Speak Loudly and Carry a Small (Memory) Stick: Capitalizing on Public Comments in an Era of Significant Agency Rulemakings

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The title of this article very well could have been Teddy Roosevelt's other favorite slogan. That is, had he been equipped with the Administrative Procedure Act and the modern federal bureaucracy. (And, of course, a computer.)

Federal environmental and natural resource agencies are undertaking new rulemakings at a whirlwind pace—perhaps as great as at any other time in recent memory. Agencies are proceeding with myriad changes to long-standing regulatory programs established under decades-old statutes to deal with contemporary environmental and natural resource issues. In the vacuum of congressional inaction, the executive branch is attacking through the regulatory process new, emerging issues like climate change, renewable energy development, unconventional oil and gas development, energy import and export, habitat conservation, and global electronics supply chains. For example, the Environmental Protection Agency (EPA) recently proposed its Clean Power Plan, greenhouse gas (GHG) standards for existing power plants, and planned regulations for the emissions of methane associated with oil and gas development. At the same time, the Bureau of Land Management proposed a new suite of regulations overhauling the system of renewable energy leasing and development on public lands; the Bureau of Ocean Energy Management proposed new offshore oil spill, blowout prevention, and Arctic drilling regulations; and the Fish and Wildlife Service accelerated its push to list dozens of new threatened and endangered species across the country and began the process for identifying, managing, and regulating activity in its eagle conservation areas.

Whether by design or happenstance, a number of other significant proposals have surfaced even during typically "quiet" periods in Washington, D.C. Just this past Christmas Eve, the Center for Environmental Quality left a present under the tree in the form of new draft guidance on considering GHGs and climate change in federal National Environmental Policy Act project reviews. With less than two years remaining for the current administration to cement its legacy, this trend of aggressive policymaking should only accelerate.

The increasing number and complexity of regulatory initiatives underway, coupled with their inherent high stakes for industry and the public, ostensibly should produce a corresponding increase in comments submitted by the regulated community. Widespread participation has certainly materialized for highly politicized or publicized issues (e.g., EPA's proposed rule redefining "waters of the United States" for purposes of Clean Water Act jurisdiction (more than 19,300 comments to date); the recently finalized regulations governing hydraulic fracturing on federal lands (more than 1.3 million comments in total); and the proposed imposition of limits on GHGs from existing power plants (more than 3.8 million comments to date)). In such instances, it is relatively simple to "pile on" to an existing controversy to garner media exposure and participate in the popular debate.

For lesser-known yet equally important federal agency proposals, in our experience stakeholder input has not been a given, including among entities who would be subjected to the new requirements. Despite the regulated community's clear vested interests in the government's proposals to regulate, their valuable contributions can remain parked on the sidelines. We have heard various justifications for remaining passive—from "the agency will get mad at me" to "this won't affect me for years" to "it costs too much to submit comments."

These rationalizations notwithstanding, nonparticipation by entities with something to contribute deprives federal regulators of valuable information and practical perspective necessary to make their regulations sensible and effective. The natural reaction for federal regulators when presented with no comments is that the proposal is viewed as either satisfactory or unimportant. Failure to engage agencies in the process of creating or modifying complex regulatory regimes can also result in unforeseen new compliance and enforcement risks and compromise the ability of the regulated community to appeal or correct agency errors once they have been made.

Therefore, in the rulemaking context, silence is *not* golden. This article revisits the genesis and underlying purpose of public notice and comment rulemaking, as a reminder that such formal opportunities were not always available to head off ill-advised regulation. We then confront some of the perceptions deterring interested parties from participating in the rulemaking process, including fear of agency backlash and comment preparation costs. We conclude by offering some best (and worst) practices for ensuring that submitted comments are well received and effective. We hope this discussion reinvigorates meaningful contributions before federal agency rules and

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policies are finalized, rather than when it may be too late to alter their trajectories.

