

Public notice and comment rulemaking (United States)

Source: OECD (2016), *Pilot database on stakeholder engagement practices in regulatory policy*, <http://www.oecd.org/gov/regulatory-policy/measuring-regulatory-performance.htm>.

Provider of information	Answers
Organisation	Office of Management and Budget (OMB)
Division	Office of Information and Regulatory Affairs (OIRA)
Name (optional)	
Overview of the practice	Answers
Name of practice	<p>Notice and comment rulemaking for subordinate regulations.</p> <p>The practice is part of the U.S. eRulemaking Program, which includes the Federal Docket Management System (FDMS), a database used by agencies that contains electronic versions of rulemaking documents (organized into “dockets”), and <i>Regulations.gov</i>, a website through which the public can access publicly available material in FDMS and submit comments on proposed rules.</p>
If available, please provide links that provide further information about the practice or attach documents.	<p>Regulations.gov: http://www.regulations.gov/#/home</p> <p>U.S. Federal Register: https://www.federalregister.gov/</p> <p>A Guide to the Rulemaking Process prepared by the Office of the Federal Register: https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf</p>
Is this practice ongoing or was it applied only during a limited amount of time/at one specific occasion?	Ongoing practice
In what year was the practice launched?	<p>The 1946 Administrative Procedure Act (APA) established the notice and comment rulemaking process.</p> <p>The E-Government Act of 2002 established the requirement for electronic dockets and commenting tools per the APA.</p> <p>The website <i>Regulations.gov</i> was launched in 2003.</p>
Was the practice updated/reformed since then? If yes, when and how has it evolved over time?	<p>Yes.</p> <p>Since the adoption of the APA in 1946, its application and practical use has evolved. This evolution is a result of the application and interpretation of the Act by U.S. Federal courts and the adoption of several laws that, while not amending the APA, in effect work within its context or close perceived loopholes. Finally, U.S. presidents have also emphasized the importance of public consultation through Executive Orders. A detailed description of the evolution of the APA can be found in the section “Additional comments and information” on p. 70.</p>
<p>Please describe the practice, including information on</p> <ul style="list-style-type: none"> • Features of the practice that you consider its key strengths • Key challenges faced during the implementation of the practice • Main results of the practice. 	<p>The theory of American administrative law is that only Congress may make laws. The President and the agencies that make rules only have the power Congress has delegated to them to enforce the law. Thus, when an agency acts, its power is derived from a statutory command. Agencies are most often authorized to craft regulations because Congress has “delegated” them the power to do so. But as part of that delegation, Congress enacted the APA, to ensure that the exercise of that delegated power is only done pursuant to procedures that ensure that it is rational and lawful. These procedures require all agencies to provide public notice and seek comment prior to issuing new subordinate regulations or revising existing ones.</p>

Specifically, agencies are required to publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register, which contains the regulatory proposal and provides information – including the evidence on which the proposal is based and the regulatory text with which the public would need to comply – to apprise stakeholders of the issues involved so that they may present responsive data or arguments. Accordingly, the NPRM usually includes several essential pieces of information:

- the draft regulatory text;
- a preamble explaining the need for the rule and the specific efforts made by the agencies to formulate the rule to meet that need; and
- a non-legalistic explanation of the rationale for the proposed approach, including a summary of the factual and/or scientific basis for the rule.

On the basis of information and comments received, agencies may conclude that the proposed solution will help accomplish the goals or solve the problems identified, and that changes to the proposed rule on the basis of comments received are minor, and proceed to a final rule. Alternatively, agencies may also decide to revise the proposed rule and publish an updated proposed rule for comment. Generally, a supplemental NPRM is used when a change is needed from the proposed to final rule that was unanticipated at the time of the NPRM publication, or when responding to a comment brings in new information and there would not be a “logical outgrowth.” Agencies may also decide to terminate the rulemaking, or establish a second comment period to collect the public’s feedback on prior comments received.

Changes are frequently made to proposed rules in response to public comments. For example, the Office of Pesticide Programs within the Environmental Protection Agency (EPA) changes almost all of its rules from the proposed rule to the final rule.

