DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT

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Transparency, Public Consultation Practices and Government Accountability in U.S. Rulemaking

IN-DEPTH ANALYSIS FOR THE AFCO COMMITTEE

EN

2015
Abstract

This paper provides basic information on transparency, public participation and government accountability in U.S. rulemaking procedures, in constitutional and historical context. Under the U.S. Administrative Procedure Act, regulatory agencies must (1) provide the public with sufficient specific information about a regulatory proposal to fairly apprise interested parties of the subjects and issues involved so that they may present responsive data or arguments, and (2) consider, analyze and address significant public comments when issuing any final rule.
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AUTHOR

Rachel Shub, Office of the United States Trade Representative

RESPONSIBLE ADMINISTRATOR

Petr NOVAK
Policy Department C: Citizens’ Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@ep.europa.eu

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ABOUT THE EDITOR

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To contact the Policy Department or to subscribe to its monthly newsletter please write to: poldep-citizens@ep.europa.eu

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Figure 1 U.S. Constitutional Framework for Rulemaking

Executive Branch: President and Agencies
- U.S. Constitution vests the "executive Power" in the President and requires him to "take Care that the Laws be faithfully executed."
- President's principal role in legislation is in signing legislation into law or vetoing bills of which he disapproves.
- President may sometimes

Legislative Branch: Congress (U.S. Senate and House of Representatives)
- U.S. Constitution vests "[a]ll legislative Powers" in Congress.
- Any Member of Congress may introduce a bill, but the vast majority of bills do not become law.
- In complex areas requiring implementation, legislation generally delegates broad authority to executive branch to develop regulations or otherwise further elaborate on the statutory requirements.

Agency Regulatory Action
- Proposed Rule
- Public Comments
- Administrative Procedure Act (APA)
- Final Rule

Agencies
- Executive branch agencies execute and implement laws, including by developing regulations/rules when authorized or instructed to do so by statute.
- Agency regulations promulgated pursuant to procedures required by the Administrative Procedure Act of 1946.
- Executive Agency (E.g. EPA, NHTSA, FDA, DOE)
  - Appointment: Agency Head chosen by president with Senate approval
  - Required to submit regulatory agenda and cost-benefit analysis to OIRA.

Judicial Branch: Federal Courts
- Courts have authority to consider claims by affected members of the public that statutes are not consistent with the Constitution and claims that agency regulations are not consistent with statutes or the procedures required by the Administrative Procedure Act.
- Public may challenge final rules in court, based on the administrative record, including public comments.

Congressional Review Act, possibility of override (rare).
U.S. Executive Branch Regulatory Development: Public Notice, Input Opportunities, and Government Accountability

**Legislative Branch: Congress**
- Congress authorizing regulatory
- Advance Notice of Proposed Rulemaking (ANPRM, optional)
  - Regulations Plans (1x per year)
  - Unified Regulatory Agenda (2x per year)

**Pre-Proposal and Internal Impact Analysis**
- Meetings with stakeholders/public-format varies. Official meetings open to public and advance notice published in Federal Register, including meeting with selected advisors under the Federal Advisory Committee Act (FACA).
- Agencies also use workshops, meetings, webinars, etc. for early engagement, via own websites and social media platforms.

**Proposed Rule and Development of Final Rule**
- Agencies draft proposed rule text and assess impact including through Regulatory Impact Analyses (RIA) and/or other.
- Notice of Proposed Rulemaking (NPRM)—proposed rule, explanation of text, and invitation of public comment— Normally includes or is accompanied by:
  - Preamble (narrative of need for rule, development of proposal to meet need, and rationale for proposed approach [e.g., level of stringency], including a summary of the data, research and other factual or scientific basis for the proposal)
  - ANPRM/NPRM
  - Supporting materials
  - Regulatory Impact Analyses (RIA)
  - Public comments
  - Underlying studies
  - Stakeholder meeting record
  - Related Notices, if any

**Final Executive Action**
- The final rule is based upon the public record, which can include:
  - ANPRM/NPRM
  - Supporting materials
  - Regulatory Impact Analyses (RIA)
  - Public comments
  - Underlying studies
  - Agency meeting record
  - Related Notices, if any

**FederalRegister.gov Regulations.gov**

**Public Notice and Participation**
- Public may challenge final rules in court, based on the administrative record, including public comments; also possibility of Congressional review.

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*Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs*