



THE ROLE OF "NOTICE AND COMMENT" AND RELATED ADMINISTRATIVE PROCEDURES IN TRADE FACILITATION IMPLEMENTATION

COMMUNICATION FROM THE UNITED STATES

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1 INTRODUCTION

Among the most significant obstacles to international trade and investment, particularly for small and medium-sized enterprises (SMEs), are unnecessary and burdensome "red tape", or border and behind-the-border procedures and costs. Overly restrictive and non-transparent requirements related to the movement, release, and clearance of goods, including goods in transit, disproportionately impact SMEs, who have limited monetary and personnel resources to manage these contingencies. SMEs often spend considerable sums of money to procure or manufacture quality products for trade, and only discover new or unfamiliar requirements when their products arrive at a destination country and are presented at customs. Unwritten and non-transparent requirements, delays, and additional costs at the border negatively impact traders on both sides of the border and inhibit SMEs from fully participating in commerce including global value chains.

The Agreement on Trade Facilitation (TFA) has the potential to improve customs procedures by making them significantly more transparent and efficient in cooperation with border regulatory agencies and private sector. Expediting the movement, release and clearance of goods, including goods in transit, will increase the competitiveness of the private sector, especially small and medium-sized enterprises (SMEs), by reducing direct and indirect trade transaction costs and deepening regional supply chain integration.

Through the implementation of TFA Article 1 (Publication) and Article 2 (Opportunity to Comment, Information before Entry into Force, and Consultations), WTO Members have the opportunity to incorporate internationally-recognized good practices and other innovations in global regulatory policymaking, resulting in greater transparency and improved governance. These advances will specifically benefit SMEs.

The prominence of transparency in publication and rulemaking in the TFA suggests that during the intervening years since the GATT 1947 was drafted, Members recognized the necessity for more comprehensive and accessible publication of customs-related regulations and procedures, and commensurate opportunities for public comment. These views are supported by independent economic studies that have shown that reducing policy uncertainty benefits SMEs far more than it does large firms. Even a small increase in transparency can increase SME exports by more than half.¹ Properly understood, these commitments help steer Members toward developing time-tested mechanisms and procedures for addressing some of the most prevalent impediments to small and medium-size businesses, traders, and investors – opaque, difficult to find, complex, and overly burdensome regulations.

¹ Studies have shown that if transparency improves by one unit, the probability that an SME will export increases by 66%. Similarly, there is a 53% increase in SME's export propensity. Li, Y. and John S. Wilson (2009), "Trade Facilitation and Expanding the Benefits of Trade: Evidence from Firm Level Data", Asia-Pacific Research and Training Network on Trade: Working Paper Series, (No. 71.)

SMEs in the United States create two of every three new jobs and account for over one third of US exports. Fostering small business innovation therefore is critical to helping raise individuals and groups of entrepreneurs, including youth and women, out of poverty; increasing economic development and growth; and raising standards of living. From this perspective, arbitrary government regulations and procedures, especially at the border, can prevent small business from creating new products, competing in the economy, and succeeding in global markets.

The history of administrative regulatory reform in the United States suggests that *institutionalizing* more transparent, assessable, and responsive methods for soliciting and channeling public participation in the development of regulations, including customs-related requirements and procedures, fosters consideration of more adaptable and flexible approaches to rulemaking that help innovative SMEs to stay in the market. Predictable and streamlined customs-related regulations and procedures similarly help ensure that all individuals and businesses have more opportunities to benefit from recent advances in global trade, logistics, e-commerce, and the new digital economy.

To fully implement and receive the benefits of the TFA commitments, it is vital to establish well-functioning public consultation procedures that allow for *all interested persons*, regardless of where they live or who they are, to have meaningful opportunities to receive timely notice of new regulatory proposals and amendments *and* to offer comments to improve these proposals. This feedback fosters a dynamic "SME ecosystem" in which entrepreneurs and small businesses can create, innovate, and grow-beyond all frontiers.

2 THE US APPROACH TO IMPLEMENTATION OF THE TFA PUBLIC COMMENT AND CONSULTATIONS OBLIGATIONS

The United States implements key aspects of TFA Article 1 (Publication) and Article 2 (Opportunity to Comment, Information before Entry into Force, and Consultations) through the US Administrative Procedures Act of 1946 (APA), as amended, and related US regulatory procedures. The APA introduced requirements, now in place for decades, that agencies publish all their governing procedures and allow any member of the public to petition the agency for a change or even a repeal of a regulation.