Following the consultation process based on the NPRM, a final regulation is published in the Federal Register, and becomes effective usually 30 to 60 days after the publication date. The rule includes the final regulatory text, as well as a summary of significant issues raised by commenters and an explanation of how the agency addressed those public comments, the objectives and rationale for the regulation, and relevant facts and data the agency relied on. Together with the proposal and supporting analyses, the comments comprise the public record that serves as the rational basis for each final regulation. The APA also allows for judicial review of the final rule to ensure compliance with this process.

The APA provides for a few exceptions to the notice and comment rulemaking process. In these cases, the agency must find “good cause” to bypass public notice and comment on a regulation because it would be impracticable, unnecessary, or contrary to the public interest. This process typically allows for public comment after the regulation is published so that the agency still has an opportunity to consider public input and revise the regulation accordingly.

In addition to the consultation process based on the NPRM, agencies may publish an Advance Notice of Proposed Rulemaking (ANPRM) before issuing a proposed rule. In the ANPRM, an agency describes the intended rulemaking and then requests the public to submit comments that would be used if the agency develops a draft proposal. In 2011, 62 ANPRMs were issued compared with 947 NPRMs (6.5 percent), in 2012, the numbers were 43 ANPRMs and 713 NPRMs (6 percent) and in 2013 39 ANPRMs and 749 NPRMs (5.2 percent).

All proposed and final rules are published in the Federal Register. The website *Regulations.gov* is a source of information on the development of Federal regulations and other related documents issued by the U.S. government. Through the website, the public can access all publicly available regulatory materials, e.g. final rules and supporting analyses, as well as ANPRMs, NPRMs, and directly provide electronic comments on regulations.

Following issuance of the final rule, stakeholders and public interest groups may challenge the rule in court on a number of grounds, including that it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” In reviewing the rule, the courts will generally defer to the technical expertise of the agency, as the entity charged with

	<p>implementation of the statute authorizing the rule. The courts will strike down the rule if it is contrary to the “unambiguously expressed intent of Congress.” (Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). If the statute is silent or ambiguous on the subject to which the rule is directed, the courts will uphold the rule if it is “based on a permissible construction of the statute.”</p> <p>Strengths of the practice according to the U.S. government include:</p> <ul style="list-style-type: none"> • All “interested persons”, regardless of domicile, may participate. Information about regulatory proposals are provided to anyone in the world with internet access. There are no registration requirements, and the time frames and consultation procedures are made clear to stakeholders. • The consultation documents—usually the draft regulatory text, a plain-language explanation and references to any underlying studies—are highly specific, allowing outside stakeholders to assess their interest with precision and make very precise comments (even on a sentence-by-sentence basis), in turn allowing the government to analyse them with similar precision (which is not possible with more general kinds of consultation documents, such as the ANPRM). • The request for comments on a proposed rule allows commenters to choose which aspects of the regulation are most important to them, thus limiting the burden of, for example, responding to extensive questionnaires. There is no requirement for a comprehensive response and the credibility of the information provided is judged by the regulatory agency. • The U.S. practice is uniformly applied, with the invocation of exceptions being rare (and subject to judicial review). Regulators do not “pick and choose” how to consult. • The availability to all stakeholders, and the existence of a public record, avoids overreliance on information obtained in meetings and closed gatherings. • There is built-in accountability for considering public comments; in the final rule, agencies must explain how it addressed all substantive comments, and is responsible for ensuring that the final rule is based on the public record. <p>Weaknesses of the practice according to the U.S. government include:</p> <ul style="list-style-type: none"> • Given the extensive opportunity for public participation, the obligations of agencies to consider public input, and liberal rules about who has “standing” as an affected stakeholder to challenge a final regulation in court, the rulemaking process requires substantial time and effort. Use of ICT has made the process less burdensome. • Business firms participating in the rulemaking process do not do so anonymously, but agencies can post confidential versions of comments that do not include sensitive business information.
<p>Please provide specific details or examples to illustrate the practice (including supporting links and documents).</p>	<ul style="list-style-type: none"> • Example of a complete record of documents on a notice and comment process for a rule on the threatened Species Status for the Northern Long-eared Bat, including NPMRs, final rule, supporting documents and comments received: http://www.regulations.gov/#!docketDetail;D=FWS-R5-ES-2011-0024 • Example Advance notice of proposed rulemaking: http://www.regulations.gov/#!documentDetail;D=NRC-2015-0070-0001
<p>What stage(s) in the process of policy making does the practice relate to? (Please tick all that apply)</p>	<p><input checked="" type="checkbox"/> Early-stage in the development of regulations (before draft)</p> <p><input checked="" type="checkbox"/> Later-stage in the development of regulations (during draft)</p> <p><input type="checkbox"/> Implementation (incl. transparency/accessibility)</p> <p><input type="checkbox"/> Ex-post evaluation of regulations</p> <p><input type="checkbox"/> Review of regulatory policy</p>
<p>What were the objectives of the practice?</p>	<p>The purposes of allowing public comment are (1) to provide the agency with information that will increase the agency’s knowledge of the subject matter of the proposed rule and (2) to permit the public to challenge the factual assumptions, analyses and tentative conclusions underlying the proposed rule and to show the agency the respects in which it might be</p>

