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Good Regulatory Practices: Conducting Public Consultations on Proposed Regulations in the Internet Era

Purpose: Consideration
Submitted by: United States



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SOM 1 Proposal on

Good Regulatory Practices:

Conducting Public Consultations on Proposed Regulations in the Internet Era

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Issue: As relationships among APEC economies grow and integrate, understanding how proposed regulations may impact trade and investment in the region is critical for preventing unnecessary regulatory divergences in the region from occurring. Stakeholders can inform regulators how proposed regulations would impact their operations and ability to access or invest in markets throughout the region. Stakeholders can also offer ideas on alternative, less burdensome, and more cost effective approaches to achieving legitimate regulatory objectives. However, the mechanisms for allowing stakeholders to become aware of proposed regulations, and providing meaningful opportunities to comment on proposed regulations, vary greatly among APEC economies.

APEC economies, their citizens, and their business are increasingly expanding their use of the Internet and information technology tools. In this context, governments can significantly strengthen their public consultation processes on proposed regulations and make them more transparent and predictable, and consequently enhance the quality, legitimacy, and effectiveness of their regulations. APEC's work on strengthening the implementation of good regulatory practices has demonstrated that when economies implement predictable and time-bound public consultation mechanisms, for example through publically accessible websites that span the whole of government, interested parties are able to review and understand proposed regulations and provide their views on how proposed regulations may be improved, including suggestions on how regulators may achieve their legitimate objectives while facilitating trade and investment throughout the region.

This year, Senior Officials should pay particular attention to improving how our regulators conduct public consultations on proposed regulations as a means of advancing regional economic integration. This proposal will: 1) describe actions for APEC to undertake in 2014 to strengthen public consultations in the Internet Era; and 2) and offer a timeline for APEC's work in this area in 2014. The proposal also includes supporting information in two annexes. Included in Annex 1 is an outline previous APEC commitments and work on strengthening public consultations. Included in Annex 2 is an outline of recent developments on public consultations in other international fora.

I. What can APEC do to strengthen public consultations?

Annex D to the 2011 Leaders Declaration (see Annex 1) pointed APEC economies in the right direction regarding the importance of strengthening public consultations on proposed regulations. Yet, as we continue to integrate our economies, our regulators would benefit from further guidance in this area.

When APEC first began its work on transparency, economies largely relied on a paper-based process to develop regulations. Since then, the Internet has revolutionized how stakeholders and governments operate and communicate with each other. Regulatory ministries and agencies now regularly notify

and seek public comments on proposed regulations on their websites, and several economies have developed consolidated, government-wide web portals that allow the public to find regulations on a particular subject; determine whether they are open for comment; access important supporting documents; and file comments electronically on proposals (e.g., www.Regulations.gov in the United States). Some regulators publish these comments on their websites for wider public consumption; others respond to public comments when publishing the final rules online. For stakeholders, sending their public comments to regulators is inexpensive and easy and they know that regulators will review their comments when posted online. They also benefit from being able to review public comments from other stakeholders that a government posts on a whole of government web portal. When a regulator publishes a final rule online, stakeholders benefit from seeing how the regulator took their comments into account, usually through a summary response to all stakeholder comments. Moreover, conducting public consultations through digital means over the Internet allows regulators, stakeholders, and other governments to get a better sense of how proposed regulations can impact trade and investment in an economy, in the region, and around the world.

So how can APEC economies harness the potential of the Internet and information technology tools to improve the quality, legitimacy, and effectiveness of their regulations, consider more and higher quality public comments from stakeholders all over the world, and reduce unnecessary barriers to trade and investment and regulatory divergences?

II. Proposal:

We propose that APEC take a set of actions by 2020 that strengthen how our regulators should conduct public consultations on proposed regulations in the Internet Era and thereby accelerate and deepen regional economic integration. These actions should be consistent with and build on past APEC commitments on transparency and place APEC at the cutting edge of how governments use information technology when developing regulations. Senior Officials, with input from the Economic Committee (EC) and Sub-Committee on Standards and Conformance (SCSC), would prepare a draft set of actions for endorsement by Leaders and Ministers in November.

