General considerations about administrative procedure - the general regime of administrative procedure in light of the CPA and the APA

Comparative analysis involving the legal systems of Portugal and the USA

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Introduction

With this paper, I will try to make a general comparison with two key aspects of two essential pieces of administrative law, both in Portugal and in the United States. We will compare the essential aspects that led to the emergence of the CPA and the APA, as well as compare two of the main administrative rule-making procedures: the first-degree procedure (CPA) and the informal procedure (APA). We will also compare two essential aspects that should always be analyzed in diplomas of this kind: the material scope and the personal scope.

1. Portuguese legal system

1.1. Origin and evolution[1]

1.1.1. The shift from procedure to a central idea in administrative law; the crisis of the administrative act

Currently, administrative procedure can be seen as "the key notion of an alternative theoretical model to the classical doctrine of the administrative act".[2]. It is important, however, to enunciate how this classical doctrine emerged, and how it evolved into the current notion of administrative procedure.

The idea that administrative law had a center originated in the liberal state of the 19th century, in which there was a positivist logic of searching for a central concept for each scientific area. The confusion that existed between administration and justice at that time made one look only at the act of authority - the act that defined the law, such as the judge (definitive) and that could be executed against the will of individuals (executory) - to carry out a theorization of all Administrative Law. The judge could not condemn the administration, nor could he order it, but could only annul the act. Thus, there were several realities that made the act the central theme of Administrative Law. The act was the only form of action of the administration: there was no planning, contracts had not yet come into being, and regulations had no autonomy, being considered as acts. There was a denial of procedure to the detriment of act: the concept of procedure was seen only in terms of its purpose - the administrative act. At that time, procedure was very much associated with process. There was a monistic logic: procedure and process were seen as a continuous reality, which revealed an approximation of the administrative function to the jurisdictional function.

In Portugal, this conception of administrative act was mostly applied at the Lisbon School. Some professors of the School of Coimbra began by contradicting this understanding. This reality (mainly from the 19th century on) dominated Portuguese law for part of the 20th century. It was only with the revision of the 1989 Constitution that the terms "definitive" and "executory" disappeared.

With the welfare state and the advent of the "service provider administration", this central conception of the administrative act began to be questioned. Other forms of action began to emerge, such as contracts, regulations, and plans. It began to be realized that the function of the administrative act is not to define the law (the ultimate function): it is seen as a means to satisfy public needs. The legality of the act begins to disappear. The act begins (in Professor Vasco Pereira da Silva's opinion) to be characterized in terms of its effects and not as something that creates law. The idea of the procedure as something centered on the execution of the act begins to disappear - everything that happens in the procedure is considered relevant. It is also beginning to be realized that the administration does not have an "executive" function. The administration only becomes empowered to execute acts when the law so provides. Administrative acts are not susceptible of coercive execution: there are acts which it makes no sense not to have coercive execution, just as there are acts whose execution is strictly prohibited (such as acts corresponding to the payment of pecuniary obligations).

With this "crisis of the administrative act", a search for new central concepts begins. In this regard, two doctrines emerge: the Italian doctrine, which places procedure as the central legal reality. It is seen that no form of action can be undertaken without procedure. Procedure would thus correspond to a reality that is broader than the act and is not limited to its formation or creation. Procedure also serves as a reality applicable to the legal effects produced after the creation of the act - the concept of procedure also applies to the execution of the act. The procedure is associated with an objective logic, linked to the realization of the values of the PA (the procedure was seen as a kind of "administrative organization") and is seen as something autonomous, in relation to the process: this is different for each function - the legislative procedure differs from the administrative procedure and the judicial procedure; on the other hand, the German doctrine views the concept as an administrative legal relationship. There are also administrative relations before and after the act; there are relations applicable to legal and non-legal forms of action. The concept of legal relationship is considered even broader than the concept of procedure: there are substantive, procedural (the existence

of a procedure creates a legal relationship between the various subjects) and procedural (for example, in situations where someone seeks to protect his or her rights by judicial means) legal relationships. This logic enshrines a personalistic view of Administrative Law, balancing the position of the individual and that of the Administration (there is parity between the two).