	<p>in error.</p> <p><i>Regulations.gov</i>, as a part of the U.S. eRulemaking Initiative, aims to increase public access to Federal regulatory materials, public participation and their understanding of the Federal rulemaking process, and Federal agencies' efficiency and effectiveness in rulemaking development.</p>
Main actors involved in the practice	Answers
Responsible authority	All U.S. government agencies
Country	United States
Level of government (e.g. national/regional/municipal level)	National level
Were partners involved in preparing, implementing or evaluating the practice? If yes, please list the partners and describe their involvement.	<p>Yes.</p> <p>In developing the system and its functionalities, the eRulemaking Program Management Office (PMO) held public meetings and consulted with universities and non-profit regulatory think tanks.</p>
Stakeholder involvement	Answers
Which methods were used to involve stakeholders for the practice?	<p>Stakeholders can comment on ANPRMs and NPRMs in various ways. Many agencies give several options for submitting comments, including U.S. mail, private courier, email, and through the comment portal <i>Regulations.gov</i>.</p> <p>In general, the comment period ranges between 30 and 60 days. For complex rulemakings, agencies may provide for longer comment periods. According to the eRulemaking PMO, between January 2015 and February 2016, the average length of the comment periods for 2,576 proposed rules was 49 days.</p> <p>In addition, an agency may hold public hearings during the comment period, where people can make statements and submit data. Sometimes, webcasts and interactive Internet sessions are also used to provide information to the public on the substance of the proposed rule. For example, EPA's Office of Pesticide Programs often holds workshops or information sessions, often available online after the publication of the NPRM. The purpose of these workshops is not to collect public comments, but to provide background information to the public. At the meeting, the public has the opportunity to ask clarifying questions on the proposed rule. However, EPA asks that all comments on the proposed rule be submitted to the docket in <i>Regulations.gov</i>. EPA is careful to not engage in discussions because it cannot be perceived as negotiating the substance of the rule during the webinar/workshop.</p>
Which stakeholder groups were involved?	General public
How were stakeholders notified of the engagement opportunity?	<p>All agencies are required to publish a "Unified Agenda", an announcement of future rulemaking activities and pending and completed regulatory actions, consisting of a "Regulatory Plan" (published annually) and an "Agenda of Regulatory and Deregulatory Actions" (published biannually), on <i>reginfo.gov</i> and <i>regulations.gov</i>. Regulatory Plans are also published in the Federal Register.</p> <p>All ANPRMs and NPRMs are posted on the website of the U.S. Federal Register and on <i>Regulations.gov</i>. <i>Regulations.gov</i> also provides for email alerts about a specific regulation, and quick access to regulations that are popular, newly posted or closing soon on its homepage.</p>
What inputs were received from stakeholders (e.g., brief comments, position papers)?	<p>Stakeholder comments are received in various forms, e.g. as electronic submissions to <i>Regulations.gov</i>, U.S. mail, private courier, or email. The content of these inputs range from detailed legal comments to simple letters concerning a few provisions, since there is no required format. Agencies also may receive thousands of identical "postcard" submissions, which may not provide significant information.</p>

