



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

October 09, 2019

SENT VIA COMMENTS.CFTC.GOV

Mr. Chris Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: RIN No. 3038-AE90, Public Rulemaking Procedures

Dear Mr. Kirkpatrick:

On behalf of the Office of the Chairman of the Administrative Conference of the United States (ACUS), I offer the following comments in response to the above-referenced proposed rulemaking.

ACUS is an independent agency in the executive branch charged by statute with making recommendations to the President, federal agencies, Congress, and the Judicial Conference of the United States to improve administrative procedure, including rulemaking. ACUS's official recommendations are issued by its Assembly, a body partially comprised of representatives from executive and independent agencies. ACUS's official recommendations may be found at <https://www.acus.gov> and in the *Federal Register*.

The Commission may find ACUS's Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014), to be especially relevant to this proposed rulemaking. Recommendation 2014-6 is intended to "help agencies reevaluate and revise their existing policies and procedures to make the petitioning process work better for all." In issuing this recommendation, ACUS sought "to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy."

Although the Commission's proposed rule would retain 17 C.F.R. § 13.2 ("*Petition for issuance, amendment, or repeal of a rule*") in its entirety, the Commission should consider taking this opportunity to amend § 13.2 to conform with Recommendation 2014-6. That Recommendation contains 16 specific recommendations for agencies to consider when developing policies governing rulemaking petitions. Although the Office of the Chairman encourages the Commission to consider all 16 recommendations, several may be of particular importance to the Commission's rulemaking:

First, Recommendation 2014-6 encourages agencies to develop and maintain procedures governing rulemaking petitions that "explain[] how the agency receives, processes, and responds to petitions for rulemaking filed under the Administrative Procedure Act." Specifically, these

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procedures “should explain what type of data, argumentation, and other information make a petition more useful and easier for the agency to evaluate” and “identify any information that is statutorily required for the agency to act on a petition.”

Second, Recommendation 2014-6 encourages agencies to “accept the electronic submission of petitions” and create an electronic docket for each petition.

Third, Recommendation 2014-6 recommends agencies consider “inviting public comment on petitions for rulemaking.”

Fourth, Recommendation 2014-6 encourages agencies to, if denying a petition, “provide a reasoned explanation beyond a brief statement of the grounds for denial.” This reasoned explanation should be made public.

Lastly, Recommendation 2014-6 encourages agencies to “use available online platforms, including their websites and Regulations.gov, to implement this recommendation.”

ACUS’s Office of the Chairman thanks the Commission for this opportunity to comment on its rulemaking process. Please contact me at tphillips@acus.gov or 202-480-2080 if you have questions or would like further information.

Sincerely,



Todd Phillips
Attorney Advisor and Counsel for
Congressional Affairs

Attachment: Recommendation 2014-6, *Petitions for Rulemaking*



Administrative Conference Recommendation 2014-6

Petitions for Rulemaking

Adopted December 5, 2014

Under the Administrative Procedure Act (APA), federal agencies are required to “give . . . interested person[s] the right to petition for the issuance, amendment, or repeal of a rule.”¹ The statute generally does not establish procedures agencies must observe in connection with petitions for rulemaking. It does, however, require agencies to respond to petitions for rulemaking “within a reasonable time,”² and to give petitioners “prompt notice” when a petition is denied in whole or in part, along with “a brief statement of the grounds for denial.”³ Beyond the APA’s general right to petition, Congress has occasionally granted more specific rights to petition under individual statutes, such as the Clean Air Act.⁴ Although agency denials of petitions for rulemaking are subject to judicial review, the “courts have properly limited their scope of review in this context.”⁵

¹ 5 U.S.C. § 553(e). This provision ensures that the people’s right to petition the government, which is protected by the First Amendment, *see* U.S. Const. amend. I, is also an important part of the rulemaking process. Although certain matters are exempt from the requirements of 5 U.S.C. § 553, *see* U.S.C. § 553(a), the Administrative Conference has previously taken the position that public participation in agency rulemaking on these matters, including through petitions for rulemaking, may be beneficial. *See* Administrative Conference of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 Fed. Reg. 46,988 n.2 (Dec. 30, 1986).

² 5 U.S.C. § 555(b).

³ 5 U.S.C. § 555(e). The APA exempts agencies from the requirement of providing a “brief statement of the grounds for denial” when it is “affirming a prior denial or when the denial is self-explanatory.” *Id.*

⁴ *See, e.g.*, 42 U.S.C. §§ 7671a(c)(3), 7671e(b), 7671j(e). Statutory petition provisions such as these may impose additional procedural requirements beyond those contained in the APA or identify substantive requirements that must be met before the agency can act.