The APA established a single set of uniform obligations—"minimum basic essentials"—on all federal agencies, whether called Executive Branch or independent agencies as defined in the law. It requires that US federal agencies provide the public with an opportunity to comment on the text of the rule or on the substance of the regulatory proposal², including key information underlying the proposal. As a practical matter, an agency must provide the public—any interested person, whether or not a national of the United States—with an adequate opportunity to submit "written data, views or arguments" on the proposed rule.

3 NOTICE AND COMMENT

For the purposes of implementing TFA Article 2, the important practice under the APA is the process for "rules". The APA defines "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency". In short, a rule usually sets a standard for future conduct of persons, designed to implement, interpret, or prescribe law or policy for the future.³

Notice of Proposed Rulemaking: Once an agency has developed the content of a proposed regulation, or "rule", the APA requires that the agency publish a proposed rule in the Federal Register in what is known as the Notice of Proposed Rulemaking (NPRM). In keeping with evolving

² See APA, 5 U.S.C. §553(b)(3).

³ The form of APA rulemaking discussed in this paper is commonly known as informal notice and comment rulemaking that is conducted under 5 U.S.C. §553. At the time of enactment of the APA, however, many agencies engaged in a formal rulemaking through an adversarial hearing like adjudication under 5 U.S.C. §§556-557. As agency rulemaking has evolved historically since enactment of the APA, most Federal agency rulemakings have gravitated towards use of the informal notice and comment rulemaking model outlined in this paper.

technology, agencies now also post proposed rules on the single US Federal Government portal for Federal Register notices⁴, regulations.gov, and on their own websites.

The APA requires agencies usually to hold proposed rules open for comment for a period that "affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking process". In practice, this normally ranges from between 30 to 60 days to much longer for more complicated rules.⁵ Further, as noted above, "interested persons" means effectively any person at all, regardless of whether the person is in the United States.

Under the APA, the agency must provide the public with sufficient information about the proposal to fairly apprise interested parties of the subjects and issues involved, so that the public may present responsive data or arguments. Accordingly, the notice usually includes several essential pieces of information:

- the draft text of the proposed rule;
- 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 plain language explanation of the rationale for the proposed approach, including a summary of the factual or scientific basis for the rule.

In keeping with evidence-based decision-making requirements, in addition to the proposed text of the regulation, the information on which the agency relied to support its proposal must also be submitted for public comment. Therefore, the public is provided an opportunity to comment on any scientific or economic analysis relied upon. In addition, US agencies are required to consider whether a proposed regulation may have significant adverse economic effects on a substantial number of small enterprises. If so, regulators must publish for comment a description of the anticipated direct economic impacts of the proposal on small enterprises and consider potential steps to minimize such adverse economic impact, consistent with legitimate regulatory objectives.

Public Comments Considered and Analyzed: Once public comments are submitted in response to a notice, regulators are required to consider and analyze any significant comments timely received from all interested stakeholders, from any source, without discrimination. This means that regulators may need to clarify or even change the rule to address substantive issues presented by the comments. If they do not do so, they must later explain the Agency's rationale for disagreeing with the comment or the rationale for how the issue was otherwise addressed. This occurs when the agency summarizes and provides responses to significant comments at the time the final rule is published.

While reviewing what can often be thousands of comments may present a daunting challenge, the exercise is a technical one that applies regulatory expertise. Each comment is considered on its own merits, in terms of the information or questions posed, rather than, for example, based on the importance or status of the author, or the number of people supporting it.

Issuance of Final Rule – Accountability: The final rule must be published in the Federal Register at least 30 days before it comes into effect. The notice must restate the "basis and purpose" of the rule. As noted above, all significant comments received are addressed by the agency and published at the end of the final regulation, including:

- a summary of comments received;
- written responses to comments, which elaborate why the agency accepted or rejected each of the comments received; and
- a description of the resulting changes (if any) in the final rule.

The APA requires that the final rule be a logical outgrowth of the original proposal and the public comments, and that the final rule be rationally related to the available information in the administrative record, which includes timely received public comments.

