

Writing Adverse Comments

May 2025
Issue Brief

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I. INTRODUCTION

The Trump administration has directed agencies to undertake ambitious efforts to eliminate or revise regulations.¹ Much opposition to this agenda will take place in the courts. In the best case, litigation can invalidate harmful initiatives and rollbacks. And even ultimately unsuccessful litigation can significantly delay the administration's implementation timeline, mitigating as much harm for as long as possible in the hopes that a new administration will change course in 2029.

How can opponents of deregulation who are not litigators support this effort? One strategy is to submit comments during the rulemaking process that support likely legal challenges. But not all comments are equally useful in that regard. This Issue Brief offers guidance for commenters about what kinds of information and analysis are likely to prove most useful from a litigation perspective. It concludes with an appendix that provides commenters with a series of drafting prompts.

II. THE PURPOSE OF ADVERSE COMMENTING

Traditionally, much modern regulation under the Administrative Procedure Act proceeds through a process known colloquially as “notice and comment,” in which agencies publicly post and solicit written feedback on a proposed rule before issuing a final regulation (typically, several months later).² When an agency posts a rule for public comment, any member of the public—individuals, academics, public interest organizations, industry trade associations, state and local governments, etc.—can comment within the prescribed period (often 60 days, but sometimes shorter or longer).

¹ See, e.g., *Unleashing Prosperity Through Deregulation*, White House, <https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-prosperity-through-deregulation/> (January 31, 2025).

² See 5 U.S.C. § 553; see also *Notice and Comment, Part I: Legislative Rules and Guidance Documents*, Governing for Impact (May 2025), <https://governingforimpact.org/apa-library/>.

Comments on a proposed rule can and do serve a straightforward communicative function: allowing the agency to receive feedback from experts and key stakeholders, whose input may lead officials to make alterations to a proposal in a final rule. Existing guides offer helpful advice to such commenters.³

This Issue Brief instead focuses on how to draft comments with a distinctive objective: supporting or even spurring legal challenges to an agency's final rule. Certain kinds of adverse comments can serve these functions for a number of reasons.

First, the APA requires that agencies consider and adequately respond to relevant and significant critiques raised in comments. The failure to account for points raised in public comments can, on its own, be grounds for a rule's invalidation,⁴ especially if the heightened level of scrutiny imposed in a recent Supreme Court case, *Ohio v. EPA*, becomes standard.⁵ Consequently, the mere act of submitting a substantive comment can potentially generate a legal vulnerability.

Agencies expend enormous resources responding to comments; they may even drop controversial portions of a rule if they cannot develop legally sufficient responses by the time they aim to finalize it. However, agencies need not respond to individual comments, just distinct arguments;⁶ nor need they accord greater weight to an argument because it was raised by multiple commenters. For these reasons, form comments submitted en masse generally are not relevant to subsequent litigation.

Second, comments can flag issues with the agency's reasoning for potential litigators. So-called "arbitrary and capricious" challenges under the APA attempt to

³ See Shagufta Ahmed et al., *How to Effectively Comment on Regulations*, Brookings Inst., https://www.brookings.edu/wp-content/uploads/2018/08/ES_20180809_RegComments.pdf (last updated November 2022); *How You Can Effectively Participate in the Regulatory Process Through Public Comment*, Office of Info. & Reg. Affairs, https://www.regulations.gov/assets/files/Public-Comment-on-Federal-Regulations_Final.pdf.

⁴ See, e.g., *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").

⁵ 603 U.S. 279, 281–94 (2024) (invalidating an EPA regulation because the agency "offered no reasoned response" to a concern "posed" by "commenters"); see Daniel Deacon, *Ohio v. EPA and the Future of APA Arbitrariness Review*, Y.J. on Reg. Notice & Comment (June 27, 2024), <https://www.yalejreg.com/nc/ohio-v-epa-and-the-future-of-apa-arbitrariness-review/> ("Gorsuch's opinion seems to bend over backwards to extend grace to the objecting commenters while holding the government to a higher standard of clarity.").

⁶ *Perez*, 575 U.S. at 96.

invalidate a regulation because the agency relied on faulty or incomplete data or reasoning.⁷ But the litigators mounting such challenges are rarely subject matter experts, and so can benefit from analyses contained in comments—explaining misinterpretations of or omissions in the empirical literature, contesting faulty assumptions or analyses, offering novel perspectives, noting divergences from past agency practice, etc.—to substantiate their claims.

Third, comments can preserve issues for litigation. As a doctrinal matter, in order to be the subject of litigation, the substance of a claim must generally be raised during the APA comment period.⁸ Put differently, if no commenter raises a potential vulnerability, litigants may face challenges pursuing it in court. (Note that the commenter raising an objection need not be the same party who raises it in litigation.)

