US-KENYA STRATEGIC TRADE
AND INVESTMENTS PARTNERSHIP

GOOD REGULATORY PRACTICES

KEY ISSUES TO BE CONSIDERED

Prof. Uche Ewelukwa Ofodile

(SJD Harvard)

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1.0 Introduction

Good regulatory practices (GRPs) provisions in FTA have grown in response to concerns among businesses, particularly multinational corporations, of the so called "regulatory barriers to trade." In trade circles, discriminatory and unpredictable regulatory processes are seen as regulatory barriers to trade and are considered non-tariff barriers. Regulatory cooperation and GRP chapters in trade agreements are a relatively new phenomenon. Typically, provisions on regulatory cooperation "require governments to institutionalise voluntary or mandatory arrangements through which public servants in different countries can and in some cases must work together, usually in close collaboration with industry, to reduce or eliminate differences in domestic laws, policies, standards, regulations and testing procedures — including health, environmental and consumer protections — that are said to impede trade."[1] An end-product of regulatory cooperation "could be an equivalency agreement, whereby two countries agree to accept each other's regulations and enforcement as "equivalent" even though the systems may be very different in practice."[2] GRPs respond to concerns about regulatory burden on businesses. Early efforts to address regulatory barriers to trade can be found in WTO agreements on technical barriers to trade (e.g. Article 2.2. and Article 2.4) and sanitary and phytosanitary measures (e.g. Article 3). GRP provisions can also be found in some recent trade agreements such as the Canada-EU CETA (e.g. Chapter Twenty-One).

The U.S. strongly believes that regulatory barriers can impede market access for U.S. goods and services. The US-Canada Regulatory Cooperation Council (RCC) was launched in 2011 with the goal of "bring[ing] together regulators from both United States and Canadian departments with health, safety, and environmental protection mandates to reduce unnecessary differences between their regulatory frameworks."[3] Passed in 2012, Executive Order 13609 of May 1, 2012 Promoting International Regulatory Cooperation affirms the U.S. commitment to promote regulatory cooperation and embraces as a formal U.S. policy many of the international regulatory cooperation principles.[4] Demonstrating U.S. commitment to eliminating or reducing perceived regulatory barriers to trade, the Trade Promotion Authority addresses regulatory practices explicitly and in detail.

Trade Promotion Authority, 2015

….

(7) REGULATORY PRACTICES.—The principal negotiating objectives of the United States regarding the use of government regulation or other practices to reduce market access for United States goods, services, and investments are—

(A) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations;

(B) to require that proposed regulations be based on sound science, cost benefit analysis, risk assessment, or other objective evidence;

(C) to establish consultative mechanisms and seek other commitments, as appropriate, to improve regulatory practices and promote increased regulatory coherence, including through—

(i) transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes; (ii) the elimination of redundancies in testing and certification; (iii) early consultations on significant regulations; (iv) the use of impact assessments; (v) the periodic review of existing regulatory measures; and (vi) the application of good regulatory practices;

[1] BUND (2019), International Regulatory Cooperation and the Public Good.

[2] https://www.iatp.org/new-nafta-grp

[3] https://legacy.trade.gov/rcc/

[4] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/eo_13609/eo13609_05012012.pdf

(D) to seek greater openness, transparency, and convergence of standards development processes, and enhance cooperation on standards issues globally;
(E) to promote regulatory compatibility through harmonization, equivalence, or mutual recognition of different regulations and standards and to encourage the use of international and interoperable standards, as appropriate;
(F) to achieve the elimination of government measures such as price controls and reference pricing which deny full market access for United States products;
(G) to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for United States products; and
(H) to ensure that foreign governments— (i) demonstrate that the collection of undisclosed proprietary information is limited to that necessary to satisfy a legitimate and justifiable regulatory interest; and (ii) protect such information against disclosure, except in exceptional circumstances to protect the public, or where such information is effectively protected against unfair competition.