⁵ Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995). In general, courts do not require agencies to respond to every individual issue raised in a petition (let alone every issue raised in comments on petitions), so long as the administrative record demonstrates a reasoned response on the whole. *Cf. Nader v. FAA*, 440 F.2d 292, 294 (D.C. Cir. 1971); *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 104 n.21 (D.D.C. 2012). In *Connecticut v. Daley*, a district court raised the “question whether the [agency] must respond in detail to each and every comment received, or if [it] is only required



The Administrative Conference has previously recommended basic procedures to help agencies meet the APA's minimum requirements and respond promptly to petitions for rulemaking.⁶ An Administrative Conference study of agency procedures and practices with respect to petitions for rulemaking has revealed, however, that further improvement is warranted.⁷ Nearly thirty years after the Administrative Conference first examined this issue, few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking.⁸ How petitions are received and treated varies across—and even within—agencies. In some cases, agency personnel do not even know what their agency's procedures are for handling petitions. Although the petitioning process can be a tool for enhancing public engagement in rulemaking, in practice most petitions for rulemaking are filed by sophisticated stakeholders and not by other interested members of the public. Some petitioners report that it can be difficult to learn the status of a previously filed petition, agency communication throughout the process can be poor, response times can be slow, and agency explanations for denials can be minimal and predominantly non-substantive.⁹

Although the right to petition can be important and valuable, making the process work well requires a difficult balancing of competing interests. On the one hand, the APA grants to the

to respond to what was raised in the actual petition for rule making." 53 F. Supp. 2d 147, 170 (D. Conn. 1999). Although the court did not resolve that question, it noted that 5 U.S.C. § 555(e) requires agencies to briefly explain only why a "petition" was denied, impliedly not extending the required response to comments on petitions (citing *WWHT, Inc. v. FCC*, 656 F.2d 807, 813 (D.C. Cir. 1981) (emphasis added by D. Conn.)).

⁶ See Administrative Conference of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 Fed. Reg. 46,988 (Dec. 30, 1986); see also Administrative Conference of the United States, Recommendation 95-3, ¶ VI(B) ("Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time.").

⁷ See Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, Final Report to the Administrative Conference of the United States (Nov. 5, 2014), available at <http://www.acus.gov/report/petitions-rulemaking-final-report>.

⁸ See *id.* at 46; see also William V. Luneburg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS 493, 510 (1986) (observing that, with respect to agency procedures governing petitions for rulemaking, "[s]ome have none; others largely mirror, without elaborating much on, statutory procedures; and still others have adopted rather detailed requirements . . . going considerably beyond the procedures expressly mandated by statute").

⁹ See Schwartz & Revesz, *supra* note 7, at 40-64.



public the right to petition for rulemaking and requires agencies to provide a decision on the merits within a reasonable period of time. To be sure, agencies often receive suggestions for new regulations and feedback regarding needed changes to existing regulations via informal channels, such as through meetings with regulated parties and stakeholders or interactions during inspections or other enforcement activities. Petitions provide another important avenue for such input—one that in theory is more broadly accessible to interested persons who do not regularly interact with agency personnel. Nonetheless, petitions for rulemaking may adversely affect an agency’s ability to control its agenda and make considered, holistic judgments about regulatory priorities, particularly in the face of limited resources. And thoughtfully evaluating petitions and defending denials on judicial review may consume already scarce agency resources.

Greater transparency, improved communication between agencies and petitioners, and more prompt and explanatory petition responses may help to balance these competing interests.¹⁰ Agencies should educate the public about how petitions fit with the other (often more informal) mechanisms through which agencies receive feedback from regulated and other interested persons on regulatory priorities and related issues. Petitioners and agency personnel alike would also benefit from greater clarity as to how petitions can be filed, what information should be included to make a petition more useful and easier for the agency to evaluate,¹¹ whether or when public comment will be invited, and how long it may take to resolve a petition. Better internal coordination may reduce the possibility that a petition will be forgotten or will not reach the appropriate agency office for decision. Encouraging communication between prospective or current petitioners and the agency can provide an efficient way to improve the quality of petitions and the overall experience for all participants in the process. Readily available information on the status of pending petitions and more prompt disposition of petitions may improve understanding between the agency and the public and reduce the likelihood of litigation.

¹⁰ See generally *id.*

¹¹ This could be similar to the information some agencies provide on their websites to help the public understand the characteristics of an effective rulemaking comment.



This recommendation seeks to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy. Building upon the Administrative Conference's previous work, it provides more guidance to agencies, identifying best practices that may make the petitioning process more useful for agencies, petitioners, and other members of the public. Moreover, electronic rulemaking dockets and agency websites provide new opportunities for agencies to achieve these goals in a cost-effective manner.¹² This recommendation should help agencies reevaluate and revise their existing policies and procedures to make the petitioning process work better for all.