<p>How were inputs from stakeholders used and by whom?</p>	<p>On the basis of information and comments received, agencies may conclude that the proposed solution will help accomplish the goals or solve the problems identified, and that changes to the proposed rule on the basis of comments received are minor, and proceed to a final rule.</p> <p>Agencies may also decide on the basis of input received to revise the proposed rule and publish an updated proposed rule for comment, decide to terminate the rulemaking, or establish a second comment period to collect the public's feedback on prior comments received.</p>
<p>Was participation limited? If yes, please describe the selection mechanism.</p>	<p>No</p>
<p>Was there a mechanism to ensure balanced representation among stakeholder groups? If yes, please describe the mechanism.</p>	<p>No.</p> <p>While there is no mechanism to ensure balanced representation, the practice of using an online platform to collect comments from any member of the public makes the consultation process as open as possible to the full range of interested stakeholders.</p>
<p>Was supporting material made available to stakeholders? If yes, what kind?</p>	<p>Yes.</p> <p>The NPRM contains a summary of the issues and actions under consideration and the rationale for the rule. It also contains supplementary information, including a discussion of the merits of the proposed solution, cites important data and other information used to develop the action, and details its choices and reasoning. The regulatory text of the proposal is usually published in full. If the full text is not provided, the agency must describe the proposed action in a narrative form.</p>
<p>Was ICT used for the practice? If yes, how?</p>	<p>Yes.</p> <p>The website <i>Regulations.gov</i> makes available all public regulatory materials, e.g. final rules, posted public comments and supporting analyses, as well as ANPRMs and NPRMs. The public can directly provide electronic comments on regulations.</p> <p>The eRulemaking program has also developed a commenting Application Programming Interface (API) that allows partners to submit comments to agencies through their own applications and websites. The APIs were developed cost effectively as they were designed to re-use a lot of the software code already in place in <i>Regulations.gov</i>. This reduced development costs while making the APIs easier and less expensive to maintain.</p>
<p>Was information on the process and the outcomes of the practice collected? If yes, what did it include?</p>	<p>Yes.</p> <p>Final rules are published in the Federal Register and on <i>Regulations.gov</i>. The preamble of the final regulatory text responds to major criticisms raised in the proposed rule comments in the "Supplementary Information" part.</p> <p><i>Regulations.gov</i> is the one location where the Federal agencies must make their regulations publically available for review and comment. This is done via a direct feed from the Federal Register. Comments received in other ways (via paper or email) are scanned into the system and posted. There is no set Federal standard on redaction or withholding comments in <i>Regulations.gov</i> and agencies will generally post every non-duplicative comment received with a few caveats. If there is a mass mailing campaign (receipt of many identical comments) only one of those needs to be posted. Agencies may also choose to redact very profane language or threats (or withhold the comment if it is determined to contain no substantive information). A threat to a specific individual will not be posted and will be sent on to the Inspector General and other relevant legal authorities. The Privacy Notice on the site directs the public to not submit copyrighted or confidential business information through the system and it will not be posted if received.</p>