The USMCA has a new and separate chapter on GRPs. Chapter 28 is broken into twenty articles and an annex:

- ✓ Article 28.1: Definitions
- ✓ Article 28.2: Subject Matter and General Provisions
- ✓ Article 28.3: Central Regulatory Coordinating Body
- ✓ Article 28.4: Internal Consultation, Coordination, and Review
- ✓ Article 28.5: Information Quality
- ✓ Article 28.6: Early Planning
- ✓ Article 28.7: Dedicated Website
- ✓ Article 28.8: Use of Plain Language
- ✓ Article 28.9: Transparent Development of Regulations
- ✓ Article 28.10: Expert Advisory Groups
- ✓ Article 28.11: Regulatory Impact Assessment
- ✓ Article 28.12: Final Publication
- ✓ Article 28.13: Retrospective Review
- ✓ Article 28.14: Suggestions for Improvement
- ✓ Article 28.15: Information About Regulatory Processes
- ✓ Article 28.16: Annual Report
- ✓ Article 28.17: Encouragement of Regulatory Compatibility and Cooperation
- ✓ Article 28.18: Committee on Good Regulatory Practices
- ✓ Article 28.19: Contact Points
- ✓ Article 28.20: Application of Dispute Settlement
- ✓ ANNEX 28-A

In the USMCA, regulation means "a measure of general application adopted, issued, or maintained by a regulatory authority with which compliance is mandatory."[5] Regulatory cooperation is defined as "an effort between two or more Parties to prevent, reduce, or eliminate unnecessary regulatory differences to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection." USMCA's regulatory cooperation chapter can be broken down into four main parts: obligation, transparency, cooperation, and enforcement.

[5] USMCA, Article 28.1.

GRPs Obligations in the USMCA

Chapter 28 sets out specific obligations for Parties including practices relating to the planning, design, issuance, implementation, and review of the Parties' respective regulations. Chapter 28 also addresses regulatory process requirements.

General Obligations

In general, Parties recognize that implementation of government-wide practices to promote regulatory quality through greater transparency, objective analysis, accountability, and predictability can facilitate international trade, investment, and economic growth, while contributing to each Party's ability to achieve its public policy objectives (including health, safety, and environmental goals) at the level of protection it considers appropriate (Article 28.2.1). In Chapter 28, USMCA Parties are obliged to *inter alia*: (i) adopt or maintain internal processes or mechanisms providing for consultation, coordination, and review among domestic authorities in the development of regulations (Article 28.4.1); (ii) provide that proposed and final regulations are written using plain language to ensure that those regulations are clear, concise, and easy for the public to understand, recognizing that some regulations address technical issues and that relevant expertise may be required to understand or apply them (Article 28.8); and (iii) designate and notify a contact point for matters arising under Chapter 28 in accordance with Article 30.5 (Agreement Coordinator and Contact Points).[6]

Regulatory process requirements

Chapter 28 contains extensive regulatory process requirements including requirements relating to risk assessment, impact assessment, and early notifications.

Risk Assessment

The risk assessment obligations are enshrined in Article 28.5 of the USMCA (Information Quality). In Article 28.5 each Party recognizes the need for regulations to be based upon information that is reliable and of high quality. Consequently, each Party "should adopt or maintain publicly available guidance or mechanisms that encourage its regulatory authorities when developing a regulation to: (a) seek the best, reasonably obtainable information, including scientific, technical, economic, or other information relevant to the regulation it is developing…."

Regulatory Impact Assessment

In Article 28.11.1, the Parties recognize that regulatory impact assessment is a tool to assist regulatory authorities in assessing the need for and potential impacts of regulations they are preparing. Consequently, each Party should encourage the use of regulatory impact assessments in appropriate circumstances when developing proposed regulations that have anticipated costs or impacts exceeding certain thresholds established by the Party. Furthermore, Article 28.11.2 calls on Parties to maintain procedures that promote the consideration key factors when conducting regulatory impact assessment. Article 28.11.2 provides:

> 2. Each Party shall maintain procedures that promote the consideration of the following when conducting a regulatory impact assessment:
>
> (a) the need for a proposed regulation, including a description of the nature and significance of the problem the regulation is intended to address;

[6] USMCA, Article 28.19.

(b) feasible and appropriate regulatory and non-regulatory alternatives that would address the need identified in subparagraph (a), including the alternative of not regulating;

(c) benefits and costs of the selected and other feasible alternatives, including the relevant impacts (such as economic, social, environmental, public health, and safety effects) as well as risks and distributional effects over time, recognizing that some costs and benefits are difficult to quantify or monetize; and

(d) the grounds for concluding that the selected alternative is preferable.

….

Early Notifications

Each Party is required to publish annually a list of regulations that it reasonably expects within the following 12 months to adopt or propose to adopt (Article 28.6). Furthermore, each regulation identified in the list should be accompanied by: (a) a concise description of the planned regulation; (b) a point of contact for a knowledgeable individual in the regulatory authority responsible for the regulation; and (c) an indication, if known, of sectors to be affected and whether there is any expected significant effect on international trade or investment.

Cooperation

Each USMCA Party commits to encourage its regulatory authorities to engage in mutually beneficial regulatory cooperation activities with relevant counterparts of one or more of the other Parties in appropriate circumstances to achieve the objectives of Chapter 28.[7]

Transparency

Chapter 28 includes extensive transparency requirements. Parties are to routinely publish information relating to their regulation and regulatory practices including (i) key information online, including draft regulations (notice and comment), annual regulatory agendas, and descriptions of regulatory agencies' functions and legal authorities; (ii) applicable forms used by regulatory agencies; (iii) fees associated with licensing, inspection, audits, etc.; and (iv) judicial or administrative procedures available to challenge regulations. Article 28.15.1 provides: "Each Party shall publish online a description of the processes and mechanisms employed by its regulatory authorities to prepare, evaluate, or review regulations. The description shall identify the applicable guidelines, rules, or procedures, including those regarding opportunities for the public to provide input."

Enforcement

The USMCA's obligations relating to good regulatory practices are enforceable through the dispute settlement processes established under Chapter 31. Before resorting to dispute settlement, USMCA Parties are required to exercise judgement as to whether recourse to dispute settlement under Chapter 31 (Dispute Settlement) would be fruitful.[8] Moreover, Article 28.20.3 stipulates that "[n]o Party shall have recourse to dispute settlement under Chapter 31 (Dispute Settlement) for a matter arising under this Chapter except to address **a sustained or recurring course of action or** inaction that is inconsistent with a provision of this Chapter."[9]

[7] USMCA, Article 28.17.
[8] USMCA, Article 28.20(1).
[9] Emphasis added.

2.0 Key Considerations for Kenya

The USMCA's chapter on good regulatory practices is expansive but is not new. Chapter 28 builds upon similar provisions in FTAs such as TPP-11 and the Canada-EU CETA. The general idea is to make regulations less burdensome on trade. Although not the first time that GRPs are addressed in an FTA, the USMCA's chapter on good regulatory practices "appears to be the most comprehensive attempt to address this issue in any trade agreement the United States has signed."

Reducing Regulatory Burden on Trade is Generally a Worthy Treaty Objective

On their face, regulatory cooperation and deregulation initiatives endorse principles that encourage the proper functioning of a government. Principles such as increased transparency and public participation, clear central coordination, evidence-based regulation (with analysis of costs and benefits), accountability under the law, and impartiality are not adequately integrated into the administrative law practices of most countries in Africa and should be welcomed. Moreover, as rightly noted in Article 28.2 of the USMCA, the implementation of government-wide practices to promote regulatory quality through greater transparency, objective analysis, accountability, and predictability "can facilitate international trade, investment, and economic growth, while contributing to each Party's ability to achieve its public policy objectives (including health, safety, and environmental goals) at the level of protection it considers appropriate" and "can support the development of compatible regulatory approaches among the Parties, and reduce or eliminate unnecessarily burdensome, duplicative, or divergent regulatory requirements.

Good regulatory practices provision in FTAs raise a number of issues and concerns for most developing countries including concerns about risks associated with de-regulation, encroachment on domestic regulatory space, the de-prioritization of the precautionary principle, regulatory chill, and the cost of implementation.

GRPs Provisions in FTAs Exceed the Obligations in AGOA

AGOA does not explicitly address GRPs. However, broadly conceived, AGOA's rule of law requirements encompasses GRPs.[10] AGOA eligibility requirements are set out in Section 104 of the AGOA legislation **(**Public Law 106/200). Under Article 104 (A)(1)(B) of AGOA, the U.S. President is authorized to designate a SSA country as an eligible SSA country if the President determines that the country has as established, or is making continual progress toward establishing – "the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law."

Risk of Impermissible Encroachment on Domestic Regulatory Space

To be sure, some provisions of the USMCA chapter on GRPs are clearly aimed at preserving domestic regulatory space but do not go far enough. For example, Article 28.2.3. states emphatically that Chapter 28 does not prevent a Party from: (a) pursuing its public policy objectives (including health, safety, and environmental goals) at the level it considers to be appropriate; (b) determining the appropriate method of implementing its obligations in this Chapter within the framework of its own legal system and institutions; or (c) adopting good regulatory practices that supplement those that are set out in this Chapter.[11] Despite the

[10] 19 U.S.C. §§ 3701-3739 (2006).
[11] Article 28.2.3.

provision of Article 28.2.3., critics believe that regulatory cooperation and harmonization provisions in FTAs have the potential to "undermine the precautionary approach to protecting the public" and "will make it harder to protect the public and environment in the future."[12]

Increased Cost and Increased Administrative Burden for Developing Countries

GRPs provisions in FTAs impose additional costs on governments through mandatory regulatory impact assessment, mandatory cost-benefit assessments, and other requirements. In some recent FTAs, chapters dedicated to good regulatory practices enjoin signatories to follow the principles that already underlie U.S. administrative law and the APEC-OECD joint regulatory checklist. Because GRP provisions reflect principles and practices that are already in place in developed countries, GRPs provisions in FTA impose substantial costs on developing countries who frequently have to implement necessary reforms from scratch. There are also genuine fears that GRPs provisions create new hurdles for governments and regulators and create additional opportunities for lobbyists to shape regulations at the outset.[13]

Sovereignty Concerns. Export of U.S. Trade Ideology

Transparency, risk assessments, evidence-based regulation and public participation in rule-making and administrative processes can be of benefit to small businesses and vulnerable groups that are frequently left out of decision-making processes in many countries in Africa. However, critics worry that GRP provisions in FTAs effectively "internationalise a 'light touch', trade-biased regulatory methodology favoured by corporations and their lobbyists."[14] According to a report by the Canadian Center for Policy Alternatives:

> "Good regulatory practices" (GRP) are … at once, an ideology of how and when government should intervene in the market (to protect people or nature, for example), a set of institutional arrangements for regulating in a pro-business way and in cooperation with other governments, and a new privileged space for multinational corporations to intervene in national rule-making, frequently and at the earliest stages.[15]

A light touch approach to regulation could potentially undermine values enshrined in the Kenyan Constitution. To be sure, Article 28.2.3 of the USMCA which affirms that Chapter 28 "does not prevent a Party from: (a) pursuing its public policy objectives (including health, safety, and environmental goals) at the level it considers to be appropriate" is a good start but can be improved upon. A provision in the Canada-EU CETA that is more explicit and calls for the preservation of standards already enshrined in several the WTO Agreements should be considered and possibly improved upon. Article 21.2 of the Canada-EU CETA provides:

> 1. The Parties reaffirm their rights and obligations with respect to regulatory measures under the TBT Agreement, the SPS Agreement, the GATT 1994 and the GATS.
>
> 2. The Parties are committed to ensure high levels of protection for human, animal and plant life or health, and the environment in accordance with the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and this Agreement.

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[12] Sharon Anglin Threat, FAQ - Regulatory Cooperation, Harmonization and "Good Regulatory Practices" in USMCA. January 16, 2019. https://www.iatp.org/new-nafta-grp

[13] IATP. "New NAFTA": New red tape for regulators November 19, 2018. https://www.iatp.org/blog/new-nafta-new-red-tape

[14] IATP. "New NAFTA": New red tape for regulators November 19, 2018. https://www.iatp.org/blog/new-nafta-new-red-tape

[15] https://www.tni.org/files/publication-downloads/international_regulatory_cooperation-web.pdf

Entrenchment of Corporate Rule

Big businesses favor regulatory cooperation because it potentially provides the opportunity to prevent the adoption of regulations in the first place, rather than challenging them after the fact through drawn-out legal processes. The U.S. Chamber of Commerce believes that "[r]egulation and compliance frequently top the list of risks facing businesses globally" and that "international regulatory cooperation is vital to align trade, regulatory, and competition policy in support of open and competitive markets."[16] Critics fear that with the international investment arbitration regime in crisis, businesses are trying to make-up for the loss of ISDS by taking steps to proactively prevent the adoption of regulations in the first place.[17] In this regard, Article 28.14 of the USMCA is a concern and provides:

Article 28.14: Suggestions for Improvement

> Each Party shall provide the opportunity for any interested person to submit to any regulatory authority of the Party written suggestions for the issuance, modification, or repeal of a regulation. The basis for those suggestions may include, for example, that, in the view of the interested person, the regulation has become ineffective at protecting health, welfare, or safety, has become more burdensome than necessary to achieve its objective (for example with respect to its impact on trade), fails to take into account changed circumstances (such as fundamental changes in technology, or relevant scientific and technical developments), or relies on incorrect or outdated information.

Under the USMCA, Parties are also required to provide a mechanism for the retrospective review of their regulations.

Article 28.13: Retrospective Review

> 1. Each Party shall adopt or maintain procedures or mechanisms to conduct retrospective reviews of its regulations in order to determine whether modification or repeal is appropriate. Retrospective reviews may be initiated, for example, pursuant to a Party's law, on a regulatory authority's own initiative, or in response to a suggestion submitted pursuant to Article 28.14 (Suggestions for Improvement).

Precautionary Approach v. Science-based risk assessment

To critics, the so-called good regulatory practices are dangerous as they "gradually chip away at what little room governments have left to regulate in a precautionary way."[18] In this regard, the provisions in FTAs that call for science-based risk assessment and for risk management are viewed with suspicion. According to a report by the Canadian Center for Policy Alternatives:

> One important tenet of "good regulatory practice" is that regulation should be based on "risk management", meaning that its objective is limited, and it is justified by currently available scientific evidence. As the risk-based regulatory framework has evolved, it has come to also require regulators to minimize the costs, or "burdens" on business, consider how they might regulate in ways that encourage trade and innovation, and adopt international standards or practices wherever possible. These tenets attempt to strip political or ethical considerations from government rule-making and are, in a fundamental way, directly opposed to the precautionary principle, which states: "*When an activity raises threats of harm to human health or the environment, precautionary measures should be taken* ***even if some cause and effect***

[16] Promote Good Regulatory Cooperation. https://www.uschamber.com/issue-brief/promote-global-regulatory-cooperation

[17] IATP. "New NAFTA": New red tape for regulators November 19, 2018. https://www.iatp.org/blog/new-nafta-new-red-tape

[18] Bund (2019), International Regulatory Cooperation and the Public Good.

relationships are not fully established scientifically. *In this context the proponent of an activity, rather than the public, should bear the burden of proof*" (emphasis added).[19]

3.0 Key Recommendations

Assess the Full Costs and Benefits of a Good Regulatory Practices Provisions

Given wide disparities in their levels of development and major differences in their administrative laws and practices, GRPs provisions in a Kenya-U.S. FTA are bound to impose significant cost on Kenya and would probably require Kenya to "upgrade" its administrative laws and policies. It is recommended that the Kenyan government carefully assess the costs and benefits of binding commitments on regulatory cooperation in an FTA with the U.S. In this regard, the Kenyan government can learn a thing or two from the USTR's negotiating objective relating to the environment. One of the U.S's negotiating objectives relating to the environment is "to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures, **including obligations that require changes to United States laws or regulations or that would affect the implementation of such laws or regulations**."[20] To the extent that the values that underpin the GRPs provisions are important, and many are, it is recommended that the Kenyan Government consider implementing unilateral reforms rather than taking on binding commitments in FTAs.

