to review agency actions in a variety of contexts, including when questions arise about whether an agency acted within its statutory authority. The statute directs courts to "hold unlawful and set aside" actions an agency has taken that are outside its delegated authority (5 U.S.C. §706(2)).

[28] See CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole; and CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey.

[29] William V. Luneburg, "Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement," *Wisconsin Law Review*, vol. 1988, no. 1 (1988), p. 6.

[30] S.Doc. 79-248, p. 359. This quoted material was from the portion of S.Doc. 79-248 excerpting from the *Congressional Record* the floor proceedings during the consideration of the APA in the House of Representatives on May 24, 1946 (see also *Congressional Record* vol. 92 [1946], p. 5651). For information on S.Doc. 79-248, see footnote 14.

Furthermore, the legislative history states that "where such petitions are made, the agency must fully and promptly consider them."[31] Thus, the APA's legislative history suggests that agencies are minimally required to consider rulemaking petitions and arguably to do so in a timely manner.

The text of the APA itself provides little information, however, on how agencies are to consider petitions, thus leaving quite a bit of discretion regarding the process and elements of agencies' consideration of petitions.[32] The *Attorney General's Manual* states that agencies

> should establish, and publish … procedural rules governing the receipt, consideration and disposition of petitions filed pursuant to section 4(d) [of the APA]. These procedural rules may call, for example, for a statement of the rulemaking action which the petitioner seeks, together with any data available in support of his petition, a declaration of the petitioner's interest in the proposed action, and compliance with reasonable formal requirements.

Agency Procedures for Consideration of Petitions

Several agencies have established such requirements for the submission of petitions. For example, the Food and Drug Administration (FDA) has issued regulations requiring certain petitioners to submit four copies of a petition, sign the petition, and include information referenced in the petition as applicable, among other things.[33] Under those same regulations, the FDA commissioner must follow certain procedures and consider specified criteria when making a decision on whether to grant a petition, such as whether the petition is in the public interest and is being pursued in good faith.[34]

On the contrary, some agencies have not established additional requirements for petitioners and merely have the minimal requirements of the APA as a basis for their petition process. For example, the Securities and Exchange Commission provides an address for petitions and asks petitioners to "set forth the text of any proposed rule or amendment" or "specify the rule the repeal of which is sought" but requires little else of petitioners explicitly in its regulations.[35]

In some cases, agencies publish a notice in the *Federal Register* acknowledging receipt of a petition and asking for public comment as part of its consideration process. For example, in June 2017, the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) issued a notice stating, "In response to petitions for reconsideration of the final rule on lease and interchange of passenger-carrying commercial motor vehicles (CMVs) published on May 27, 2015, and effective on July 27, 2015, FMCSA intends to revise the regulations to address 'chartering' (subcontracting) and the 48-hour delay in preparing a lease. FMCSA is requesting public comment on the proposed responses to the petitions discussed below."[36] This public input would not substitute for the notice-and-comment rulemaking requirements of the APA if the

[31] S.Doc. 79-248, p. 201. This portion of S.Doc. 79-248 refers to the Senate Judiciary Committee report on the APA. For information on S.Doc. 79-248, see footnote 14.

[32] See Schwartz and Revesz, *Petitions for Rulemaking*, pp. 11-24, on "The Limited Requirements to Consider and Respond" to petitions.

[33] 21 C.F.R. §§10.20, 10.30, 10.33.

[34] 21 C.F.R. §10.33.

[35] 17 C.F.R. §13.2.

[36] FMCSA, "Lease and Interchange of Vehicles; Motor Carriers of Passengers," 82 *Federal Register* 27768, June 16, 2017.

agency decides to grant a petition,[37] but it could assist the agency in gauging public interest and could provide information to assist the agency in its decision.

ACUS Recommendations on Consideration of Petitions

In 2014, the Administrative Conference of the United States (ACUS) reported that "few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking" and that "how petitions are received and treated varies across—and even within—agencies."[38] ACUS issued several recommendations related to petitions for rulemaking, including some that addressed the consideration of petitions. The recommendations stated that, for example, "Each agency that has rulemaking authority should have procedures, embodied in a written and publicly available policy statement or procedural rule, explaining how the agency receives, processes, and responds to petitions" and that "the procedures should indicate how the agency will coordinate the consideration of petitions with other processes and activities used to determine agency priorities, such as the Unified Agenda and retrospective review of existing rules."[39] ACUS also recommended that "the procedures should explain what type of data, argumentation, and other information make a petition more useful and easier for the agency to evaluate."[40] Such information could be of assistance to petitioners as they are preparing to petition agencies.