<p>Was this information made publicly available? If yes, where could it be accessed? Please provide a web link or copies of the relevant documents</p>	<p>Example of a summary of comments received for a proposed rule on the threatened Species Status for the Northern Long-eared Bat: http://www.regulations.gov/#!documentDetail;D=FWS-R5-ES-2011-0024-3614</p> <p>Final rule including summary of comments received for an Airworthiness Directive for McDonnell Douglas airplanes: http://www.regulations.gov/#!documentDetail;D=FAA-2006-26049-0009</p>
<p>Was feedback provided to participating stakeholders? If yes, please describe how.</p>	<p>Yes.</p> <p>The preamble to the final regulatory text includes an agency's response to the significant comments submitted in response to the agency's proposed regulation.</p>
<p>Development and implementation</p>	<p>Answers</p>
<p>How long did the development and implementation take?</p>	<p>Throughout the 1990s, the U.S. government explored ways to encourage Federal agencies to use ICT to improve communication with the public and to promote public participation in the rulemaking process. In 2002, Congress passed the E-Government Act, which requires agencies to accept public comments on proposed rules "by electronic means" and to ensure that a publicly accessible Federal website contains "electronic dockets," which are official repositories for documents and information (including public comments) related to specific rulemakings. The first module of the eRulemaking system was completed in January 2003 when <i>Regulations.gov</i> was launched.</p>
<p>Which resources were needed to develop and set up the practice initially (i.e., staff, budget etc.)?</p>	<p>During the initial development of the e-Rulemaking program, the initiative's expenditures were \$5.7 million in fiscal year (FY) 2003 and \$6 million in FY 2004.</p>
<p>Which resources were needed to implement the practice (e.g., staff and budget per consultation)?</p>	<p>The total eRulemaking budget in FY 2015 was \$7.9 million, and the PMO has seven staff members.</p>
<p>What challenges were encountered during development and implementation and how were they overcome?</p>	<p>There were many significant challenges, including the lack of harmonization of regulatory terms used by participating agencies, as well as the need to create a shared funding model, in which participating agencies contribute funds from their own budgets.</p> <p>Over the past decade, these and other challenges have been addressed, but not eliminated, through incremental changes and improvements in how the program operates. For example, the program has long recognized increasing public participation would bring new challenges. In a restrictive budget environment, agencies face the challenge of processing, managing, and reviewing increasing numbers comments from the public under tight deadlines. Using legacy manual methods, it would take hundreds to thousands of person hours to process, read, and analyze comments in a highly popular rulemaking. Seeking to stay ahead of this demand, the eRulemaking program began developing tools in FDMS that would help agencies process comments more efficiently.</p> <p>Working with its agency partners, the program developed a strategy to identify unique, substantive comments and organize them for analysis by agency experts. Duplicate and near duplicate comments submitted through campaigns by advocacy groups or other sources can represent more than half of the submissions on high profile issues. The first step was to introduce a deduplication tool that identifies duplicate and near duplicate comments. Running the body of comments through this tool quickly identifies the central content of these comments, saving agencies a significant amount of time and effort to review and process each comment individually. With the ability to sort comments into duplicates/near-duplicates and unique comments, the eRulemaking program next introduced a tool that uses text analytics to organize comments thematically. This allows agencies to quickly identify major themes and easily group comments for appropriate expert review.</p>
<p>Has the practice been tested before implementation? If yes, please describe.</p>	<p>Prior to the eRulemaking Initiative, several agencies had their own online portals for providing access to regulatory information.</p>