In the transition to the infrastructural state, one begins to question whether the positivist logic of finding a central concept is really the best way to perspective the development of the various scientific areas. The idea is that concepts change according to realities. Thus, one begins to look for what will be more explanatory in the framework of Administrative Law.

Nevertheless, within the framework of structural administration, the concept of multilateralism is being discussed: legal relations are becoming multilateral, and legal acts are beginning to have effects in relation to several subjects. In the same way, mass procedures, affecting a large number of subjects, begin to be carried out. It is this consecration of multilateralism that causes the idea of the central concept to begin to be questioned.

Nevertheless, and to reiterate, this does not mean that one can look for what is more explanatory within the framework of Administrative Law. We can speak, following Professor Vasco Pereira da Silva's understanding, that the multilateral legal relationship would be the most explanatory concept, but it would necessarily have to include the procedure, as it corresponds to one of the essential elements of today's administrative reality.

This crisis of the administrative act is simultaneously the result of the "subtraction of entire domains from authoritarian and unilateral administrative activity" and of the "absorption of the administrative act into a framework of more complex and articulated forms of activity "[3].

1.1.2. Codification[4]

The first codes of procedure, drawn up in the early 20th century, formed much in account with the monist idea of procedure: the codes were very formal and had many mandatory rules, bringing the procedure closer to the judicial process. It was said that process and procedure were the same thing, in the sense that the former was the continuation of the latter. As mentioned, it was the Italian doctrine that sought the autonomization of the procedure: the administrative procedure should be flexible so that

the administration takes the most appropriate decision, while still being subject to rules of a procedural nature. But these rules do not have the function that the judicial process has: the model of the procedure is not the process, the former being valued. This doctrine, due to the autonomy, singularity and flexibility typical of the procedure, does not seek to elaborate a codification. Even today, in Italy, there is no code of procedure. In France, there is a doctrine that prevailed until the 1970s, which takes a somewhat opposite position: the procedure could jeopardize the typical flexibility of administrative law. France currently has a code of administrative procedure, but it is demonstrated through a set of separate laws and jurisprudence.

The first codifying moments originated in Germany, in the 1950s, then moved to France, and then to Portugal.

In the Portuguese case, the 1976 Constitution already provided, in the then art. 268/3, that "The processing of administrative activity will be the object of special law, which will ensure the rationalization of the means to be used by the services and the participation of citizens in the formation of decisions or deliberations that concern them."

From early on, there were separate laws that sought to regulate specific aspects of administrative procedure. A set of laws intended to regulate a certain type of procedure - the disciplinary procedures - stand out. As a consequence of the codifying movement that arose in the 20th century, the first law promising the elaboration of, at the time, a "code of administrative procedure" was the 1962 Law of Means. This promise was never fulfilled. After the revolution of 1974, several governments tried to promote the elaboration of projects. The first was drafted by Rui Machete and the second, resulting from public discussion of the first, was published in 1987[5].

In the debate about codification that took place in Portugal, Professor Rogério Soares understood that a regularization could bring positive aspects, but it should be reduced to a minimum: the development of legislation on procedure should be limited to the improvement of "formal administrative law", that is, that part of Administrative Law that has as its object the organization and operation of public agencies. The author preferred the realization of "a series of well-considered separate laws". The author asserted that such an undertaking was unnecessary in systems which, like ours, were based on the administrative act and which, therefore, attached less importance to the procedure than to its result. And he added the argument that judicial control of administrative acts is not limited in Portuguese law.