Response to Petitions

The APA requires that agencies respond to petitions in a timely manner. Specifically, Section 555(b) states that "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."[41] This provision has generally been interpreted to apply to a number of potential matters brought to an agency, including petitions for rulemaking: "Citing various combinations of §§ 553(e), 555(b), and 555(e), courts have repeatedly found that agencies must at least 'respond' to petitions for rulemaking."[42]

Furthermore, the APA appears to require that if the response to a petition is a denial, the agency must provide a reason for the denial. Section 555(e) states that "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

[37] See Schwartz and Revesz, *Petitions for Rulemaking*, p. 26, footnote 144, and p. 67.

[38] ACUS, "Adoption of Recommendations," 79 *Federal Register* 75114, December 17, 2014, p. 75117.

[39] ACUS, "Adoption of Recommendations." The Unified Agenda of Federal Regulatory and Deregulatory Actions is issued twice per year (typically in the fall and spring) and states agencies' current regulatory activities, along with an estimate of when each regulation will be completed. The fall edition of the Unified Agenda is accompanied by the Regulatory Plan, in which agencies state which rules they plan to prioritize over the coming year.

Retrospective review of existing rules generally refers to agencies' review of previously issued rules. Presidents since Jimmy Carter have all required some form of retrospective review through various executive orders and other executive branch initiatives. Under the Trump Administration, similar, though more demanding, review has been institutionalized under Executive Order 13771, which requires agencies to identify and eliminate offsetting costs associated with at least two previously issued regulations for every regulation they plan to issue that imposes new costs. See Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," 82 *Federal Register* 9339, February 3, 2017.

[40] ACUS, "Adoption of Recommendations."

[41] 5 U.S.C. §555(b).

[42] Schwartz and Revesz, *Petitions for Rulemaking*, p. 12.

grounds for denial."[43] Although these provisions appear to establish a requirement for the agency to provide a timely response and a reason for denial, the APA does not further explicate what a response might or should entail.[44]

Presumably, if an agency grants a petition, the agency would conduct any procedural requirements that may apply (such as if the petition requested the agency to issue a rule subject to the APA's notice-and-comment requirements). Simply receiving a petition, however, does not require the agency to grant a petitioner's request. The legislative history of the APA states that agencies have several options in responding to petitions, including denial: "The agency may either grant the petition, undertake public rulemaking proceedings as provided by subsections (a) and (b) of this section, or deny the petition."[45] The *Attorney General's Manual* appears to express a similar view: "the mere filing of a petition does not require the agency to grant it or to hold a hearing or to engage in any other public rule making proceedings."[46] Thus, it appears that the agency is not necessarily obligated to grant any petition, but it must meet the minimum requirements of receiving the petition and responding to it in a timely manner.

ACUS Recommendations on Agency Responses to Petitions

The ACUS recommendations mentioned above also addressed agencies' responses to petitions, stating that agencies "should provide a reasoned explanation beyond a brief statement of the grounds for denial" and "should not reflexively cite only resource constraints or competing priorities."[47] Furthermore, ACUS recommended that agencies should adopt in their procedures "an expectation that it will respond to all petitions for rulemaking within a stated period (e.g., within 6, 12, or 18 months of submission)," "[e]stablish and make publicly available an individual target timeline for responding to that petition," and "provide the petitioner and the public with a brief explanation for the delay, along with a reasonable new target timeline," if the target cannot be met.[48]

Denial of a Petition: Judicial Review

An agency's denial of a petition may also be subject to judicial review.[49] Section 706(2) of the APA states that courts can review and set aside final agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[50] Section 555's requirement for the agency to give notice of the denial of a petition and to generally accompany the denial with a "brief statement of the grounds for denial" has, at times, been interpreted in combination with Section 706(2) of the APA to require the agency to issue a rational (but potentially brief)

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[43] 5 U.S.C. §555(e).

[44] See Schwartz and Revesz, *Petitions for Rulemaking*, pp. 11-13.

[45] S.Doc. 79-248, p. 201. This portion of S.Doc. 79-248 refers to the Senate Judiciary Committee report on the APA. For information on S.Doc. 79-248, see footnote 14.

[46] *Attorney General's Manual*, p. 38.

[47] ACUS, "Adoption of Recommendations," p. 75118.

[48] ACUS, "Adoption of Recommendations," p. 75118.

[49] A discussion of court treatments of judicial challenges of petition denials is beyond the scope of this report. But see Schwartz and Revesz, *Petitions for Rulemaking*, for a thorough discussion of relevant case law. This discussion can be found throughout the report. See also pp. 28-30 specifically addressing the right to judicial review of an agency's response (or lack of response) to a petition.

