

RFK Jr. moves to eliminate public comment on HHS decisions

In notice to Federal Register, health agency says public participation is not needed in many decisions

Health and Human Services Secretary Robert F. Kennedy Jr., at a Cabinet meeting at the White House this week. *Andrew Harnik/Getty Images*



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Health and Human Services Secretary Robert F. Kennedy Jr. posted a document Friday proposing to strip public participation from much of the business his department conducts. The move comes during a time of major upheaval across federal health agencies, and as the public waits to see how Kennedy will enact his pledge of “radical transparency” at the department.

The statement, placed in the Federal Register, said HHS would rescind its longtime practice of giving members of the public a chance to comment on the agency’s plans. It is set to be formally published in the register on Monday, March 3.

“This is a direct attack on the idea that HHS — a gigantic agency — should have to tell the public everything that it’s doing,” said Alex Howard, an open government advocate and former director of the Digital Democracy Project at Demand Progress Educational Fund.

Normally, before issuing a new rule or regulation, the public is given an opportunity to submit written comments in support or in opposition to government proposals. This has been the case for years under the Administrative Procedure Act.

However, Kennedy and HHS are arguing they don’t need to seek public input when the agency is making decisions about “agency management

or personnel,” or related to public property, loans and grants, benefits, or contracts. HHS can also choose to cut out public participation when it deems the process “impracticable, unnecessary, or contrary to the public interest,” per the law.

The move is “hugely concerning and will almost certainly be challenged,” said a former high-level HHS official in the Biden-Harris administration. “This includes grants, loans, and benefits, which is a large portion of what HHS does.”

HHS did not immediately respond to STAT’s request for comment.

Since 1971, HHS has chosen to involve the public in its rulemaking about the listed issues, and to err on the side of sharing more publicly — to forego the process “sparingly.” This decision, referred to as the Richardson Waiver, has made it so anyone could read through notices in the Federal Register of what HHS planned to do, and offer feedback.

HHS says it is rescinding the little-known waiver because the public participation process imposes too many responsibilities on the department, “beyond the maximum” requirements of the law. Those obligations “are contrary to the efficient operation of the department, and impede the department’s flexibility to adapt quickly to legal and policy mandates,” Kennedy wrote in the document.

Cary Coglianese, a professor of law and political science at University of Pennsylvania Carey Law School, said the justification Kennedy provides for his decision is “inaccurate” because agencies have always been allowed to go above and beyond the Administrative Procedure Act. “This is really troublesome in that it represents a backsliding on good government practices and it doesn’t really provide any justification for that backsliding,” he said.

If the policy is implemented, it would mean HHS “can simply announce changes,” Coglianese said. It was not immediately clear what all would be covered under the proposed change, or why Kennedy is moving to rescind the waiver now.

“What does a public benefit, exactly, entail?” said Jeffrey Davis, a director at McDermott+ and a former HHS adviser who worked with

senior officials on Medicare budget and policy. “The terms are pretty broad.”

The decision stands in contrast to Kennedy’s repeated promises to make HHS an agency whose processes and data are so accessible that public records requests would not even be necessary.

“We’re going to work together to launch a new era of radical transparency,” Kennedy said on Feb. 19. “Only through radical transparency can we provide Americans with genuine informed consent, which is the bedrock and the foundation stone of democracy. Transparency allows diverse parties to establish common ground of mutually trusted information.”

In the 1980s, HHS attempted to overturn the same rule in order to skip public participation on decisions related to loans, grants, benefits and contracts. It faced intense backlash, according to a write-up at the time by the American Society of Clinical Pathologists. Dozens of members of Congress wrote a resolution asking the health secretary to withdraw his proposal. Around that same period, officials were considering changes to public benefit programs, including to Medicare.

HHS attorneys eventually walked back their proposal.

From a legal standpoint, HHS can decide to do less public engagement than it had done in previous decades under the APA, Coglianese said. And there is still room for individual agencies to engage the public more deeply, but it would be on a case-by-case basis instead of across the board.

“It will, if nothing else, give the appearance that the department wants to undertake some changes that would be politically unpopular and might think that it would have a greater chance of making those decisions without a lot of public controversy,” he said. “It’s often foolhardy to short-circuit public engagement. It’s not even good regulatory practice, quite frankly.”

While the waiver change may not immediately end up in court, RFK Jr.’s decision could face pushback from Congress or from the public. HHS makes decisions that affect millions of Americans’ lives, so involving the

public is essential, said Doug Linkhart, president of the non-partisan National Civic League.

“You can’t sit at a desk in Washington and imagine what works best for people across the country,” he said. “In the long run, it makes the policies better and probably speeds things up by avoiding problems down the road, like lawsuits.