Professor Freitas do Amaral held the opposite view. He contradicted Professor Rogério Soares' position, believing that the regulation of the procedure is a constitutional requirement (article 267/4 of the Constitution); the protection of private parties in face of the Administration is, today and always, one of the objectives to be achieved by a procedural law; he believes that "only with this Code and with some of the solutions that it established - namely, the principle of prior hearing of interested parties is that finally this participation/collaboration between the Administration and private parties will start to be practiced in Portugal, which until now in 99 % of the cases was purely and simply denied by the Administration, closed in its ivory tower and proud of its privileges";

Professor Marcelo Rebelo de Sousa defended a compromise perspective before the two previous ones. The Professor is in favor of codification, but also considers the dangers that it may entail. Professor Vasco Pereira da Silva agrees with Freitas do Amaral in his apology for the Administrative Procedure Code, even if some of the fears and reservations expressed by Professor Rogério Soares are justified.

In 1987, the Government commissions a commission to review the 1980-1982 project and present a final version. The first Code of Administrative Procedure was thus drafted in 1991. It underwent four changes, with a broad fifth amendment in 2015 (and another in 2020). Already well before the new CPA its reform was being discussed. Professor Vasco Pereira da Silva presented a set of reasons why he considered that the code should be reformed[6]: the need to adapt the existing concepts in the current CPA; the need to correspond to the legislative changes that have been occurring; the need to adapt it to European and global law.

1.2. The CPA

1.2.1. Personal Scope

The question is who applies, and to whom do the provisions of the CPA apply. The CPA defines the personal scope essentially in art. 2/1, 65 and 68. Thus, the CPA applies to: (1) bodies of any entities that, regardless of their nature, possess public powers or are regulated in a specific way by administrative law provisions (art. 65/1, a) and art. 2/1); (2) private individuals holding rights, legally protected interests, duties, charges, encumbrances or subjections within the scope of the decisions that were or may be made therein (art. (3) private individuals and legal persons under private law, when

they intend to protect diffuse interests (interests that cannot be defended by just anyone) against actions or omissions of the Administration that may cause relevant non-individualized damage to certain fundamental goods (stipulated in art. 68/2) (art. 65/1, c) and art. 68/2). In the case of legal persons, these must be representative of the interests they are intended to protect; (4) private natural persons, when, for the purpose of ensuring the defense of State property of the autonomous regions or local authorities affected by action or omission of the Administration, they are resident in a district in which the affected property is located or has been located (art. 65/1, c) and 68/3); (5) bodies that exercise administrative functions (art. 65/1, d) and art. 68/4): (5.1.) when the legal persons to which they belong hold legally protected rights or interests, powers, duties or obligations that may be affected by the decisions that have been or may be taken in this context; or (5.2.) when it is their duty to defend diffuse interests that may benefit or be affected by such decisions.

The subjects of the procedural legal relationship referred to in sub-paragraphs b), c) and d) of article 65, under one of the titles of legitimacy provided for in article 68 (article 65/2), are considered to be interested in the proceedings.

1.2.2. Material Scope

Although the CPA has provisions that apply to regulations, acts and contracts, it should be noted that the type of administrative procedure we wish to compare (the first-degree procedure) applies essentially to acts (and also, to a certain extent, to regulations). Thus, it follows that: (1) administrative act: The "administrative act" is the unilateral legal act practiced, in the exercise of administrative power, by an organ of the Administration or by another public or private entity empowered for such by law, and that translates the decision of a case considered by the Administration, aiming to produce legal effects in an individual and concrete situation. This definition partially corresponds to the one found in art. 148, CPA[7].

Regulations correspond to legal rules issued in the exercise of administrative power by an administrative body or by a public entity empowered to do so by law[8].

1.2.3. The administrative procedure - the first degree decision procedure[9]

1.2.3.1. General considerations

This corresponds to the procedure leading to the practice of a primary administrative act. Normally the doctrine divides this procedure into six phases. These six phases do not have to be followed in each and every type of procedure.