Perhaps recognizing the power of public comment, the second Trump administration has sought to restrict participation in the regulatory process. (And has likely opened itself to further legal challenges as a result.) It has opted for short comment periods, often just 30 days, on significant rulemakings.⁹ It has deployed a little-known regulatory mechanism, the interim final rule, to issue temporary, binding regulations while it simultaneously solicits post-publication comments.¹⁰ And in some cases it has even claimed the authority to dispense with comment periods altogether.¹¹

Commenters can prepare for short comment periods by monitoring the Federal Register and the Office of Information and Regulatory Affairs’s dashboard,¹² which can provide advance notice of certain forthcoming proposed rules. They can also consider requesting comment period extensions.¹³ Despite its sequential

⁷ See 5 U.S.C. § 706(2)(A); see also *Arbitrary-and-Capricious Challenges*, Governing for Impact (May 2025), <https://governingforimpact.org/apa-library/>.

⁸ See *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1148 (D.C. Cir. 2005).

⁹ See, e.g., *Patient Protection and Affordable Care Act; Marketplace Integrity and Affordability*, 90 Fed. Reg. 12942 (Mar. 19, 2025).

¹⁰ See, e.g., *Removal of National Environmental Policy Act Implementing Regulations*, 90 Fed. Reg. 10610 (March 5, 2025); *Affirmatively Furthering Fair Housing Revisions*, 90 Fed. Reg. 11020 (March 3, 2025).

¹¹ See, e.g., *Directing the Repeal of Unlawful Regulations*, Presidential Mem. (April 9, 2025), <https://perma.cc/YJF4-LT5X>.

¹² *Regulatory Review Dashboard*, Office of Info. & Reg. Affairs, <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>.

¹³ See, e.g., Anna Rodriguez, *Re: Request for Extension of Comment Period for “Patient Protection and Affordable Care Act; Marketplace Integrity and Affordability” Proposed Rule*, Docket No. CMS-9884-P,

idiosyncrasy, commenters should generally participate in an interim final rule's comment period no differently than in the traditional notice and comment context. Finally, we have addressed the administration's attempts to avoid soliciting comments on certain rules elsewhere.¹⁴

III. GUIDANCE ON ADVERSE COMMENTING

When lawyers draft adverse comments on proposed rules, they often aim to outline potential legal objections that litigants might later pursue. They might claim the agency's rule violates the Constitution or contest the agency's statutory authority to take the proposed action, including by invoking the "major questions doctrine."¹⁵ Finally, they might raise any number of administrative law process objections.¹⁶ Raising these objections in the comment period can prove fruitful, both to preserve issues for litigation and to provide future litigants with legal research and analysis.

But there are a number of ways that non-lawyers can offer non-legal analysis and insight that also support litigation, including by: (1) identifying novel agency practices; (2) critiquing the quality of agency reasoning and decisionmaking; and (3) documenting the (quantified, when possible) harms to stakeholders. Comments containing these insights can prove invaluable to litigators, who operate on accelerated timelines and benefit from the record commenters establish.

90 FR 12942 (Mar. 19, 2025), *Governing for Impact* (Apr. 3, 2025), <https://www.regulations.gov/comment/CMS-2025-0020-10625> (hereinafter "ACA Comment").

¹⁴ See, e.g., *Rapid Response: Presidential Memorandum on "Directing the Repeal of Unlawful Regulations,"* *Governing for Impact*, <https://governingforimpact.org/wp-content/uploads/2025/04/Rapid-Response-re-Directing-the-Repeal-of-Unlawful-Regulations-final.pdf> (Apr. 2025).

¹⁵ See, e.g., Sean Heather, *Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule* (88 Fed. Reg. 3,482-3,546, January 19, 2023), U.S. Chamber of Commerce (Apr. 17, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-19345>.

¹⁶ See, e.g., ACA Comment, *supra* (arguing that the proposed rule does not display the reasoned decisionmaking required by the APA).

A. Novel Agency Actions

Courts are increasingly skeptical of novel agency actions. Under the major questions doctrine, for example, the Supreme Court has stated that certain kinds of “unheralded” and “transformative” agency actions should be treated as all but presumptively invalid.¹⁷ While that doctrine’s imprecision and malleability remain controversial,¹⁸ it is clear that an “anti-novelty” principle plays a core, animating role.¹⁹ Conversely, in its landmark decision overturning the *Chevron* doctrine of agency deference, the Supreme Court reaffirmed that longstanding agency interpretations of statutes, especially those “issued contemporaneously with the enactment of the statute,” may “be entitled to great weight” in courts’ interpretive processes.²⁰

Consequently, adverse commenters should, when possible, detail how proposed regulations diverge from past agency practice in an effort to help litigators characterize the resulting final rules as “novel” during litigation.²¹ Some drafting prompts might include:

- Is the agency adopting a novel or unprecedented interpretation of a statute?
- Is the agency deploying a new kind of regulatory mechanism or program?

