Public Consultation in the U.S. Regulatory System

Shagufta Ahmed
Office of Information and Regulatory Affairs
U.S. Office of Management and Budget

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Any views expressed here are solely those of the presenter, and do not necessarily reflect the position of the Office of Management and Budget or the Executive Office of the President.
Agenda

1. Why is Public Consultation Important?

2. Legal and Policy Framework for Public Consultation
   - Administrative Procedure Act (APA) of 1946
   - Executive Order 12866
   - World Trade Organization (WTO) requirements
   - Electronic Government Act (E-Gov Act) of 2002

3. Facilitating the Submission of Effective Public Comments
   - Seeking and responding to public comments
   - Key aspects of the regulation to publish for comment
   - Identifying upcoming agency regulatory actions

4. Public Comment Infrastructure
   - Federal Register (national gazette)
   - eRulemaking Program (Federal Docket Management System & Regulations.gov)
Why is Public Consultation Important?

- **Enhanced Information Quality:** Public consultation allows input from those affected by the regulation. It brings in external expertise that helps regulators avoid potential unnecessary costs and inefficiencies.

- **Credibility:** Seeking the views of affected parties strengthens the relationship between government and stakeholders.

- **Better Implementation and Compliance:** Consultation can identify unintended effects and practical problems. This increases buy-in and facilitates implementation.
Legal Framework for Public Consultation: Administrative Procedure Act of 1946 (APA)

- The APA requires that agencies go through a notice and comment process open to all members of the affected public, both U.S. and foreign.
- Proposed regulations must be published in the *Federal Register* (national gazette).
- Before agencies can issue a final regulation, they must respond to all public comments, make sure that the final regulation is a logical outgrowth of the proposal and the administrative record, and is not arbitrary or capricious.
- All members of the public, including any international stakeholders, may comment on rules.
Legal and Policy Framework for Public Consultation: APA, Executive Order 12866, WTO

The APA requires agencies to provide an opportunity for the public to submit “written data, views or arguments.”

The APA does not require a minimum comment period.

- In 1993, Executive Order 12866 encourages agencies to provide at least 60 days for public comment, to the extent feasible and permitted by law.
- Agencies will provide longer comment periods when stakeholders may need more time to understand and analyze a complex regulatory proposal.

**APA Good Cause Exemption**

- The agency may find “good cause” that notice and comment would be “impracticable, unnecessary, or contrary to the public interest.”
- The agency must explain its rationale for finding good cause in the preamble to the interim final rule.

**World Trade Organization (WTO) Requirements**

- The United States uses the APA to implement the WTO requirements to take trading partners’ comments into account.
World Trade Organization (WTO): SPS Agreement Annex B - paragraph 5

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.
Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
Legal Framework for Public Consultation: E-Government Act

• The **E-Government Act of 2002** required regulatory agencies to improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency.
• **Goal**: Provide the public convenient access to electronic rulemaking dockets, and make it easier for the public to comment on regulatory proposals.
• **Solution**: Regulations.gov and Federal Docket Management System
• **Improve and modernize** well-established legal and administrative procedures by leveraging new technologies that make it easier for members of the public to understand and participate in the development of regulations.
Legal Framework for Public Consultation: E-Government Act

• Increases public participation with early engagement and social media tools
  ▪ A taxonomy of regulatory terms to simplify the online regulatory content.
  ▪ Creating more comprehensive electronic versions of paper regulatory dockets.
  ▪ Enable visitors to customize review of regulatory information.
Facilitating the Submission of Effective Public comments

• **At time of proposal**
  - disclose, in sufficient detail, the thinking underlying agency’s proposal and supporting data and analysis
    ▪ Enables public to critique the proposal knowledgably and develop alternatives to the proposal

• **At time of final rule**
  - respond in a reasoned manner to “significant comments”
  - explain how the agency addressed those comments, and
  - show how these responses led to the final rule
Facilitating the Submission of Effective Public comments

• Requirement for agency to explain rationale and substance of final rule in light of comments
  - serves as an internal check on arbitrary agency action by ensuring that, before taking final action, an agency can clearly articulate the reasons for its decision, including its reasons for not agreeing with comments opposing that decision

• Process of including in the final rule careful, step-by-step written explanations of its reasons for accepting or rejecting comments gives the agency opportunity to:
  - judge whether any revisions in the planned final rule might be appropriate
Facilitating the Submission of Effective Public comments

Key aspects of the proposed regulation to publish for public comment:

• **Preamble**
  - Legal authority for the regulation.
  - A summary of the provisions in the regulatory proposal.
  - A description of alternatives to the agency’s proposal.
  - Solicitation for public comments on the issues raised. Use prompt questions - ask specific questions of the public – Data? Impacts? Unintended consequences? Alternatives?
  - Various legal and analytical assessments and underlying assumptions.