1.2.3.2. Initial Phase

Corresponds to the phase that initiates the procedure. This initiation can be determined by the administration or by an interested party (art. 53, CPA). If the Administration initiates the procedure, it must do so through an internal act, and must communicate the beginning of the procedure to the people whose legally protected rights and interests can be identified (art. 110/1, CPA). If the private party takes the initiative to initiate the procedure, it must do so by submitting a written request, or sent by email, containing the various items of information indicated in art. 102/1, CPA.

At this stage "provisional measures" (art. 89/1) may also occur.

1.2.3.3. Instruction Phase

This phase is intended to investigate the facts that are of interest to the final decision and to collect any evidence that may be necessary (CPA, arts. 115 to 120). In the context of the inquiry, the "director of the inquiry" is responsible for "investigating all the facts, knowledge of which is appropriate and necessary to reach a legal and fair decision within a reasonable period of time, and to this end may use all the means of proof allowed by law" (CPA, art. 115/1). It may order interested parties to provide information, to produce documents or things, to submit to inspections and to collaborate in other means of proof (CPA, art. 117/1). In turn, interested parties may add documents and opinions or request proof that is useful for clarifying the facts of interest to the decision (CPA, art. 116/3).

Without prejudice to the administration's duty to investigate the relevant facts of its own motion, the interested parties are responsible for proving the facts they have alleged (CPA, art. 116/1).

During the fact-finding stage, the individual whose request gave rise to the procedure or against whom it was initiated may be heard. But this hearing should not be confused with the hearing that must necessarily take place later, in the third phase of the

procedure: in the second phase, it is a diligent investigation; in the subsequent phase, it is the exercise of the right to participation or defense.

1.2.3.4. Phase of the hearing of interested parties

The hearing of interested parties is regulated in articles 121 to 125. Interested parties to a procedure are assured the right to participate in the formation of decisions concerning them. It includes the notification of interested parties before the final decision is taken on the probable meaning of the decision, so that they may "comment on all issues of interest for the decision, in fact and in law, as well as request additional steps and attach documents" (art. 121/2); this is followed by the instructor's consideration of the arguments and reasons presented by the interested parties in defense of their points of view.

The communication to the interested parties of the "probable direction of the decision" must be accompanied by an adequate justification, i.e. the reasons why the Administration is inclined to benefit or harm the private party: if the private party does not know the Administration's reasons, he will not always be able, at the preliminary hearing, to counter them effectively.

There are some situations in which the director of the procedure may not proceed with the hearing of interested parties; if this occurs, the reasons that in the specific case justified the waiver of the hearing should be expressly and autonomously indicated in the final decision (CPA, arts. 124/2 and 126). The dismissal in question is legitimate when certain situations present in art. 124/1 are verified.

The CPA provides two ways for interested parties to be heard in the procedure before the final decision is taken: the written hearing and the oral hearing. It is up to the director of the procedure to decide, in each case, whether the prior hearing of interested parties should be written or oral (art. 122/1, CPA).

Minutes are taken of the hearing, containing an extract of the allegations made by the interested party, who may add written allegations, during the hearing or later (CPA, art. 123/4). The non-appearance of the interested party does not constitute motive for postponement of the hearing, but if justification for the absence is presented before the time set for the hearing, the hearing must be postponed (CPA, art. 123/2).

1.2.3.5. Decision preparation phase

This is the phase in which the Administration weighs what was considered in the initial phase, the evidence gathered in the instruction phase, and the private parties' arguments in the interested parties' hearing phase (CPA arts. 125 and 126). The procedure is taken to the decision-making body. The decision-making body may consider the instruction insufficient, ordering new steps, and may also request new opinions (CPA, art. 125).

In the ordinary administrative procedure, the director of the procedure, if not the body competent for the final decision, "draws up a report in which he indicates the application of the interested party, summarizes the content of the procedure, including the grounds for waiving the hearing of interested parties, when this did not occur, and formulates a proposal for a decision, summarizing the factual and legal reasons that justify it" (art. 126, CPA).