¹⁷ *West Virginia v. EPA*, 597 U.S. 697, 721–23 (2022) (requiring “something more than a merely plausible textual basis for the agency action” in “certain extraordinary cases in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion provide a reason to hesitate”) (internal quotations omitted).

¹⁸ See, e.g., Thomas Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332 (May 2023).

¹⁹ See generally Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009 (2023).

²⁰ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 388 (2024) (cleaned up); see also *Kisor v. Wilkie*, 588 U.S. 558, 594, (2019) (Gorsuch, J., concurring) (“[T]he government’s early, longstanding, and consistent interpretation of a statute, regulation, or other legal instrument could count as powerful evidence of its original public meaning.”) (emphasis omitted).

²¹ For an example of a defensive comment that effectively rebuts such assertions, see Heidi Shierholz et al., *Re: RIN 1235-AA39, WHD-2023-0001, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, Econ. Pol’y Inst. (Nov. 7, 2023), <https://www.epi.org/publication/epi-comments-on-dols-proposed-overtime-rule/>.

- Is it withdrawing longstanding benefits or protections?
- Is it seeking to subject new entities or individuals to its regulatory authority?
- Is it imposing costs that far exceed those imposed by previous programs?

B. Quality of Agency Reasoning

Courts invalidate agency actions that fail to exhibit reasoned decisionmaking or, to use the language of the APA, are “arbitrary” or “capricious.”²² By documenting errors or omissions in an agency’s reasoning, subject matter experts and key stakeholders can play a vital role in building the evidentiary record to substantiate these types of claims in subsequent litigation. A few marquee court decisions offer guidance as to how.

To start, the Supreme Court’s landmark *State Farm* decision from 1983 provides a list of potential errors in agency reasoning that offer natural drafting prompts to the would-be commenter:

- Did the agency rely “on factors which Congress has not intended it to consider”?
- Did it “entirely fail[] to consider an important aspect of the problem”?
- Did it offer “an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”?²³

Next, while agencies may change their policy positions, in doing so they must at minimum acknowledge the change and provide good reasons for their new policy.²⁴

²² 5 U.S.C. § 706(2)(A).

²³ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *Arbitrary-and-Capricious Challenges*, Governing for Impact (May 2025), <https://governingforimpact.org/apa-library/>.

²⁴ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (An agency “it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one;

And when an agency's new position "rests upon factual findings that contradict those which underlay its prior policy" or disturbs "serious reliance interests," it must provide "a more detailed justification than what would suffice for a new policy created on a blank slate."²⁵ Commenters can therefore aid litigants by elaborating on the factual predicates underpinning, and the reliance interests engendered by, an agency's existing policies that the agency proposes to change.²⁶ In particular, commenters should contest agencies' claims that the factual context has changed if, in truth, it has not.

In addition, agencies' proposed rules have to make public "the most critical factual material that is used to support the agency's position," thereby exposing it "to refutation."²⁷ Comments that reveal where an agency has not made "available technical studies and data that it has employed in reaching the decisions to propose particular rules" will be useful to litigants.²⁸

Finally, agencies promulgating or revising important rules often produce elaborate benefit-cost analyses to justify their policy proposals.²⁹ While courts review an agency's benefit-cost analysis "deferentially," a "serious flaw ... can render the

it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.").

²⁵ *Id.* at 515; see also *FDA v. Wages & White Lion Invs., LLC*, 145 S. Ct. 898, 917 (2025) ("Under [the change-in-position] doctrine, agencies are free to change their existing policies as long as they provide a reasoned explanation for the change, display awareness that they are changing position, and consider serious reliance interests.") (cleaned up).

²⁶ For example, the Supreme Court invalidated the first Trump administration's attempt to repeal the Deferred Action for Childhood Arrivals program in part because the Department of Homeland Security failed to adequately consider reliance interests. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020) (noting that the agency was "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns").

²⁷ *Window Covering Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 82 F.4th 1273, 1283 (D.C. Cir. 2023) (cleaned up).

²⁸ *Id.* (cleaned up).

²⁹ See *Regulatory Planning and Review*, Exec. Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993). The Trump administration has asserted that, under the Supreme Court's decision in *Michigan v. EPA*, 576 U.S. 743 (2015), agencies generally must choose the regulatory approach that maximizes net benefits. Jeffrey B. Clark, *Interim Guidance Implementing Section 3 of Executive Order 14215, Titled "Ensuring Accountability for all Agencies,"* Office of Mgmt. & Budget M-25-24 (Apr. 17, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-24-Interim-Guidance-Implementing-Section-3-of-Executive-Order-14215-Titled-Ensuring-Accountability-for-All-Agencies.pdf>.

resulting rule unreasonable and warrant vacatur on arbitrary and capricious grounds.”³⁰ Commenters can highlight where agencies’ benefit-cost analyses overstate benefits, underestimate costs, and otherwise err. Most helpful are comments that rebut agencies’ analyses in detail and with reference to high-quality data, to which courts will generally require a more robust response.