[50] 5 U.S.C. §706. See also CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

explanation for a denial of a petition.[51] In some instances, courts have found agencies' denials of petitions to be in violation of the APA.[52] Frequently when this has occurred, courts have remanded the denial to the agency to reconsider the petition.[53]

Potential Benefits of Rulemaking Petitions

Rulemaking petitions have several potential benefits, such as that they can provide additional, low-cost opportunities for public participation in federal rulemaking. The subsections below identify and discuss several potential benefits of rulemaking petitions. However, as discussed in the last subsection below, responding to rulemaking petitions could potentially require agencies to allocate resources they would otherwise use elsewhere.

Public Involvement in Rulemaking

The primary benefit is arguably the opportunity for stakeholders and interested persons to engage directly in a significant type of federal policymaking. Federal rulemaking is the means through which most federal statutes and programs are implemented, and public participation in that process has been an essential component since the APA was enacted in 1946. The benefits of public participation could flow in both directions: Non-agency parties have a chance to make their views known to agencies, and agencies could learn from petitioners about the impacts of their rules—previously issued or not-yet-issued—by obtaining additional information or perspectives they may not otherwise consider. One study of the use of petitions for rulemaking under the Endangered Species Act found that outside groups petitioning the Fish and Wildlife Service provided useful information for identifying species that are "at least as deserving of protection under the Act as species identified by the agency on its own," further concluding that "these public participation tools might have an important role to play in collecting dispersed or diffuse information to help better inform agency decisionmaking."[54]

Less Costly Than Judicial Review

The rulemaking petition process provides an arguably more democratic, widely available opportunity for public access by individuals and entities who may not otherwise have an opportunity to challenge agency rules through the courts by seeking judicial review. Filing a petition with a federal agency under the APA or another statutory petition mechanism is likely to be less costly financially and resource-wise than the potential cost of litigation.

Potential for Compelling an Agency to Act

Petitions for rulemaking can potentially serve as a mechanism to try to force an agency to issue a rule through a court challenge: On occasion, rulemaking petitions that were denied and challenged have led to court orders for the issuance of a rule. For example, in 1999, a group of stakeholders petitioned the Environmental Protection Agency (EPA) to regulate greenhouse gas

[51] See Schwartz and Revesz, *Petitions for Rulemaking*, p. 17, and their discussion throughout the report for relevant court cases addressing agencies' obligations with regard to petitions.

[52] Schwartz and Revesz, *Petitions for Rulemaking*, p. 17.

[53] Schwartz and Revesz, *Petitions for Rulemaking*, p. 20. For an example of such a court decision, see *Massachusetts v. EPA*, 549 U.S. 497 (2007). This case is also discussed briefly below.

[54] Eric Biber and Berry Brosi, "Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law," *UCLA Law Review*, vol. 58, no. 2 (December 2010), pp. 321, 364.

emissions from new motor vehicles under its Clean Air Act regulatory authority. EPA took comments on the petition[55] and published notice in 2003 that it was denying the petition.[56] After a judicial challenge to the denial of the petition, in 2007, the Supreme Court held that EPA's reasons for denial of the petition were invalid and that EPA did have the authority to regulate greenhouse gas emissions under the Clean Air Act.[57] The Court determined that, under the Clean Air Act, EPA must make a determination on the merits of whether to regulate greenhouse gas emissions or provide a reasonable explanation why it cannot or will not make that decision.[58]

Potential Intersection with Retrospective Review of Regulations and Regulatory Budgeting

Rulemaking petitions can also encourage agencies to review or eliminate specific regulations that are outdated, ineffective, or overly burdensome. Administrations going back at least to the 1970s have required agencies to engage in retrospective regulatory review.[59] The Trump Administration has taken that requirement a step further with its "one-in-two-out" regulatory requirement, which requires agencies to identify offsetting costs from at least two rules for every rule that imposes new costs.[60] Rulemaking petitions could provide an information mechanism for agencies to comply with these requirements: Outside parties could help identify regulations or portions of regulations that are ripe for revision or elimination.[61]

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[55] EPA, "Control of Emissions from New and In-Use Highway Vehicles and Engines," 66 *Federal Register* 7486, January 23, 2001.

[56] EPA, "Control of Emissions from New Highway Vehicles and Engines," 68 *Federal Register* 52922, September 8, 2003.

[57] *Massachusetts v. EPA*, 549 U.S. 497 (2007). See Schwartz and Revesz, *Petitions for Rulemaking*, pp. 20-21, discussing the facts and significance of this case.

