

COALITION FOR SENSIBLE SAFEGUARDS

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

Jan. 28, 2019

Dear Director Mulvaney,

The Coalition for Sensible Safeguards (CSS) – an alliance of more than 160 labor, scientific, research, good government, faith, community, health, environmental and public interest groups – strongly urges the U.S. Office of Management and Budget (OMB) to extend all open rulemaking comment periods for a minimum of 35 days due to the government shutdown. A broadly applicable extension would be consistent with the spirit if not the letter of applicable administrative law, and CSS believes that it is the only effective way to ensure the shutdown did not deprive the public of its fundamental right to meaningful participation in the rulemaking process.

Transparency and public participation have long been essential hallmarks of U.S. administrative law. They are best exemplified by the notice and comment procedures established under the Administrative Procedure Act, which empowers ordinary Americans to weigh in on pending policy decisions that might affect them and requires government officials to account for the public input they receive before issuing final rules. These procedures not only serve to promote better quality decision-making; they also provide accountability in the rulemaking process and help ensure the legitimacy of the results of that process.

From Dec. 22, 2018 to Jan. 25, 2019, the partial government shutdown paralyzed roughly a quarter of federal agencies, including OMB. Numerous comment periods for rules that impact the public have closed during the shutdown, and more than 400 comment periods are due to close in the next 30 days. There was never a definitive statement from administration officials as to whether public comments, or requests for agency action, are being accepted and considered by agency officials during the shutdown.

When visiting [Regulations.gov](https://www.regulations.gov) and [FederalRegister.gov](https://www.federalregister.gov), members of the public were given the distinct impression that neither site was fully operational or being updated.¹ Thus, it is reasonable

¹ A banner at the top of the [Regulations.gov](https://www.regulations.gov) homepage recently read, “The EPA is affected by the current government shutdown. As a result continued systems operations cannot be guaranteed.” On Jan. 17, 2019, [Regulations.gov](https://www.regulations.gov) was completely inaccessible due to the shutdown and then reopened after administration officials confusingly attributed the closure to technical issues. The daily feed from the *Federal Register* will not be processed

for members of the public seeking to comment on rules to conclude that agencies were not accepting comments during the shutdown.

A broad extension would resolve shutdown-imposed limitations on agency responsiveness related to requests for comment period extensions, public hearings and requests for additional information. The problem is particularly acute for rulemakings with comment periods currently open where members of the public have requested an extension of the comment period or where they plan to request a comment period extension but have not yet done so.

If there is a pending request for a comment period extension, it is likely that such a request could not have been granted until the shutdown ended due to the inability to formally notice such an extension in the *Federal Register*. Likewise, Americans contemplating requests for comment period extensions were faced with the prospect that agencies will simply be unable to grant, or even respond to, such requests during the shutdown.

For example, the U.S. Department of Education (ED) published a notice of proposed rulemaking titled, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” on Nov. 28, 2018. The notice provided a 60-day comment period, due to expire on Jan. 28, 2019. On Dec. 20, 2018, 20 state attorneys general jointly wrote to ED to request a comment period extension of 60 days, stating that the current comment period is too short and would “deny students, faculty, staff, and other school community members a meaningful opportunity to comment and is inconsistent with past practice.”² ED has yet to respond to this request.

The status of pending rulemakings with scheduled or potential public hearings also is unclear. As with requests for comment extensions, the shutdown may have prevented agencies from scheduling public hearings or responding to such requests.

The U.S. Environmental Protection Agency’s (EPA) Dec. 20, 2018, proposal, “Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units” is a prime example. The proposal specifically references plans to hold a public hearing, but EPA was unable to specify a date, time or place before the shutdown. It is unclear if EPA will schedule such a hearing or consider requests relating to a hearing prior to the proposal’s original Feb. 19, 2019, comment deadline.

Due to the shutdown, it is important that the public is provided additional time to comment and that such an extension is communicated to the public as soon as possible. To ensure that the goals of transparency and public participation are met, the length of comment period extension should be 35 days, in other words commensurate with the length of time the government was

during the duration of the shutdown.” A banner at the top of the [Federalregister.gov](https://www.federalregister.gov) homepage read, “During the funding lapse, [Federalregister.gov](https://www.federalregister.gov) is not being supported. If data feeds are not available from GPO, [FederalRegister.gov](https://www.federalregister.gov) will not be updated, so please use the official edition of the Federal Register on [Govinfo](https://www.govinfo.gov) (<https://www.govinfo.gov/app/collection/fr>). If there is a technical issue with the Public Inspection List, you can view the documents on public inspection at our office in Washington, DC or on [archives.gov](https://www.archives.gov).”

² <https://www.attorneygeneral.gov/wp-content/uploads/2018/12/2018-12-21-Title-IX-Extension-Request-Letter.pdf>

impaired by the funding impasse. In no event should agencies fail to meet statutorily- or judicially-imposed deadlines that are imminent. If providing the full opportunity for public comment discussed in this letter would make it impossible to meet such deadlines, the relevant agency must provide the maximum feasible comment period and engage in additional outreach to ensure that all stakeholders are aware of the opportunity for comment and the deadline for providing input.

We thank you for your prompt attention to this letter.

Sincerely,

Robert Weissman, President
Public Citizen
Co-chair, Coalition for Sensible Safeguards

Jack Gillis, Executive Director
Consumer Federation of America
Co-chair, Coalition for Sensible Safeguards