RECOMMENDATION

Agency Policy on Petitions for Rulemaking

1. 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 for rulemaking filed under the Administrative Procedure Act.

- (a) If an agency also has more specific regulations that govern petitions filed under other statutes or that apply to specific sub-agencies, the agency's procedures should cross-reference those regulations.
- (b) If an agency rarely receives petitions for rulemaking, its procedures may simply designate an agency contact who can provide guidance to prospective petitioners.
- (c) The procedures should explain how petitions relate to the various other options available to members of the public for informally engaging with agency personnel on the need to issue, amend, or repeal rules.

¹² See, e.g., Administrative Conference of the United States, Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2257, 2264-65 (Jan. 17, 2012).



2. 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.

3. The procedures should explain what type of data, argumentation, and other information make a petition more useful and easier for the agency to evaluate. The procedures should also identify any information that is statutorily required for the agency to act on a petition.

Receiving and Processing Petitions

4. Agencies should accept the electronic submission of petitions, via email or through Regulations.gov (such as by maintaining an open docket for the submission of petitions for rulemaking) or their existing online docketing system.

5. Agencies should designate a particular person or office to receive and distribute all petitions for rulemaking to ensure that each petition for rulemaking is expeditiously directed to the appropriate agency personnel for consideration and disposition. This designation may be especially important for agencies that have multiple regions or offices.

Communicating with Petitioners

6. Agencies should encourage and facilitate communication between agency personnel and petitioners, both prior to submission and while petitions are pending disposition. For example, agencies should consider asking petitioners to clarify requests or submit additional information that will make the petition easier to evaluate. Agencies should consider also alerting petitioners to recent developments that may warrant a petition's modification or withdrawal.

7. Agencies should provide a way for petitioners and other interested persons to learn the status of previously filed petitions. Agencies should:

- (a) Use online dockets to allow the public to monitor the status of petitions; and



- (b) Designate a single point of contact authorized to provide information about the status of petitions.

Soliciting Public Comment on Petitions

8. Agencies should consider inviting public comment on petitions for rulemaking by either:

- (a) Soliciting public comment on all petitions for rulemaking; or
- (b) Deciding, on a case-by-case basis, whether to solicit public comment on petitions for rulemaking. Inviting public comment may be particularly appropriate when:
 - (i) A petition addresses a question of policy or of general interest; or
 - (ii) Evaluating a petition's merits may require the agency to consider information the agency does not have, or the agency believes that the information provided by the petitioner may be in dispute or is incomplete.

9. If an agency anticipates that it will consider but not respond to all comments on a petition for rulemaking, it should say so in its request for comments.

Responding to Petitions for Rulemaking

10. Agencies should docket each decision with the petition to which it responds.

11. If an agency denies a petition, where feasible and appropriate, it should provide a reasoned explanation beyond a brief statement of the grounds for denial. Agencies should not reflexively cite only resource constraints or competing priorities.



12. Agencies must respond to petitions within a reasonable time. To that end, each agency should:

- (a) Adopt in its 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); and/or
- (b) Establish and make publicly available an individual target timeline for responding to that petition.

13. If an agency is unable to respond to a petition by the target timeline it has established, it should provide the petitioner and the public with a brief explanation for the delay, along with a reasonable new target timeline. The explanation may include a request for new or additional information if the agency believes it would benefit from that or the facts or circumstances relevant to the petition may have changed while the petition was pending.

Providing Information on Petitions for Rulemaking

14. Agencies should maintain a summary log or report listing all petitions, the date each was received, and the date of disposition or target timeline for disposition (where necessary, this should include the brief explanation for any delay in disposition and the reasonable new target timeline). The log or report should be described in the agency's procedures (*see* paragraph 1) and made publicly available on the agency's website. It should be updated at least semi-annually. Agencies should create and maintain the summary log or report beginning on the date of this recommendation and should also include or otherwise publicly provide, to the extent feasible, historic information about petitions for rulemaking that have been resolved.

15. The Office of Information and Regulatory Affairs should request that agencies include in their annual regulatory plan information on petitions for rulemaking that have been resolved during that year or are still pending.



Using Electronic Tools to Improve the Petitioning Process

16. Agencies should use available online platforms, including their websites and Regulations.gov, to implement this recommendation as effectively and efficiently as possible, including by informing the public about the petitioning process, facilitating the submission of petitions, inviting public comment, providing status updates, improving the accessibility of agency decisions on petitions, and annually providing information on petitions for rulemaking that have been resolved or are still pending.