The Origin of Public Notice and Comment

It is easy to take for granted the basic right of public notice and comment in federal agency rulemaking. That right did not officially exist, however, until the 1946 passage of the Administrative Procedure Act (APA), specifically what is now section 553. 5 U.S.C. § 553 (originally § 1003, reorganized and amended in 1966). The 1930s and 1940s had witnessed the rapid growth of the federal government and the rise of the regulatory state, mirroring the increasing complexity of American industry and society. Congress found unsatisfactory the lack of guideposts for this "fourth branch" of government. As the APA legislative history states:

> [T]he powers committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. . . . If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. . . . The limits of their power over the citizen must be fixed and determined. . . . The rights of the citizen against them must be made plain. . . . A system of administrative law must be developed, and that with us is still in its infancy, crude, and imperfect.

Legislative History of the Administrative Procedure Act, S. Doc. No. 248, at 350 (Testimony of Rep. Walter before the House of Representatives May 25, 1946, quoting Elihu Root). In response, Congress enacted the APA to balance the need of federal agencies to efficiently carry out their regulatory and adjudicatory functions with the need to protect the public from the arbitrary exercise of legislative and judicial power by government officers who are neither elected legislators nor judges.

From the beginning, Congress envisioned public comment as a central component of the agencies' rulemaking functions. In sum, section 553 requires that, with certain exceptions, agencies formally notify and permit interested parties to submit their views for consideration before issuing regulations that have the force and effect of law. According to the legislative history of the APA, these requirements are based on the premise that rulemaking is a deliberate, legislative-type undertaking and must be fully informed to ensure good outcomes.

> An administrative agency . . . is not ordinarily a representative body . . . Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. . . . Its knowledge is rarely complete, and it must always learn . . . the viewpoints of those whom its regulations will affect. . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests.

Id. at 19–20 (Quoting *Administrative Procedure in Government Agencies—Report of the Committee on Administrative Procedure, Appointed by the Attorney General, at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein*, (S. Doc. 8, at 108)). Section 553 was also intended to protect private interests and inject fundamental fairness into a legislative process that would purport to govern private conduct:

> The intended effect [of the notice-and-comment process is] to enable parties to express themselves in some informal manner prior to the issuance of rules and regulations, so they will have been consulted before being faced with the accomplished fact of a regulation which they may not have anticipated or with reference to which they have not been consulted. . . . Day by day Congress takes account of the interests and desires of the people in framing legislation, and there is no reason why administrative agencies should not do so when they exercise legislative functions which Congress has delegated to them.

Id. at 358. Thereby, Congress created a formalized mechanism for interested parties to provide agencies with information regarding factual, legal, or policy aspects of proposed regulations, and to present new ideas, objections, or alternate regulatory approaches for agency consideration.

To Comment or Not to Comment

Assuming federal agencies comply with proper notice and other procedural requirements, the regulated community currently has the ability to comment and potentially alter the content of rules and policies before they become final. (The separate and important issue of substantive rulemakings posing as informal guidance without public notice and comment is beyond the scope of this article.) Of course, everyone should not comment on everything. But if an entity truly would (or could) be affected by a proposal, why would it not comment on the record? As it turns out, there may be multiple reasons for nonparticipation, highlighted below. Upon closer inspection, these concerns are less compelling than they might appear. Moreover, the downside of withholding comments may easily outweigh the effort required to preserve arguments on the record.

"What regulatory proposal?" Regulated entities must be aware of proposed agency actions that may affect them. Though the point seems obvious, staying apprised of all of the regulatory proposals that could be relevant is extremely difficult given the myriad daily demands on people's attention and the sheer volume of regulations proposed by modern federal agencies. If an entity is not aware of a proposal, it cannot comment on it. And, once finalized, the rule is binding on everyone regardless of whether everyone had prior knowledge of the proposal. Regulated entities can easily avoid "missing the boat" by setting up a protocol for monitoring regulatory developments of interest. This could be as simple as designating a person to, on a daily or weekly basis, scan the *Federal Register* table of contents under relevant agencies and report items of potential interest to management. Electronic

monitoring (sometimes for a fee) generally is also available. Other ways to stay aware of pending rulemakings include regularly visiting the "news" sections of agency websites, subscribing to regular agency email newsletters, reading trade press summaries, or communicating with outside counsel.