1.2.3.6. Decision phase

The procedure ends with the decision, or with any of the other facts provided for in the CPA (art. 93). The procedure may end: by the practice of an administrative act: the competent body must resolve all relevant issues raised during the procedure that have not been decided upon previously (CPA, art. 94/1); by the conclusion of a contract (CPA art. 126).

In the case of the administrative act procedure, it is important to bear in mind the rules regarding deadlines for its conclusion: private initiative procedures must be decided within 90 days, unless another deadline derives from the law, the deadline may, in exceptional circumstances, be extended by the director of the procedure (art. In principle, the failure to reach a final decision on a claim addressed to the competent administrative body within the legal deadline constitutes non-compliance with the duty to take a decision, giving the interested party the possibility of using the appropriate means of administrative and judicial protection (art. 129, CPA); ex officio proceedings, which may lead to the issue of a decision with unfavorable effects for the interested parties, lapse in the absence of a decision within 180 days (art. 128/6).

Besides being extinguished by an express final decision and complementary formalities, the administrative procedure may also be extinguished for the causes present in art. 131, art. 132, art. 95, art. 133, art. 130.

1.2.3.7. Complementary phase

Certain acts and formalities are carried out after the procedure's final decision: registrations, filing of documents, subjection to internal controls or tutelary approval, approval by the Court of Auditors, publication in the Diário da República or other official gazette, publication in private newspapers or posting in various places, notification of the decision to the addressees (when necessary - CPA, art. 114), etc.

2. Legal system of the United States of America

2.1. Origin and Evolution

2.1.1. The political movement that brought about a legal reform in administrative procedure

The emergence of Administrative Law in the two great Common Law systems (United Kingdom and the United States of America) took place during the Welfare State period, when the growth of administration seen in continental legal systems began to spread around the world.

Note that the United States has always had some skepticism and political suspicion regarding Administrative Law: there has always been a resistance to the creation of a uniform law regulating the possibility of the Government exercising "power over citizens", which, regardless of any procedural regulation, would impinge on the individual rights of citizens[10] (note that this does not mean that the first manifestations of an Administrative Law in the US first occurred in the 20th century. For example, the first administrative agency had already been created in 1789 by Congress, to provide pensions to wounded soldiers of the War of Independence). Thus, when Congress delegated powers to an administrative agency, the procedural rules were included in the respective legislation[11].

The movement and the political controversies over legal reform in administrative procedure reached its peak with the height of the New Deal - a set of reforms that took place between 1933 and 1939, under President Roosevelt, in order to recover from the damage caused by the Great Depression[12]. As a consequence of the various reforms, administrative agencies began to gain prerogatives and power, which caused great disagreement between Democrats and Republicans: the former, Roosevelt's supporters, saw advantages in the support measures, as they believed that the agencies were instruments through which experts could design effective policies that would respond to specific problems and needs in a way that could never be achieved by any legislation;

the Republicans, on the other hand, worried that this growth would be a threat to individual rights and free-market efficiency[13]. Moreover, doubts and discord were worsened by the apparent lack of transparency of the head of the Federal Emergency Relief Administration, Harry Hopkins: when Congress demanded explanations on how decisions were made and what criteria were used for the distribution of funds, he refused to answer[14]. In an initial phase, the Republicans put up a lot of resistance: even though they did not have a majority in Congress, they chose to solve the problem in court: more than 1,600 injunctions were issued against the implementation of new legislation in the New Deal[15]. It turned out that this pressure was facilitated by the Supreme Court's decision in Coast Hotel v. Parrish[16] - a decision that allowed the Supreme Court independence from the Judicial Procedures Reform Act of 1937 - which allowed Roosevelt's supporters to seek strong procedural and judicial restrictions on the various actions of administrative agencies, including strict limits on their ability to enforce new policies and change existing legislation[17].

