



Photo source: Mobilus In Mobili

Rulemaking and the Resistance

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The Resistance Needs to Pay Attention to Agencies

The New York Times | <https://nyti.ms/2xUPvmV>

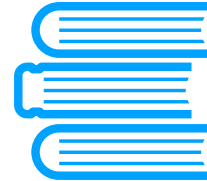
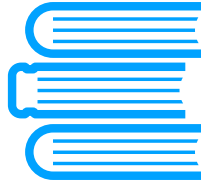
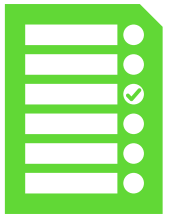
BUSINESS DAY

Where Trump's Hands-Off Approach to Governing Does Not Apply

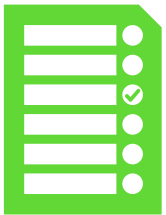
By BEN PROTESS, DANIELLE IVORY and STEVE EDER SEPT. 10, 2017

The Trump administration opened the door to allowing more firearms on federal lands. It scrubbed references to “L.G.B.T.Q. youth” from the description of a federal program for victims of sex trafficking. And, on the advice of religious leaders, it eliminated funding to international groups that provide abortion.

The Rulemaking Process



Why Make a Rule?



Agency Rule List - Update 2017

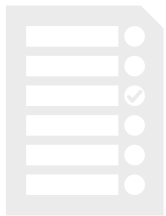
Department of Labor

Agency	Agenda Stage of Rulemaking	Title	RIN
DOL/ETA	Proposed Rule Stage	Trade Adjustment Assistance for Workers	1205-AB78
DOL/ETA	Proposed Rule Stage	Drug Testing by States for Purposes of Determining Unemployment Compensation Eligibility	1205-AB81
DOL/ETA	Proposed Rule Stage	Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations	1205-AB85
DOL/ETA	Final Rule Stage	Senior Community Service Employment Program (SCSEP), Performance Accountability	1205-AB79
DOL/ETA	Final Rule Stage	Exercise of Time-Limited Authority to Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program	1205-AB84
DOL/EBSA	Prerule Stage	Request for Information on Fiduciary Rule and Prohibited Transaction Exemptions	1210-AB82
DOL/EBSA	Proposed Rule Stage	Delay or Amend Final Rule Amending Claims Procedure Regulation	1210-AB39
DOL/EBSA	Proposed Rule Stage	Revision of the Form 5500 Series and Implementing Related Regulations Under the Employee Retirement Income Security Act of 1974 (ERISA)	1210-AB63
DOL/EBSA	Final Rule Stage	Amendment of Abandoned Plan Program	1210-AB47
DOL/EBSA	Final Rule Stage	Electronic Filing of Apprenticeship & Training Notices, and Top Hat Plan Statements	1210-AB62
DOL/EBSA	Final Rule Stage	Adoption of Amended and Restated Voluntary Fiduciary Correction Program	1210-AB64
DOL/OSHA	Prerule Stage	Communication Tower Safety	1218-AC90
DOL/OSHA	Prerule Stage	Mechanical Power Presses Update	1218-AC98
DOL/OSHA	Prerule Stage	Powered Industrial Trucks	1218-AC99
DOL/OSHA	Prerule Stage	Lock-Out/Tag-Out Update	1218-AD00
DOL/OSHA	Prerule Stage	Blood Lead Level for Medical Removal	1218-AD10
DOL/OSHA	Proposed Rule Stage	Occupational Exposure to Beryllium	1218-AB76
DOL/OSHA	Proposed Rule Stage	Quantitative Fit Testing Protocol: Amendment to the Final Rule on Respiratory Protection	1218-AC94
DOL/OSHA	Proposed Rule Stage	Crane Operator Qualification in Construction	1218-AC96
DOL/OSHA	Proposed Rule Stage	Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work	1218-AD07
DOL/OSHA	Proposed Rule Stage	Technical Corrections to 16 OSHA Standards	1218-AD12
DOL/OSHA	Proposed Rule Stage	Puerto Rico State Plan	1218-AD13
DOL/OSHA	Proposed Rule Stage	Improve Tracking of Workplace Injuries and Illnesses	1218-AD16
DOL/OSHA	Proposed Rule Stage	Tracking of Workplace Injuries and Illnesses	1218-AD17
DOL/OSHA	Final Rule Stage	Standards Improvement Project IV	1218-AC67
DOL/MSHA	Prerule Stage	Exposure of Underground Miners to Diesel Exhaust	1219-AB86
DOL/MSHA	Final Rule Stage	Refuge Alternatives for Underground Coal Mines; Limited Reopening of the Record	1219-AB84
DOL/MSHA	Final Rule Stage	Examination of Working Places in Metal and Nonmetal Mines	1219-AB87
DOL/WHD	Prerule Stage	Request for Information Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees	1235-AA20
DOL/WHD	Proposed Rule Stage	Tip Regulations Under the Fair Labor Standards Act (FLSA)	1235-AA21
DOL/OWCP	Final Rule Stage	Longshore and Harbor Workers' Compensation Act: Maximum and Minimum Compensation Rates	1240-AA06
DOL/OWCP	Final Rule Stage	Claims for Compensation Under the Energy Employees Occupational Illness Compensation Program Act of 2000, as Amended	1240-AA08
DOL/OWCP	Final Rule Stage	Black Lung Benefits Act: Medical Benefit Payments	1240-AA11
DOL/OLMS	Proposed Rule Stage	Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act	1245-AA07
DOL/OLMS	Proposed Rule Stage	Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies	1245-AA08
DOL/OLMS	Proposed Rule Stage	Trust Annual Reports	1245-AA09
DOL/OS	Final Rule Stage	Change of Mailing Address for the Benefits Review Board	1290-AA32
DOL/ASVET	Proposed Rule Stage	HIRE Vets Medallion Program	1293-AA21