[58] Specifically, the Court stated that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do…. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design." *Massachusetts v. EPA*, 549 U.S. 497 (2007).

See also CRS In Focus IF10871, *Vehicle Fuel Economy and Greenhouse Gas Standards*, by Richard K. Lattanzio, Linda Tsang, and Bill Canis for a brief discussion of the *Massachusetts v. EPA* ruling.

[59] Retrospective regulatory review is the practice of revisiting previously issued regulations. For a discussion of these past initiatives, see Joseph E. Aldy, "Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy," November 17, 2014, https://www.acus.gov/sites/default/files/documents/Aldy%2520Retro%2520Review%2520Draft%252011-17-2014.pdf.

[60] Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," 82 *Federal Register* 9339, February 3, 2017. The Office of Management and Budget issued guidance on compliance with Executive Order 13771. See memorandum for regulatory policy officers at executive departments and agencies and managing and executive directors of certain agencies and commissions from Dominic J. Mancini, Acting Administrator, Office of Information and Regulatory Affairs, "Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs,'" M-17-21, April 5, 2017, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21.pdf.

[61] See Reeve T. Bull, "Building a Framework for Governance: Retrospective Review and Rulemaking Petitions," *Administrative Law Review*, vol. 67, no. 2 (Spring 2015), pp. 265-319.

Increase in Public Legitimacy of Agency Rulemaking

Additionally, by allowing for participation in addition to the notice-and-comment requirements of the APA, agencies could potentially increase their public legitimacy—either for a particular regulation or as a more general matter. The APA's legislative history acknowledges a potential "public relations" improvement for agencies that use petitions, stating that petitions "should be a most useful instrument of both improving the public relations of administrative agencies and protecting the public by affording interested persons a legal and regulatory means of securing the issuance, change, or rescission of a rule."[62] An announcement in the *Federal Register* that an agency is considering granting a petition could serve as a notification similar to an advance notice of proposed rulemaking (ANPRM), which is another mechanism for early public participation in the rulemaking process.[63] Such a notice could indicate, even in highly tentative terms, the type of action being considered by the agency and invite public input.[64]

Potential Disadvantages for Rulemaking Petitions

Nonetheless, considering and responding to rulemaking petitions can be time- and resource-intensive for agencies. In 2013, the Nuclear Regulatory Commission (NRC) published a proposed rule to amend its procedures for receiving and considering petitions.[65] In the document, the agency cited an increase in the number of rulemaking petitions it had received recently, stating that this "presented a significant resource challenge to the NRC."[66] Such allocation of resources could cause delays in other activities at an agency, such as issuing other regulations. The use of resources to respond to a petition varies widely depending on the nature and content of the petition, however.[67]

What Makes a Petition Effective?

The effectiveness of, and timing of response to, a petition for rulemaking likely depends on many factors, including the quality and nature of the arguments presented, the policy preferences of the agency and the Administration, any statutory requirements or constraints the agency faces, the

[62] S.Doc. 79-248, p. 359. This quoted material was from the portion of S.Doc. 79-248 excerpting from the *Congressional Record* the floor proceedings during the consideration of the APA in the House of Representatives on May 24, 1946. See also *Congressional Record*, vol. 92 (1946), p. 5651. For information on S.Doc. 79-248, see footnote 14.

[63] An ANPRM is a preliminary announcement by an agency that it is considering undertaking or planning to undertake a rulemaking process. It occurs early in the rulemaking process—prior to the issuance of a notice of proposed rulemaking (NPRM)—and would generally be considered the first major step in a rulemaking proceeding. ANPRMs are not required by the APA, but a few agencies are required to issue them. The Federal Trade Commission is required to issue them in some instances, for example—see 15 U.S.C. §57(b)(2), requiring the commission to publish an ANPRM. Occasionally, agencies issue ANPRMs voluntarily to obtain information and/or views from the public that may not be readily available to the agency.

[64] See, for example, Federal Election Commission, "Rulemaking Petition: Amending the Definition of Contribution to Include 'Valuable Information,'" 84 *Federal Register* 37154, July 31, 2019, providing a "notice of availability" of a rulemaking petition and seeking public comment on the petition.

[65] NRC, "Revisions to the Petition for Rulemaking Process," 78 *Federal Register* 25887, May 3, 2013. The NRC finalized the changes in 2015 (NRC, "Revisions to the Petition for Rulemaking Process," 80 *Federal Register* 60513, October 7, 2015).

[66] NRC, "Revisions to the Petition for Rulemaking Process," 78 *Federal Register* 25887, May 3, 2013.