Outputs and evaluation of the practice	Answers
<p>Did the implementation of the stakeholder engagement practice lead to any new policies, reviews of existing policies, changes in policy design or structural reforms?</p>	<p>Changes are frequently made to proposed rules in response to public comments, particularly with high profile regulations that attract large numbers of comments.</p> <p>The Department of Transportation's Federal Aviation Administration's (FAA) regulation on Flightcrew Member Duty and Rest Requirements is an example of a final regulation that changed in response to public comments on the proposed rule: https://www.regulations.gov/#!docketDetail:D=FAA-2009-1093. The FAA received over 8,000 comments in response to the NPRM. In response to the comments, FAA made a number of changes to the regulatory provisions proposed in the NPRM. These changes include the following:</p> <ul style="list-style-type: none"> • The mandatory provisions of the NPRM do not apply to all-cargo operations. Instead, this rule permits all-cargo operations to voluntarily opt into the new flight, duty, and rest limitations imposed by this rule. • Certificate holders are no longer required to independently verify whether flightcrew members are fit for duty. • Most of the daily Flight Duty Plan (FDP) limits have been increased to provide certificate holders with more scheduling flexibility. One of the daily flight-time limits has been decreased to address safety considerations. • The cumulative duty-period limit has been removed from this rule. • The schedule-reliability requirement has been largely removed from the final rule. The remaining parts of the schedule-reliability process have been changed to only apply to instances in which a flightcrew member exceeds the FDP and/or flight-time limits imposed by this rule. • The flightcrew member must now be provided with 10 hours of rest between FDP periods, but that rest is measured from the time that the flightcrew member is released from duty. The rest must provide for an 8-hour sleep opportunity. • The amount of credit provided for split-duty rest and augmentation has been increased, and changes to the final rule make these credits easier to obtain. <p>The changes listed above are just some of the amendments that were made to the NPRM in response to the comments. The Discussion of Public Comments and Final Rule section of the final rule's preamble contains a discussion of the changes that were made to the NPRM in response to issues raised by the commenters.</p>
<p>Was the impact of using the practice quantified? If yes, please provide key results of the quantification.</p>	<p>The eRulemaking Program has helped to eliminate redundant and duplicative IT systems in the Federal rulemaking process and as a result the public currently has standardized and enhanced access to easily participate in the regulatory process. Since its initial launch in September 2005, FDMS has grown to contain over 7.5 million documents including Federal Register Documents (Rules, Proposed Rules, Notices), Public Submissions/Comments, Supporting and Related Materials and Other documents. FDMS provides a cost-effective shared service used by over 170 Federal agencies and sub agencies.</p> <p>The public facing website, <i>Regulations.gov</i>, engages the public in the regulatory process by providing opportunities to learn about important regulatory issues and provide comments to the government on the real economic, social, and health implications of regulatory activities.</p> <p>The program has increased the opportunities for the public to engage in the regulatory process as well as government transparency. For example, over 5 million documents are posted on <i>Regulations.gov</i>, 80% of which are public submissions. Nearly half a million comments are submitted through <i>Regulations.gov</i> each year by its nearly 4 million annual visitors.</p>
<p>Has the practice been evaluated internally by the government? If yes, what methods were used for evaluation and what were the conclusions? If possible, please attach documents related to the documentation of the evaluation or provide a link.</p>	<p>Yes.</p> <p>In 2015, the PMO reached out to agency users to evaluate their satisfaction with FDMS, including the current functionalities. The project management office conducted listening sessions with over 50% of the partner agencies.</p>

	<p>Agencies provided feedback on the whole practice providing valuable feedback on how to improve the practice's efforts and on future directions that the practice should take.</p>
<p>Has the practice been evaluated externally by other actors? If yes, who did the evaluation, what methods were used for evaluation and what were the conclusions? If possible, please attach documents related to the documentation of the evaluation or provide a link.</p>	<p>Yes.</p> <p>In 2005, the U.S. Government Accountability Office (GAO), issued a report on "Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System." GAO assessed (1) the basis for selecting a centralized eRulemaking system, (2) how the PMO collaborated with other agencies and agency views of that collaboration, and (3) whether the PMO used key management practices when developing the system. GAO recommended that E-Rulemaking officials establish a governance structure that would allow it to collaborate with other agencies on developing and implementing the centralized e-Rulemaking program. The recommendation was implemented. The GAO report can be found at: http://www.gao.gov/products/GAO-05-777.</p> <p>In 2008, the America Bar Association's Committee on the Status and Future of Federal e-Rulemaking issued a report to Congress and the President on "Achieving the Potential The Future of Federal e-Rulemaking." The Committee found that the eRulemaking program was a "remarkable accomplishment" but that achieving its full potential would require a "fundamentally new approach" that systematically addressed interrelated challenges of governance, management and funding, technical architecture, agency practice, and public response.</p> <p>In addition, the public provides feedback on <i>Regulations.gov</i> via FORESEE surveys which the project management office reviews monthly.</p>
<p>Additional comments and information</p>	<p>Answers</p>
<p>Is there any more information or documentation that would be valuable to share in relation to the practice?</p>	<p>There have been a number of academic analyses of the U.S. notice and comment system.</p> <p>Some recent studies include:</p> <ul style="list-style-type: none"> • O'Connell, A. (2008), "Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State", <i>Virginia Law Review</i> 94, pp. 889-986. • Webb Yackee, J.S., and Susan Webb Yackee (2010), Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making 'Ossified'?", <i>Journal of Public Administration Research and Theory</i> 20(2), pp. 261-282. • West, William F. (2004), "Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis", <i>Public Administration Review</i> 64(1), pp. 66-80. <p><i>Regulations.gov</i> has further expanded its reach by providing Application Programming Interfaces (APIs) that allow third parties to access data from <i>Regulations.gov</i>, on their own terms, and conduct their own analysis – looking at issues by industry, geographic region, or even commenters' sentiment. Users can access the data stream to develop their own applications to suit their own needs, conduct social or economic research, adding value beyond the purview and resources of the eRulemaking program.</p> <p><u>Detailed description of the evolution of the APA since 1946 (addition to section "Overview of the practice", see p. 64):</u></p> <p>Although the APA was adopted in 1946, its terms have been given meaning since that time through years of practical application and interpretation by U.S. Federal courts. Indeed, reading the APA without awareness of the subsequent refinements would not communicate how it works as a practical matter. For example, the original APA includes a distinction between "formal" and "informal" rulemaking, but most rulemaking is now in fact "informal". Also, although the APA allows for both the proposed text and "the substance of the rule" to be used as the consultation document, given the notice requirements, agencies err on the side of proposing the text. They also often go beyond statutory requirements.</p> <p>Some practical aspects have also evolved:</p> <ul style="list-style-type: none"> • Foremost is the advent of the internet, which has allowed stakeholders to submit comments electronically on