Agencies generally welcome comments from all stakeholders and adjudge those comments based on their substance rather than on the identity of the submitter.

Summaries are no substitute for actually reviewing the proposed rule, however. The proposals with the greatest substantive or financial impact may be too complex or esoteric to make the media headlines and thus might be missed. Even in the *Federal Register*, the agency's title or upfront summary of a proposed rule may understate its full scope, contents, or significance. Some purported "mere technical changes" arguably are anything but.

"The agency might get mad at me." Another commonly expressed reservation is the fear that the agency will negatively perceive the comment submission, thereby endangering important relationships and risking retribution in future dealings. Almost universally, this fear is unfounded. To a tee, agencies generally welcome comments from all stakeholders and adjudge those comments based on their substance rather than on the identity of the submitter. Indeed, they expect, and often rely on, those with vested interests to weigh in. In many instances, the proposal will ask specific questions regarding how the agency should resolve certain difficult issues. A surer way to spur agency resentment would be to reserve key information or arguments and sandbag the agency after it has gone through the effort of promulgating the rule. Moreover, to both preserve goodwill and maximize their substantive value, comments should be constructive and supported, in lieu of vitriolic or personal attacks on the agency or individuals. If there is a particularly sensitive issue, it is also fine to request an advance meeting to preview the comment before it is submitted in writing. In that way, an entity may learn that others have raised the same comment or that the issue is already being addressed by the agency.

"Comments will be too time-consuming and costly; let others do it." Rather than divert resources from day-to-day activities, it is tempting to rely on other similarly situated parties to prepare comments. Overall, that may not be the most effective or economical course. The decision whether to comment is not binary. That is, one need not write an exhaustive explanation of all the problems in the proposal; there is no minimum word count. A bulleted list of spotted issues may suffice. The length and detail of comments will depend on the complexity of the proposal and its importance to the commenter but generally should not resemble a legal brief. In addition, it is inherently risky to count on others to make specific arguments at all, let alone well. Though membership in trade associations is an invaluable solution to the free-rider problem, the added perspective of an individual company is often ideal to articulate in concrete terms the threatened impacts of a proposed rule. Finally, the cost of compliance with permanent, potentially burdensome new requirements representing an agency's regulatory "wish list" often far outweighs the time and cost of contributing to their development.

"I have no complaints with the proposed rule." What if the agency gets it right the first time? It is still important to express that sentiment on the record through comments. A favorable provision from one person's perspective is usually viewed unfavorably by another person. If the latter submits objections to the provision but the former remains silent, the agency faces a negative record suggesting revisions are needed in the final rule. Commenting is not only a negative exercise; it is just as important to identify and affirmatively support favorable proposed language that commenters believe should remain unchanged.

"This proposal does not affect me right now." While a proposal may not affect current activities, potential long-term effects are also relevant. For example, would a proposal regarding federal lands management impact any future company plans to increase activities on federal lands? Likewise, might it set an unfavorable precedent for other federal or state programs? Once regulations are finalized, they tend to remain in effect for decades, long enough to potentially have a profound effect on an industry.

"The agency will do whatever it wants anyway." Nonparticipation also might be explained by disillusionment, resignation, or indifference regarding the outcome of the regulatory process. This viewpoint is perhaps overly pessimistic given most agencies' willingness to listen. In fact, industry input can have a profound influence on an agency's thinking on a regulatory matter. As an illustration, the Bureau of Land Management's proposed hydraulic fracturing regulations changed considerably between drafts due to industry comments. In 2012, BLM published a significant regulatory proposal for public comment intended to closely regulate hydraulic fracturing on federal lands. 77 Fed. Reg. 27,691 (May 11, 2012). After receiving thousands of comments, including many from the regulated community, BLM rethought its approach and a year later re-proposed a new, less-stringent version of the regulation, which was then largely finalized. 78 Fed. Reg. 31,636 (May 24, 2013). Widespread industry participation helped the agency conclude that a somewhat lighter regulatory touch was more appropriate.