We also propose that APEC undertake a robust capacity building program to help APEC economies undertake these actions by 2020. The SOM would also prepare a draft capacity building program for endorsement by Leaders and/or Ministers. The capacity building program would include a mix of workshops and dialogues in APEC and targeted, focused capacity building to assist economies in implementing the above commitments, along with initiatives to help regulators structure requests for public comments to obtain the best possible input on proposed regulations.

Finally, as a means of advancing our work on strengthening the implementation of good regulatory practices, we propose that the Conference on Good Regulatory Practices be hosted annually, rather than biennially, with the SCSC and EC alternately organizing the Conference.

III. APEC Work in 2014 on Public Consultations

To prepare possible commitments for Leaders and Ministers to take on public consultations later in 2014, Senior Officials should endorse the following actions at SOM 1:

1. Have a focused discussion at SOM 2 in Qingdao on how strengthening public consultations on proposed regulations can advance regional economic integration.
2. Take note that the EC has agreed that the theme of the 2014 APEC Economic Policy Report (AEPR) will be good regulatory practices, including public consultations, and that China, the 2014 host economy, will co-lead the development of the AEPR with Japan and the United States.
3. Instruct the SCSC to draft a study for consideration at SOM 2 on stakeholder experiences with providing public comments on proposed regulations, focusing on the use of providing public comments digitally on regulatory web portals. This study would also cover stakeholder views on whether final regulations considered their comments and facilitated trade and investment.
4. Draft possible actions to strengthen public consultations, along with a capacity building program, for consideration at SOM 2, with a view to producing revisions intersessionally before SOM 3.
5. Organize a policy dialogue on the margins of SOM 3 in coordination with the EC and SCSC on different approaches economies have on using the Internet and information technology tools to solicit and consider public comments in public consultations on proposed regulations. This dialogue would also discuss the draft actions and draft capacity building program, with a view to providing an outcomes document to the SOM.
6. Discuss at SOM 3 the results of the study on stakeholder experiences with providing public comments on proposed regulations, focusing on the use of providing public comments digitally on regulatory web portals.
7. At SOM 3, finalize actions by Leaders and Ministers to strengthen public consultations, finalize the capacity building program on public consultations, and agree to host the Conference on Good Regulatory Practices on an annual basis.

ANNEX 1 - Past APEC Contributions to Strengthening Public Consultations on Proposed Regulations:

APEC has a long history of advancing policies to improve transparency with respect to proposed regulations. In 1995, APEC economies agreed on transparency as a general principle under the Osaka Action Agenda¹. APEC Leaders provided greater detail on this general principle in their 2003 statement in Bangkok to Implement APEC's Transparency Standards^{2 3}. This statement also provided further detail on taking forward these general commitments in specific areas, such as customs regulation and standards and conformance. In 2007, APEC undertook a review on how economies were implementing these transparency standards and incorporated them into the Individual Action Plan process.

APEC has also addressed how economies can strengthen their public consultations on proposed regulations in its joint work with the OECD, which culminated in the 2005 publication of the APEC-OECD Integrated Checklist on Regulatory Reform. In particular, the checklist posed two questions with comments regarding public consultation for consideration by governments in their regulatory reform efforts (see questions B5 and D4⁴).

In 2011 in Honolulu, APEC Leaders advanced APEC's efforts to strengthen the implementation of good regulatory practices in Annex D to their Declaration⁵. Regarding public consultations, APEC Leaders agreed to undertake actions to:

Implement the principles related to public consultation of the 2005 APEC-OECD Integrated Checklist on Regulatory Reform section on regulatory policy and the 2004 Leaders' Statement to Implement the APEC Transparency Standards.

Implementation of these principles may include, but are not limited to, the following:

¹ Section A; 5. TRANSPARENCY - Each APEC economy will ensure transparency of its respective laws, regulations and administrative procedures which affect the flow of goods, services and capital among APEC economies in order to create and maintain an open and predictable trade and investment environment in the Asia-Pacific region.