	<p><i>Regulations.gov</i> since 2003.</p> <ul style="list-style-type: none"> • Also, the practice has evolved so that not only text, but the information on which the agency relies to support its proposal, which can include underlying scientific or economic studies or analyses, such as the Impact Assessment, are submitted for public comment, along with the NPRM. • Moreover, in order to avoid circumvention of the rule via other consultation methods (such as consulting advisory groups) the final rule must be a “logical outgrowth of the full record”, which includes information from timely submitted comments contained in the publically available “docket” on line (<i>Regulations.gov</i>). The final regulation may not rely, for example, on information obtained through individual meetings, unless that information is placed in the “record.” <p>In addition to the evolution of practical aspects above, several laws were passed by Congress that, while not amending the APA, in effect work within its context or close perceived loopholes. Examples include:</p> <ul style="list-style-type: none"> • The Regulatory Flexibility Act of 1980, which established additional analytic and consultation requirements if a regulation is likely to have a significant economic impact on a substantial number of small entities, such as small and medium-sized business. • The Paperwork Reduction Act (PRA), first passed in 1980, created procedural requirements for surveys, disclosures, recordkeeping requirements, and other types of “collections of information” conducted by Federal agencies. This includes a requirement that agencies provide an opportunity to comment on estimates of the time and cost burdens associated with agency collections of information, in order reduce administrative burdens on the public and ensure the “practical utility” of the information collected. • As part of a “government in the sunshine” movement, the Federal Advisory Committee Act (FACA), adopted in 1972, disciplined Federal agencies’ solicitation of opinions from expert groups, partly out of concern that agency use of advisory committees made them more susceptible to undue influence by special interests or favored groups despite the practice of notice and comment. (FACA contains selection requirements to ensure balanced composition and avoid “regulatory capture,” as well as transparency requirements.) As a practical matter, agencies ordinarily use expert groups to gather expert advice on discrete issues (such as technical questions on the frontier of scientific knowledge), well before rulemaking—and the process governed by the APA—begins. <p>Finally, U.S. presidents have emphasized the importance of public consultation. For example, in 2011, President Obama issued Executive Order 13563, “Improving Regulation and Regulatory Review,” which requires agencies to “afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days,” to the extent feasible and permitted by law. Executive Order 13563 also requires an “open exchange” of information among government officials, experts, stakeholders, and the public. In this context, “open exchange” refers to a process in which the views and information provided by participants are made public to the extent feasible, and before decisions are actually made.</p>
Crosslinks to OECD principles and databases	Answers
Related further OECD material	<p>OECD (2015): Regulatory Policy Outlook 2015: http://www.oecd.org/regreform/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm</p> <p>OECD (2015), Regulatory Policy Outlook 2015. Companion Volume: http://www.oecd.org/gov/regulatory-policy-in-perspective-9789264241800-en.htm</p> <p>OECD website on regulatory policy in the United States: http://www.oecd.org/gov/regulatory-policy/united-states.htm</p>

Sources

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Office of the Federal Register (n.d.), "A Guide to the Rulemaking Process", retrieved from: https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf, last accessed 9 November 2016.

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