2.1.2. The political movement that brought about a legal reform in administrative procedure (continued); the emergence of the APA

In order to seek advancement of the New Deal legislative proposals, the Special Committee on Administrative Law of the American Bar Association was established in 1933. This committee concluded that administrative agencies were acting without "considered judgment, without due process, without sufficient consideration of the issues, and without granting parties the right to be heard or procedures for relief14". In 1938, the committee drafted "An Act to Provide for a More Expeditious Settlement of Disputes with the United States" known as the Walter-Logan bill[18]. This was vetoed by Roosevelt. Nevertheless, the President recognized the need for reform in administrative procedure and sought to draft his own legislation. Therefore, a committee was created to investigate the need for reform in administrative procedure[19]. In 1941, the report was submitted, proposing the following recommendations: "(1) the creation of a new office with power to appoint and remove hearing commissioners; (2) the publication of agency rules, policies and interpretations, including the dates at which agency rules went into effect; and (3) the appointment of special hearing officers in adjudicatory proceedings.[20] Due to the need for a quick administration with few restrictions, and due to the aversion shown by the democrats to amendments to the Walter-Logan proposal, the search for immediate reform was not a good possibility for the time being[21].

These circumstances fade away: President Roosevelt is replaced by Truman, who does not possess the charismatic qualities of his predecessor, and the war ends. Thus, a favorable environment begins to exist for changes in administrative procedure. In addition to the reasons given, the Democrats were afraid of losing control of Congress in the 1946 midterms, so that if the Republican Party gained the upper hand, the various programs adopted in the New Deal could be eliminated. The Democrats therefore began to want to soften the prerogatives of administrative agencies: they recognized that the absence of procedural regulation would give a Republican president great discretion to direct agency decision-making in any way he chose. A strict system of procedural safeguards would allow the status quo established during the New Deal era to be maintained[22]. Note, however, that Republicans also seek these reforms for other reasons: they feel that judicial review would not be sufficient for Democrat-appointed judges to ratify New Deal policies. It would always be difficult for agencies to consider new policy directions. Moreover, they recognized that they would always be able to adopt legislation that would undermine New Deal policies. In other words, if they won both chambers, they could accomplish their goals even more efficiently with administrative reforms.

As it happens, Congress passes the APA in 1946. The Senate passed it in February and the House in May. The bill was signed into law in June. In short, the legislation created three main categories of administrative action: "(1) rulemaking, in which agencies imposed regulations; (2) adjudication, in which agencies resolved disputes by finding facts and making conclusions of law; and (3) discretionary agency decision-making[23].

2.2. The administrative procedural steps under the APA

2.2.1. Personal Scope

As for the personal scope, we can say that the APA applies to three "categories": (1) agencies (§ 551 (1)): corresponds to every authority of the United States Government. It does not include, however, for example, Congress (§ 551 (1) (A)), courts (§ 551 (1) (B)), agencies composed of representatives of the parties or of representatives of organizations of the parties in disputes determined by them (§ 551 (1) (E)), military authority exercised on the ground in time of war or in occupied territory (§ 551 (1) (G)); (2) persons: includes an individual, partnership, corporation, association, or public or

private organization that is not an agency (§ 551 (2)), parties: includes a person or agency named or admitted as a party, or who duly seeks and is entitled to be admitted as a party, to an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes (§ 551 (3)).

2.2.2. Material scope

The APA applies, essentially, to "rules": "means the whole or a part of an agency statement of general or particular applicability and future effect intended to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practical requirements of an agency and includes the approval or prescription for the future of rates, salaries, corporate or financial structures or reorganizations thereof, prices, facilities, apparatus, services, or allowances for the same or of assessments, costs, or accounting, or practices bearing on any of the foregoing" (§ 551 (4)).