• **Regulatory Text**
  - Draft text that the agency proposes be codified in the Code of Federal Regulations (i.e., law).
Facilitating the Submission of Effective Public comments

Publish a list of regulations agencies are planning to issue

• Unified Agenda and Regulatory Plan
  - The Unified Agenda of Regulatory and Deregulatory Actions is the semi-annual publication about agencies’ upcoming regulatory actions. Includes a brief summary of the regulation.
  - The annual Regulatory Plan explains the regulatory priorities of agencies.
  - Both are available on the Regulations.gov and RegInfo.gov.
Public Comment Infrastructure:
(1) Federal Register (national gazette)

- Established in 1935, the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations.

- Lets members of the public know what the government is doing in one central location.

- Executive orders and other presidential documents are also published in the *Federal Register*. This is required by law (Federal Register Act of 1935).
(2) eRulemaking Program

- **Federal Docket Management System (FDMS):** The “back end” system agencies use to accept and review public comments and manage docket materials.

- **Regulations.gov:** A public website to make the Federal rulemaking process more accessible, participatory, and comprehensible.
Federal Docket Management System (FDMS)

• Federal Docket Management System (FDMS) is the back-end system that “feeds” Regulations.gov.

• Most regulatory agencies (40+) currently use Regulations.gov as their electronic comment and public docketing system.

• Each partner agency has access to FDMS to manage their various dockets and review comments before posting them on Regulations.gov.

• In general, agencies post all comments regardless of merit, however they do review for issues such as: privacy information, confidential business information, forms of pornography, etc. and either redact or don’t post.
Public Comment Infrastructure: eRulemaking – Regulations.gov

• A public website which allows for members of the public to comment electronically on proposed rules and other documents requesting public comment.

• Increases ease for the public to access documents in the Federal Register.

• Allows for agencies to consolidate comments in an easier manner and use electronic systems to search for comments.
Public Comment Infrastructure: eRulemaking – Regulations.gov

- Direct data feed from the Federal Register, the daily U.S. publication that publishes all regulatory actions.
- Over 200K dockets, and over 7 million documents, including public comments and supporting materials, available to the public.
- Continuous upgrades to underlying technology to enable rapid and dramatic changes to user interface at lower cost.
- Application Programming Interface (API) now available for other users to repurpose the regulatory content.
Public Comment Infrastructure: Regulations.gov – Homepage

- **Homepage**
  - Navigate with Search, Browse, and Learn
  - Commenter’s Checklist
  - Connect with social media tools and Exchange
- **Browse up to 10 new categories**
- **What’s Trending** uses site data
- **Learn about the regulatory lifecycle**
- **Search improvements**
Public Comment Infrastructure: Regulations.gov – Docket page

- Docket Page
  - Puts docket materials into a “virtual folder” including: primary documents, supporting documents, and comments.
  - “Comment Now” button is one click access to submitting a comment.
  - Shows how many comments have been received.
  - Compiles relevant data from other sites, such as the Federal Register and RegInfo.gov
Regulations.gov - Audience

Best describes you

- General public, 44%
- Regulated industry, 10%
- Small business, 9%
- Local/State government, 7%
- Consultant, 7%
- Academic community, 7%
- Federal government, 6%
- Public interest organization, 4%
- Law firm, 3%
- Lobbyist/Trade organization, 2%
- Foreign government, 1%
- Tribal government, 0%
## Regulations.gov - Stats

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**Regulations.gov Users**

![Graph showing user statistics for 2013 to 2017](image)
## Regulations.gov - Stats

### Comments Complete on Regulations.gov

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Regulations.gov – Stats

Total Dockets

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<td>2011</td>
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Regulations.gov – Stats

Total Documents

- 2017 (as of 4-16): 9,070,068 documents
- 2016: 8,875,958 documents
- 2015: 7,532,554 documents
- 2014: 6,961,452 documents
- 2013: 6,052,016 documents
- 2012: 5,323,166 documents
- 2011: 4,840,349 documents
References


• Federal Register Act: https://www.archives.gov/federal-register/laws/federal-register

• Federal Register: www.FederalRegister.gov


• Public Participation in the Regulatory Process: www.regulations.gov


• Regulations.gov: http://www.Regulations.gov