Judicial Review: As specified in the APA, after a final rule is published (along with the agencies' extensive explanations), affected parties may challenge the legality of a regulation in court on the

⁴ See APA, 5 U.S.C. §553(b).

⁵ See APA, 5 U.S.C. §553(c).

basis that it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law".

4 EXAMPLES – CUSTOMS RULEMAKING

As stated above, governmental agencies publish notices of proposed rulemaking and solicit comments from the public. The public comments may shape the final rule. Below are some examples when US Customs and Border Protection (CBP) revised a proposed rule based on comments received regarding the needs of small and medium enterprise. Each involved licensing customs brokers.

Example – Age Requirement for Customs Brokers. In one example, CBP proposed a change which would have raised the age requirement for a person to take a customs brokers exam from 18 years of age to 21 years of age. This would align with the age requirement for obtaining a broker's license. However, CBP received a number of comments on the proposed rule objecting to the change, and specifically raising concerns that raising the age requirement to 21 would inhibit the career potential of individuals who can currently take and pass the examination and subsequently apply to obtain a customs broker's license promptly upon turning 21. In the explanation accompanying the final rule, CBP noted that after further considering the age limit issue, CBP agreed with the comments that the age requirement should not be changed because it would increase costs and burden traders and customs brokers. Under the final rule, the age requirement to take a customs brokers exam remained 18 years of age.

Example – Criteria for Sharing Client Information. In another example, CBP published a proposed rule regarding "Permissible Sharing of Client Records by Customs Brokers". In it, CBP proposed amending CBP regulations to allow brokers, upon the client's consent in a written authorization, to share client information with related business entities. CBP received numerous comments, the majority of which expressed concern that the proposed rule did not serve the interests of the importing public and that it was better and less costly for traders if the brokers worked with their clients and made case-by-case determinations on sharing of client information. Ultimately, CBP published a withdrawal of notice of proposed rulemaking. CBP explained that the proposed rule was withdrawn to permit further consideration of the relevant issues involved in the proposed rulemaking as reflected in comments received.

5 PERSPECTIVE AND RECOMMENDATIONS

This submission has outlined the key features of the US Administrative Procedures Act of 1946, as amended, which provides the legal basis and processes through which the United States implements fundamental obligations of TFA Articles 1 and 2. Key among the features of the APA are a set of *external procedures* to open participation to interested persons in the review and analysis of draft regulations, and a matching set of *internal procedures* to channel the received public input into accountable, working-level government deliberations. Together these "notice and comment" procedures allow persons who care about policy and regulatory outcomes to have a predictable, structured, and non-discriminatory opportunity to provide input into the decision-making process.

The APA's notice and comment procedures function alongside a vibrant community of business associations and other non-government organizations (NGOs) that help organize often widely dispersed interests that might not otherwise participate directly in rulemaking procedures. US small businesses, which typically do not have the time, personnel, or resources to monitor regulatory changes, account for over 50% of the membership of some of the best-known business associations and chambers of commerce. These associations serve as key *intermediary institutions* that connect policymaking to the vast network of small businesses throughout the country, and thereby facilitate the submission of practical suggestions for modification and improvement into the regulatory process.

The APA similarly presents an enabling and accountable framework in which unnecessary obstacles to small business and entrepreneurial development, trade, and investment may be identified, assessed, and "weeded-out" *before* they become the topic of international concern. Notice and comment, therefore, may be seen to foster public (and international) trust in regulatory decision-making. That is, the public, having collaborated in the development of regulations, may better support the ultimate results of agency decision-making. Regulators, likewise, can better explain

their actions to the public. The act of publishing in the final regulation how an agency took into account the written input received from the public serves to "complete the circle" of openness and accountability. After 70 years of experience of conducting federal rulemakings, "notice and comment" continues to serve as one of the *primary drivers* for advancing "evidence-based decision-making", improved regulatory outcomes, and compliance with WTO Agreement obligations—across all the agencies of the federal government.

The United States recommends to the Committee that Members are invited to likewise share their views and experiences concerning the importance of greater transparency and improved governance with a view toward full TFA implementation and achieving its aims of further expediting the movement, release and clearance of goods, including goods in transit.