2.2.3. The administrative procedure - the first degree decision procedure

2.2.3.1. General considerations

Informal regulation corresponds to a rulemaking process that allows federal agencies to amend, repeal, or create an administrative regulation. Unlike formal rulemaking, which requires deliberation of a proposed rule during a trial process, informal rulemaking only requires written public feedback on proposed rules submitted during a comment period. Informal rulemaking is also referred to as notice-and-comment rulemaking[24]. It is provided for in section 553. It is inconsistent how the various phases are distributed. According to the Office of Information and Regulatory Affairs, the informal process is broken down into nine stages[25]:

2.2.3.2. Consideration of initial events

This phase considers the various initiatives that may influence agencies to initiate the process. These initiatives can come from, for example: recommendations from the president; petitions; changes in the environment/community being regulated; recommendations from various types of committees (state, federal, etc.); laws passed by Congress.

2.2.3.3. Decision on the need for public notification

The question at this stage is whether public notification is required, or whether one of several exceptions in section 553(b) applies. Note that public notice is the general rule, but may not be necessary if, for example, the rule is limited to minimal changes that require almost no agency discretion; when notice would go against the purpose of the rulemaking; when the notice is implicitly drafted by Congress; when there are interpretive rules or rules involving foreign or military affairs.

2.2.3.4. Developing a Proposal

A (public) notice of rulemaking occurs, which should have a: description or statement about the tentative content; the legal basis, indicating who has authority for the regulation, and the area to which it will be subject; an explanation for each provision, explaining why a particular rule is needed, what it will ensure, and what kind of resources were used to make it.

It must also have a preamble that can be easily understood by the general population, which should have, for example, the history behind the regulation, the alternatives the agency is considering, or analyses that describe compliance with applicable statutes or executive rules. These analyses must be completed before the final rule is developed.

2.2.3.5. Sending the proposition to the Office of Management and Budget

OMB will review any rules that the agencies or the Office of Information and Regulatory Affairs deem to be essential. OMB has set deadlines for doing this review/appreciation. OIRA may, in some circumstances, waive this phase. Agencies must submit a cost/benefit assessment.

2.2.3.6. Publication of the public notice of rulemaking

At this stage, the agency publishes in the Federal Register the terms or content of the proposed rule or a description of the problems and situations involved (section 553, (b)). The public notice must contain the time, place, and nature of the proceeding, as well as a reference to the authority on which the regulation is proposed and an identifying number.

2.2.3.7. Analysis of public comments

Agencies must give the public an opportunity to comment in writing. Agencies should not be selective in their consideration of this information, but should consider all relevant to the situation at hand (section 553 (c)). The public has 60 days to comment. Case law indicates that agencies must respond to the most important issues that have arisen in these comments. The most important requests correspond to those that, when adopted, require a change to the proposed rule.

2.2.3.8. Final rule development

The final rule must have the provisions of the Code of Federal Regulations adopted, as well as incorporate in the preamble text indicating the basics and purpose of the agency's decision (section 553 (c)). The choices for the final rule cannot be "arbitrary and capricious" (they must have a rational basis for the decision). The final rule must be within the scope and logic of the proposed rule. It may differ substantially from the public notice, provided the public notice is properly informed.

The final rule should explain the provisions adopted and the reasons for the agency's decision, including possible changes from the public notice, should document the discussions and response to public comments, and should set an effective date for publication.

2.2.3.9. Seding the final rule to the Office of Management and Budget

The OMB will review any rule that it finds significant. This review/appreciation process takes at least 90 days. In certain circumstances, OIRA may allow a shorter period. Agencies must review and amend the rule in light of this review to meet the concerns demonstrated by OMB.

2.2.3.10. Publication of the final rule

The final rules are published in the Federal Register, and should not take effect until at least 30 days later (except in the exception situations referred to in the second phase). Agencies may decide to extend this deadline. Under the Congressional Review Act, before rules take effect, agencies must submit them to Hause, the Senate, and the Government Accountability Office. Rules deemed by the CRA to be "major" can only take effect after 60 days (with some exceptions).

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