

Taking Comments into Account

**U.S. Notice and Comment Rulemaking:
A Sampling of U.S. Agencies' Methods
for Responding to Public Comments**

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.**

Benefits of Taking Comments Into Account

- Supports accountability,
- Sustains confidence in the legal environment,
- Makes regulations more secure and accessible,
- Less influenced by special interests, and
- Therefore more open to competition, trade and investment.

Prerequisites of a “meaningful opportunity to comment”

- 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 knowledgeably and formulate alternatives
- 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

“Significant comments”

- “Significant comments” are those
 - Which raise relevant points, and
 - Which, if adopted by the agency, may require a change in the agency’s proposed rule
- “Relevant” is a broad concept


Good governance role

- 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
- Process of clearly articulating in the final rule careful, step-by-step explanations of its reasons for accepting or rejecting comments
 - gives agency opportunity to judge whether any revisions in the planned final rule might be appropriate

Similar steps taken by agencies in responding to comments

- Each rule is different
- There is no one way to summarize, analyze, or respond to public comments
- But substantial similarities in how U.S. agencies organize their work internally

Internal processing of comments-- Steps

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- 1) “Significant”?
 - 2) Categorizing, based on type of issue
 - 3) Grouping with similar comments
 - 4) Analyzing merits/evaluation
 - 5) Developing recommended responses to comments
 - Including any needed changes to rule
 - 6) Obtaining policy guidance on key responses
 - 7) Drafting final rule
 - 8) Reviewing draft final rule
 - Ensuring that responses to comments and rationales for those responses are sound

Staff responsible for evaluating and responding to comments

- Team of agency
 - program officials,
 - economists, and
 - lawyers
- Typically the same ones who
 - were responsible for developing the proposal, and
 - will be responsible for recommending acceptance or rejection of comments to management/changes to proposal
- Categorizing and Grouping Comments: use of contractor for complex rulemaking (some agencies)

Categorizing and grouping comments

- Determine whether any aspect of each comment is “significant”
- If so, categorize the comment
 - E.g., feasibility, compliance period, costs, etc.
- Group that portion of the comment together with portions of other comments addressing that issue
- Use of spreadsheets (e.g., Excel) to aid work as a team

Evaluating & analyzing comments

- Merits/value of each significant comment
 - Merit/value is measured by persuasiveness of supporting arguments and quality of supporting data, not identity of the commenter
- Any changes requested by commenters in the rule, including whether suggested changes would be feasible, enforceable and acceptable in view of program goals and the law
- Analysis put in writing for internal review (charts, etc.)

Recommendations to management on responses to comments

- Staff then prepares recommendations regarding the disposition of each comment
- May include:
 - an explanation of the reasons that a comment is inaccurate or mistaken, and so no change to the proposed rule is necessary
 - an explanation of the reasons that the agency agrees with the comment, and a revision of the proposed rule as suggested
 - an explanation agreeing with the comment, but addressing the concern in a fashion different from that suggested by the commenter

Internal review and guidance on responses to comments

- *Peers and immediate supervisors* review analyses and recommendations
- *Senior agency officials* provide guidance on disposition of important issues raised by comments
- *Head of the agency* may review proposed disposition of especially important issues

Final rule's responses to comments

- Contained in preamble or separate “response to comments” document
- Includes reasons for agreeing or disagreeing with comments and changes to address comments
Similar comments are grouped and discussed together (to avoid needless repetition and ensure coherent, substance-based approach)
- Many agencies do not identify commenters
 - **Focus is on substance of comments**

Reviewing draft final rule, including comment responses

- Agency
 - Review by senior agency officials for technical matters, economics and law, and by agency administrator
- Department
 - For significant final rules issued by agencies that are part of a Department, review by Department-level offices and ultimately the Secretary
- OMB and interagency
 - For significant final rules, review by the Office of Management and Budget (central oversight)

“and take the comments and the results of the discussions into account”

- Agencies provide, in sufficient detail, the underlying rationale and supporting data/analysis in the proposal
- Agencies consider comments through an organized, deliberative process and show how they responded to comments in the final rule
- Overarching legal frameworks governing agencies' administrative procedures provide transparency, predictability and accountability

Thank you

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