[67] See Schwartz and Revesz, *Petitions for Rulemaking*, p. 62.

evidence available to the agency and its ability to justify taking any particular action, and whatever preferences the agency and Administration may have for prioritization of resources at the agency.

Many of these factors are outside of the control of a petitioner, but there are certain steps a petitioner might take to make a stronger case to the agency. Some outside groups have offered advice to the public for how to petition agencies more effectively. For example, the Center for Effective Government suggested that a petition for rulemaking should include information such as an explanation of the proposed action; the language the petitioner would like to propose for a new or amended rule or eliminate from a rule; information and arguments that support the petitioner's proposed action, including relevant technical and scientific data; specific facts or circumstances that support the proposed action; and relevant legal information about any specific laws or statutory provisions that is relevant to the petition and the rule in question.[68]

Individual agencies may provide guidance, or even requirements, for petitioners on their websites or in their regulations.[69] For example, some of the suggestions provided by the Center for Effective Government above are from the Federal Aviation Administration's (FAA) regulations and guidance, which are on its website.[70] Similarly, the NRC has regulations and detailed information on its website on how to submit petitions, as well as information tracking petitions that have been submitted to it, including visual information on the number and status of the petitions that have been submitted.[71]

As noted above, however, ACUS found in 2014 that few agencies had established official procedures for receiving, considering, and responding to petitions.[72] As such, guidance may not necessarily be available for any particular agency's expectations or requirements. In such circumstances, general guidelines, such as those referred to above from the Center for Effective Government, may be useful.

Other Statutory Authorities for Petitions for Rulemaking

In addition to the APA petition mechanism, Congress has enacted various criteria for specific agencies' decisionmaking processes. Generally, these additional statutory mechanisms appear to

[68] See https://www.foreffectivegov.org/node/4061. The Center for Effective Government, which was formerly known as OMB Watch, ceased operations in March 2016, according to its website, but still maintains some information online. The Project on Government Oversight appears to maintain the center's website and materials. See https://www.foreffectivegov.org/about-us.

[69] Appendix C of Schwartz and Revesz, *Petitions for Rulemaking*, contains a list of agency regulations and guidance on petitions. See https://www.acus.gov/sites/default/files/documents/ACUS%2520-%2520Petitions%2520FINAL%2520-%2520Appendix%2520C%2520-%2520Agency%2520Comparisons.xlsx.

[70] See 14 C.F.R. §11.71 and "Petition for Exemption or Rulemaking," https://www.faa.gov/regulations_policies/rulemaking/petition/, which includes specific instructions for how to submit a petition for rulemaking to the FAA.

[71] See 10 C.F.R. §2.802 and §2.803 and various pages on the NRC's website, including "Petition for Rulemaking Dockets," https://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/petitions-by-year.html; "The Rulemaking Petition Process," https://www.nrc.gov/about-nrc/regulatory/rulemaking/petition-rule.html; and "Planned Rulemaking Activities—Petitions," https://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/active/PetitionIndex.html for real-time information, including graphics, on petitions that have been submitted to the agency.

[72] ACUS, "Adoption of Recommendations," p. 75117.

build upon the 553(e) petition mechanism. A comprehensive list of all such provisions is beyond the scope of this report, but some examples include the following:

- The Fixing America's Surface Transportation Act required FMCSA to publish on a publicly accessible website a summary of all petitions for regulatory action submitted to FMCSA; "prioritize the petitions submitted based on the likelihood of safety improvements resulting from the regulatory action requested;" respond to each petition within 180 days of posting the summary; prioritize responses to petitions consistent with a petition's potential to reduce crashes, improve enforcement, and reduce unnecessary burdens; and keep an updated inventory of the petitions on its website.[73]
- The Endangered Species Act states, "To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary [of the Interior] shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register."[74]
- The Food, Drug, and Cosmetic Act contains requirements for the Secretary of Health and Human Services and for individuals petitioning the agency for a regulation on food additives. The statute lists information the petitions shall include, such as detailed scientific information about the additive and "full reports of investigations made with respect to the safety for use of such additive, including full information as to the methods and controls used in conducting such investigations."[75] It also requires a petition to respond to requests from the Secretary for additional information and further requires the Secretary to publish notice of the regulation proposed by the petitioner.[76]

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[73] P.L. 114-94, §5204; 49 U.S.C. §113 note.

[74] 16 U.S.C. §1533(b)(3). For an analysis of the use and effects of petitions for rulemaking under the Endangered Species Act, see Biber and Brosi, "Officious Intermeddlers or Citizen Experts?," pp. 321-400.

[75] 21 U.S.C. §348(b).

[76] 21 U.S.C. §348(b).

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