² http://www.apec.org/Meeting-Papers/Leaders-Declarations/2003/2003_aelm/leadersstmtimplapectranspstd.aspx

³ Paragraphs 1(a) and 2 of this Statement have a particular bearing on public consultations:

1. (a) Each Economy will ensure that its laws, regulations, and progressively, procedures and administrative rulings of general application respecting matters in Section C of Part One of the Osaka Action Agenda are promptly published or otherwise made available, for example via the Internet, in such a manner as to enable interested persons and other Economies to become acquainted with them.
2. When possible, each Economy will:
 - (a) publish in advance any measure referred to in paragraph 1 that it proposes to adopt; and
 - (b) provide where applicable interested persons a reasonable opportunity to comment on such proposed measures.

⁴ B5 - Are there effective public consultation mechanisms and procedures including prior notification open to regulated parties and other stakeholders, non-governmental organisations, the private sector, advisory bodies, accreditation bodies, standards-development organisations and other governments?

D4 - To what extent has the government established effective public consultation mechanisms and procedures (including prior notification, as appropriate) and do such mechanisms allow sufficient access for all interested parties, including foreign stakeholders?

⁵ http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm/2011_aelm_annexD.aspx

- *Establish procedures that provide stakeholders with a meaningful opportunity to comment on regulatory proposals;*
- *Provide plainly written, clear, and concise draft measures for public comment with adequate time for review, so that stakeholders and government can have a genuine dialogue that leads to improved regulatory outcomes; and*
- *Ensure that regulators consider public comments.*

In 2013 in Bali, APEC Leaders stated that they “agreed to take specific actions to develop, use or strengthen the implementation of the three Good Regulatory Practices they identified in 2011 (including public consultations).” APEC Ministers welcomed the progress made by economies towards implementing the 2011 APEC Leaders’ commitment to strengthen the implementation of Good Regulatory Practices (GRPs) by ensuring internal coordination of rule-making, assessing the impact of regulations, and conducting public consultations on proposed regulations. They also instructed officials to continue carrying out related capacity-building and information-sharing activities on a voluntary basis so as to create a high-quality regulatory environment, and advance regulatory coherence and cooperation, taking into account different economies’ circumstances. Furthermore, APEC Leaders instructed officials to report on progress made in undertaking this goal in 2014 and 2015.

ANNEX 2 - A strong international consensus on strengthening public consultations

Recent conclusions and recommendations from a number of international organizations reflect a strong consensus that broad-based public consultation is a good regulatory practice. For example, the World Bank has observed that:

Stakeholder consultation is a regulatory tool used to improve the transparency, efficiency and effectiveness of regulation... Consultation increases the quality of regulatory policies in different ways: by bringing into the discussion the expertise and perspectives of those directly affected by the regulation; by helping regulators balance opposing interests and identify unintended effects and practical problems; and by fostering interactions between regulators from various parts of government.⁶

On March 22, 2012, the OECD offered additional guidance to its members on public consultations in its 'Recommendation of the Council on Regulatory Policy and Governance'. Recommendation 2 acknowledges that public consultation opportunities can occur online. It states:

Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis. Governments should ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.

In successive triennial reviews in the WTO Committee on Technical Barriers to Trade, WTO Members have recognized that Good Regulatory Practice (GRP) can contribute to the effective implementation of the substantive obligations of the WTO Agreements, and, can play a part in avoiding unnecessary obstacles to international trade. In the Committee's Sixth Triennial Review, WTO Members agreed:

To identify a non-exhaustive list of voluntary mechanisms and related principles of GRP, to guide Members in the efficient and effective implementation of the TBT Agreement across the regulatory lifecycle, including, but not limited to, the following areas [the first of which is] (ii) transparency and public consultation mechanisms.

Thus, key multilateral institutions, including the World Bank, OECD, and now the WTO are actively building out GRP principles, which place a high importance on leveraging transparency and public consultation processes and mechanisms to prevent the creation of unnecessary obstacles to trade before they become topics of international concern.

⁶World Bank: International Finance Corporation, 2010, *Better Regulation for Growth: Regulatory Governance in Developing Countries* (http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/07/13/000334955_20100713050729/Rendered/PDF/556450WP0Box0349461B0GovReg01PUBLIC1.pdf), p. 23.