More importantly, failing to comment (on any of the above grounds) dangerously raises exhaustion issues in any potential legal challenge to the regulation. While the case law is not uniform, generally courts will consider challenges to the validity of a rule only if the issues were presented to the agency during the rulemaking process. *See, e.g., United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). The rationale is that an agency should receive the first opportunity to respond on the record and consider the argument before issuing its final regulation. If agencies were compelled to consider untimely comments, or if courts were to second-guess agency decisions based on post hoc arguments, the administrative process would never end. Though there are exceptions to this general rule, and so-called "as-applied" challenges

might be possible in certain circumstances, failure to preserve arguments in the record during the rulemaking process unnecessarily provides a ready-made defense for the government. Moreover, because a challenge to a regulation almost always is based strictly "on the record" that was before the agency at the time it issued the regulation, the merits of any lawsuit would be compromised since the issues being litigated are not fully developed in the administrative record.

Making the Most of the Commenting Opportunity

While commenting is universally important, not all comments are created equal. Following a decision to submit comments, the following suggested steps—and steps to avoid—should help optimize the value of the comments to the agency.

First and foremost, it is critical to understand the proposal. Carefully review the regulatory text actually proposed, rather than just the preamble, to identify any problematic provisions. In many instances, comments can help an agency understand possible unintended interpretations that can easily be fixed. As noted above, do not assume that a proposed rule's scope is limited by its title or that changes are minor just because the preamble says they are.

Second, ask questions and challenge assumptions. A key function of public commenting is to enable the agency to recognize advertent or inadvertent assumptions (factual or legal) and consider alternative approaches. Moreover, it is not necessary to resolve all raised questions. Simply bringing them to the agency's attention adds value to the process. Indeed, the questions may be so critical or numerous as to force abandonment of the proposed rule or re-proposal of an improved rule.

Third, offer specific "fixes" where possible. It often is easy to attack proposed language. It is harder to craft a more suitable alternative. Doing so, however, will greatly assist the agency and decrease the likelihood of an even less favorable substitute. If the concept is so flawed as to prevent anything short of deletion, then say so, and be sure to explain why.

Fourth, there is strength in numbers behind submitted comments. Membership organizations provide invaluable services in gathering the input of many stakeholders and synthesizing that input into a coherent, unified set of comments. Participation within a group is typically more efficient and provides cover for any individual entity unwilling to "go it alone." Be even more creative in creating coalitions. Depending on the particular rulemaking, atypical allies may have common interests and create a powerful, diverse constituency whose input is difficult to ignore.

Fifth, the same rule does not necessarily apply to numbers of comments submitted. Some organizations create a form comment letter and call on each of their members to submit it individually. The growth of electronic dockets makes this as easy as a few clicks. The rationale appears to be that forcing the agency to report that it received "100,000 comments" against the proposal moves the needle more than a single set of well-crafted comments. In most situations, this is not helpful. It creates additional paperwork with no corresponding value. More and more, agencies are recognizing that a single comment may carry as much value as an oft-repeated one. Courts likewise appear not to be swayed by large-scale submissions of identical comments. For example, the Tenth Circuit recently explained in a National Environmental Policy Act case that "we consider the substance of the comments, not the number for or against the project." *See Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181–82 (10th Cir. 2012). In sum, quality trumps quantity. That said, if individuals have new or different input to add, they should certainly do so as indicated above.

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Sixth, maintain credibility. While the goal of comments is advocacy, avoid overstatements or grandiose language. Of course, exclude statements that cannot be supported. If an issue is ambiguous, it is best to say so and then explain the preferred resolution. Also, ensure that one set of comments does not contradict a position previously taken with the same agency.

Finally, the process should not end after hitting "send." Commenters can request a meeting with agency staff or counsel to ensure the comments were properly understood and provide any other requested information. It often is worthwhile to review comments filed by other stakeholders and identify any meaningful errors that should be corrected in the record to ensure that the agency bases its final rule on the best available information.

The ability to comment before federal agency rules become final is a critical right. The regulated community should take full advantage of the opportunity to educate the agency and shape the record. Often, the benefit of that input will appear in the final rule. In other instances, that input will provide the basis for a successful judicial challenge.

With that said, for now, we have no more comment.