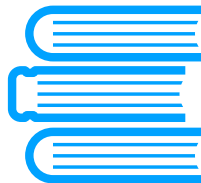
Prerule Consultation



Develop Proposed Rule



Issue Proposed Rule



What's in a Proposed Rule?



Background



Section-by-Section

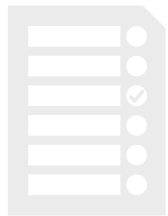


Analyses



Proposed Regulatory Text

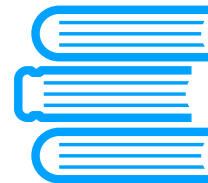
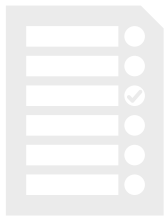
Public Comments



Develop Final Rule



Issue Final Rule (with Effective Date)



Judicial or Legislative Challenges



Public Comment is a Huge Opportunity!



Where to find Proposed Rules: Federal Register

The screenshot shows the Federal Register website interface. At the top, there's a navigation bar with links for Sections, Browse, Search, Reader Aids, and My FR. Below this is the Federal Register logo and the text "The Daily Journal of the United States Government". The date "Wednesday, September 13th" is displayed. The main content area is divided into several sections:

- Current Issue:** 105 documents from 41 agencies (227 Pages), including 84 Notices, 2 Presidential Documents, 5 Proposed Rules, and 14 Rules.
- Public Inspection:** Special Filing (updated on 11:15 AM, on Wednesday, September 13, 2017) with 9 documents from 5 agencies (6 Notices, 2 Presidential Documents, 1 Rule). Regular Filing (updated on 08:45 AM, on Wednesday, September 13, 2017) with 93 documents from 36 agencies (71 Notices, 9 Proposed Rules, 13 Rules).
- Search:** A search bar with the text "Search All Federal Register Documents Since 1994". Below it, a "Find" button and a search term input field. A search result count of "759,276 documents" is shown.
- Suggested Searches:** A list of suggested searches including "Endangered & Threatened Species" (850 documents in the last year, 3 open for comment), "Taking of Marine Mammals" (286 documents in the last year, 1 open for comment), and "Fishery Management" (1467 documents in the last year).

On the left side, there are links for Money, Environment, and World. On the right side, there's a "Site Feedback" link.

Where to find Proposed Rules: Regulations.gov



Submit Comments Online

The screenshot shows a web browser window with the URL <https://www.federalregister.gov/documents/2017/09/13/2017-19434/standards-for-the-growing-harvesting-packing-and-holding-of-produce-for-human-consumption-extension>. The page title is "Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption; Extension of Compliance Dates for Subpart E". It is a "Proposed Rule" by the Food and Drug Administration, dated 09/13/2017. A green button labeled "SUBMIT A FORMAL COMMENT" is visible, with a red arrow pointing to it. Below the button, a message states: "This document has a comment period that ends in 61 days. (11/13/2017)". The page also includes a "PUBLISHED DOCUMENT" section with details about the agency (Food and Drug Administration, HHS), the action (Proposed rule), and a summary of the rule. A "DOCUMENT DETAILS" sidebar on the right provides additional information, including the printed version (PDF), publication date (09/13/2017), agencies (Food and Drug Administration), dates for comments, and the document type (Proposed Rule).

Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption; Extension of Compliance Dates for Subpart E

A Proposed Rule by the Food and Drug Administration on 09/13/2017

This document has a comment period that ends in 61 days. (11/13/2017)

SUBMIT A FORMAL COMMENT

PUBLISHED DOCUMENT

AGENCY:
Food and Drug Administration, HHS.

ACTION:
Proposed rule.

SUMMARY:
The Food and Drug Administration (FDA, the Agency, or we) is proposing to extend, for covered produce other than sprouts, the dates for compliance with the agricultural water provisions in the Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption rule. We are proposing to extend the compliance dates to address questions about the practical implementation of compliance with certain provisions and to consider

DOCUMENT DETAILS

Printed version:
[PDF](#)

Publication Date:
09/13/2017

Agencies:
[Food and Drug Administration](#)

Dates:
Submit either electronic or written comments on this proposed rule by November 13, 2017.

Comments Close:
11/13/2017

Document Type:
Proposed Rule

Document Citation:

Examples of public comments

CFPB proposed rule: publish online “unstructured consumer complaint narrative data” (i.e., raw complaints from consumers)

Special Interests Were Ready



September 22, 2014

Ms. Monica Jackson
Office of the Executive Secretary

Disclosure of Consumer Complaint Narrative Data

The CFPB is broadly seeking comments related to the proposed extension of the policies regarding the Consumer Complaint Database to include complaint narratives. Of particular concern is the strong possibility of inaccurate or unfounded consumer complaints being posted, and the reputational risk such complaints represents for credit unions. The MCUL is deeply concerned that there is no real process proposed for vetting complaints prior to publication to the public database. As previously discussed, credit unions take great care in addressing their members' complaints directly and work diligently to maintain strong, ongoing relationships with their members. Absent some protocol or process to determine whether a claim has any substance prior to posting, these efforts at diligence and service will be thwarted, and the door will be open to careless or even malicious reputational attacks by disaffected consumers or even competitors.

The General Public? Less Helpful

Comment

After submitting a very detailed complaint to the CFPB I was troubled to find out what this multi-billion dollar, taxpayer-funded governmental agency's mandate actually is and is not. Even though I submitted over 30 pages of detailed documents, chronologically proving that REDACTED had issued me over a half dozen credit cards after I had cancelled my credit card with them and ordered them to not reissue one to me (on one of many recorded calls, for which I provided to-the-minute call times), AND REDACTED then allowed companies to make charges to those credit cards which I not only didn't know existed, but had instructed them not to issue. This is a blatant violation of I can't imagine how many laws. Not only issuing credit cards to a customer that has instructed you to close the account, never to be reopened, but the bank then allowing other companies to make charges against those cards. How can those companies even have the new credit card numbers if I don't? The only answer is that REDACTED, without my knowledge or consent, sent MY credit card numbers to other companies and allowed them to make charges against those cards without me ever activating them.

Think Like a Litigator, Write Like an Expert

1. Read the STATUTE, then the RULE and any accompanying documents (like an “E&J”)
2. Ask yourself:
 - Does the agency’s interpretation of the statute make sense?
 - Can you point to where in the statute the agency has the power to make all of its choices? Is it going beyond the statute?
 - Are there parts of the statute the agency is ignoring?

Think Like a Litigator, Write Like an Expert— Continued

- What evidence is the agency relying on? Is that evidence the most credible?
- Does the agency's rule fit the evidence it cites?
- Is the agency ignoring important evidence that you know?
- Has the agency considered important alternative choices? Does the agency's rejection of those alternatives make sense?
- Is the agency departing from past practices? Has it explained in a detailed way why the change?

Important Administrative Law Cases

- *Chevron*, 467 U.S. 837 (1984) and *Auer*, 519 U.S. 452 (1997)
- *Massachusetts v. EPA*, 549 U.S. 497 (2007)
- *Brown & Williamson*, 529 U.S. 120 (2000) / *Utility Air*, 134 S. Ct. 2427 (2014)
- *State Farm*, 463 U.S. 29 (1983)
- *Business Roundtable*, 647 F.3d 1144 (D.C. Cir. 2011)
- *FCC v. Fox*, 567 U.S. 239 (2012).

To-Do

1. Bookmark [federalregister.gov](https://www.federalregister.gov) and [regulations.gov](https://www.regulations.gov). Get in the habit of keeping up with proposed rules.
2. Find partners, like law professors or local organizations, who can help you understand the policy and sign your public comments.
3. Study up on the Administrative Procedure Act, and keep an eye out for potential litigation.
4. Reach out to ACS at LCEmails@acslaw.org to volunteer to monitor specific policy areas in the Federal Register for comment opportunities.