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Disclosure of Critical Factual Material Supporting Proposed Rules (D.C. Circuit)

What are the notice and comment requirements for informal rulemaking?

The Administrative Procedure Act (5 U.S.C. § 553) requires agencies to publish notice of proposed rules in the Federal Register and “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”

What supporting materials must agencies make available for notice and comment?

Several Courts of Appeals interpret 5 U.S.C. § 553 to require agencies to make the “critical factual material” underlying proposed rules—technical studies, staff reports, data, and methodologies—available for public comment. Disclosure enables commenters to point out where agencies rely on erroneous data or conclusions.

The most significant decisions applying the doctrine come from the D.C. Circuit. The cases listed to the right exemplify the court’s approach.

The D.C. Circuit has remanded rules for agencies to make supporting materials available for notice and comment when agencies did not disclose materials “critical” to a rulemaking *and* the nondisclosure resulted in prejudice to a petitioner. To show prejudice, a petitioner generally must raise an objection or response to the undisclosed material that could have affected the agency’s decisionmaking.

Supporting materials the D.C. Circuit has generally required agencies to make available for notice and comment:

Reports and technical studies prepared by staff or consultants and underlying data, methodologies, models, and assumptions. *Am. Radio Relay League v. FCC*, 524 F.3d 227 (D.C. Cir. 2008); *Owner-Operator Indep. Drivers Ass’n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

“Primary” materials that the agency considered after notice and comment and are critical to the agency’s action. *Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Cir. 2006); *AISI v. OSHA*, 939 F.2d 975 (D.C. Cir. 1991).

Budgetary/actuarial materials. *AMA v. Reno*, 57 F.3d 1129 (D.C. Cir. 1995); *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240 (D.D.C. 2015).

Supporting materials the D.C. Circuit has generally *not* required agencies to make available for notice and comment:

Draft rules and internal legal analyses. *Banner Health v. Price*, 867 F.3d 1323 (D.C. Cir. 2017); *Guedes v. BATFE*, 356 F. Supp. 3d 109 (D.D.C. 2019).

Materials that are relatively insignificant to the agency’s action or materials on which the agency did not rely. *Time Warner Entm’t Co. v. FCC*, 340 F.3d 1126 (D.C. Cir. 2001); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336 (D.C. Cir. 1985); *Hunteo Pawn Holdings v. DOD*, 240 F. Supp. 3d 206 (D.D.C. 2016).

“Supplementary” materials that the agency considered after notice and comment but merely expand on or confirm information already in the record. *CEI v. DOT*, 863 F.3d 911 (D.C. Cir. 2017); *Building Indus. Ass’n of Superior Cal. v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001); *NMA v. Babbitt*, 172 F.3d 906 (1999); *Solite Corp. v. EPA*, 952 F.2d 473 (D.C. Cir. 1991).

Staff studies in response to public comments that logically follow or reasonably develop the originally proposed rule (absent a showing of prejudice). *Air Transp. Ass’n v. CAB*, 732 F.2d 219 (D.C. Cir. 1984).

Materials cited in the proposed rule that are otherwise available to the public in another forum. *Conn. Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir. 1982); *Pharm. Research & Mfrs. of Am. v. FTC*, 44 F. Supp. 3d 95 (D.D.C. 2014); *Cape Cod Hosp. v. Sebelius*, 677 F. Supp. 2d 18 (D.D.C. 2009).

Additional Resources

ACUS Rec. [2013-3](#), *Science in the Administrative Process*
ACUS Rec. [2013-4](#), *Administrative Record in Informal Rulemaking*
Leland E. Beck, [Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking](#) (May 2013)