Other drafting prompts might include:

- Has the agency mischaracterized the relevant empirical literature or omitted notable studies?
- Does its proposal rely on erroneous or dubious research?
- Are its own analyses flawed or premised on contestable or erroneous assumptions or methodologies?
- Are there alternatives to the agency’s proposal that the agency has not considered?

C. Harms to Stakeholders

One obstacle to challenging deregulation in federal court is the doctrine of standing, which is intended to ensure federal courts only hear cases brought by litigants with a particularized stake in the outcome. As standing doctrine has evolved, it has proved to structurally benefit regulated entities over regulatory beneficiaries.³¹

Commenters can aid future litigants by conducting analyses that quantify the harms that an agency’s proposed policy, if finalized, would impose on specific populations or entities (the more granular, the better). Doing so can potentially force agencies to make a difficult legal choice: either they ignore or impermissibly reject commenters’ estimates, potentially teeing up the kind of reasoned decisionmaking claim described above, or they acknowledge those harms in the rulemaking record, which

³⁰ *Window Covering Mfrs. Ass’n*, 82 F.4th at 1287 (cleaned up).

³¹ See Rachael Klarman & Will Dobbs-Allsopp, *Solving Standing’s Corporate Bias*, Roosevelt Institute n.31 (July 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/07/RI_GFILegalStanding_IssueBrief_202107-1.pdf.

should help those harmed stakeholders surmount standing hurdles in litigation. Some drafting prompts might include:

- What entities or groups would likely be harmed if the agency's proposed action becomes final?
- How might one quantify or monetize those harms or risks of harm?
- How certain is it that those harms will occur?
- Why would it be reasonable to attribute those harms to the agency's proposed action?

* * *

Upon the publication of a final rule, commenters should review the document to ascertain whether the agency addressed their contentions. If the agency fails to do so, commenters should flag that fact for litigators, who often face resource constraints when it comes to parsing thousands of comments to identify instances of agency non-responsiveness.

IV. CONCLUSION

By focusing on certain inquiries that can support or form the basis for subsequent legal challenges, non-legal commenters can offer valuable contributions to lawsuits aimed at slowing or halting harmful regulatory initiatives. In the below appendix, we offer a reference sheet for the prompts described in more detail above.

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APPENDIX

Adverse Commenting Reference Sheet

The following prompts can help commenters draft comments that support future litigation.

Novel Agency Actions

- Does the agency's proposed action significantly diverge from past practice? If so, how?
- Is the agency deploying a new kind of regulatory mechanism or program?
- Is it withdrawing longstanding benefits or protections?
- Is it seeking to draw new classes of entities or individuals under its regulatory purview?
- Is it imposing costs that far exceed those imposed by previous programs?

Quality of Agency Reasoning

- Did the agency rely on factors which Congress has not intended it to consider?
- Did the agency fail to consider a factor that Congress required it to consider?
- Did it fail to consider an important aspect of the problem?
- Did it fail to consider an obvious alternative?

- Are there significant flaws in the agency's logic?
- Did it ignore evidence before it?
- Is there evidence the agency *should* consider that it has not mentioned or relied upon?
- Did it offer an explanation that went against the evidence?
- Is its reading of the evidence implausible or wrong?
- Has the agency changed its position? If so:
 - Has it acknowledged that change and offered a reason for doing so?
 - Has the agency's reversal unsettled any significant reliance interests? If so, has the agency justified doing so?
 - Does the agency's reversal depend on factual findings that contradict earlier agency conclusions? If so, has the agency explained why its view of the facts have changed? Have the facts changed?
- Did the agency make public the critical factual material, data or methodologies undergirding its analysis?
- Are there any errors or contestable conclusions in the agency's benefit-cost analysis?
- Has the agency overstated benefits?
- Has the agency failed to consider all or some costs?
- Has the agency mischaracterized the relevant empirical literature or omitted notable studies?
- Does its proposal rely on erroneous or dubious external research?
- Are its own analyses flawed or premised on contestable or erroneous assumptions or methodologies?

Harms to Stakeholders

- What entities or groups are likely to be harmed by the agency's proposed action?
- How might one quantify or monetize those harms?
- How certain is it that those harms will occur?
- Why would it be reasonable to attribute those harms to the agency's proposed action?