Limit the Scope of any Regulatory Chapter

Should the Kenyan government consider a GRPs chapter to be inevitable in a FTA with the U.S., effort should be made to limit the scope of such a chapter. First, it is suggested that the scope of such a chapter be limited to regulatory cooperation activities and should not extend to the legislative or procedural aspects of domestic regulatory reform. Second, it is advised that cooperation be on a voluntary basis. For example, Article 21.2.6 of the Canada-EU CETA states explicitly that "[t]he Parties may undertake regulatory cooperation activities on a voluntary basis." For greater certainty, Article 21.2.6 of the Canada-EU CETA provides that "a Party is not required to enter into any particular regulatory cooperation activity, and may refuse to cooperate or may withdraw from cooperation."[21]

Careful Review of Negotiating Text. Safeguard Domestic Regulatory Space

Provisions on GRPs are often couched in vague languages and their meaning are not always very clear. Consider Article 28.4.1 of the USMCA (Internal Consultation, Coordination, and Review) under which the Parties recognize that internal processes or mechanisms providing for consultation, coordination, and review among domestic authorities in the development of regulations can increase regulatory compatibility among the Parties and facilitate trade. Article 28.4.1 goes on to provide:

> [E]ach Party **shall adopt or maintain those processes or mechanisms to pursue, among others, the following objectives**:
>
> (a) promoting government-wide adherence to good regulatory practices, including those set forth in this Chapter;
>
> (b) identifying and developing improvements to government-wide regulatory processes; (c) identifying potential overlap or duplication between proposed and existing regulations, and preventing the creation of inconsistent requirements across domestic authorities;

[19] https://www.tni.org/files/publication-downloads/international_regulatory_cooperation-web.pdf
[20] TPA-15, Section 102(a)(7); 19 USC 4201(a)(7). Emphasis added.
[21] CETA, Article 21.2.6.

(d) **supporting compliance with international trade and investment obligations**, including, as appropriate, the consideration of international standards, guides, and recommendations;
(e) promoting consideration of regulatory impacts, including burdens on small enterprises of information collection and implementation; and
(f) **encouraging regulatory approaches that avoid unnecessary restrictions on competition in the marketplace**. (Emphasis added)

The meaning and implication of Articles 28.4.1 (d) and (f) is not clear and could be highly contested under Articles 31 and 32 of the Vienna Convention on the Law of Treaties which codifies customary international law rules on treaty interpretation.

Given the risk of impermissible encroachment on domestic regulatory space, it is imperative that the Kenyan government take extra care to ensure that its domestic regulatory space is preserved in any GRPs chapter. There are many options and tools for preserving domestic policy space in a chapter on GRP and the Kenyan government is advised to study and weigh all options. For example, in the Canada-EU CETA, the Parties: (i) explicitly reaffirm their rights and obligations with respect to regulatory measures under several WTO agreements; (ii) express their commitment to ensure "high levels of protection for human, animal and plant life or health, and the environment;" and (iii) affirm that regulatory cooperation will not limit the ability of each Party to carry out its regulatory, legislative and policy activities.

GRP Obligations Should not be Enforceable

Given the different levels of development between the U.S. and Kenya, it is advisable that provisions on GRPs should not be subject to any dispute settlement mechanism. In the USMCA, obligation relating to regulatory cooperation is subject to dispute settlement under chapter 31. In the TPP-11, a similar provision is not subject to dispute settlement. Article 25.11 of the TPP-11 states that the Parties do not have recourse to dispute settlement "for any matter arising under" the regulatory coherence chapter. The Canada-EU CETA does not include a provision on dispute settlement at all in its regulatory cooperation chapter.

Review Negotiation Objectives

Given the many implications of a GRPs chapter for the Kenyan government and for Kenyan citizens, it is shocking that the Kenya's negotiating objective is silent on the issue. It is recommended that the Kenyan government revise its negotiating objective as regards regulatory cooperation and good regulatory practices.

Good Regulatory Practices

Kenya (Negotiating Objectives)	**United States (Negotiating Objectives)**
---	- Obtain commitments that can facilitate market access and promote greater compatibility between U.S. and Kenya regulations, including by: • Ensuring transparency and accountability in the development, implementation, and review of regulations, including by publication of proposed regulations;

	• Providing meaningful opportunities for public comment in the development of regulations; • Promoting the use of impact assessments and other methods of ensuring regulations are evidence-based and current, as well as avoiding unnecessary redundancies; and • Applying other good regulatory practices such as internal coordination mechanisms, and securing commitments to ensure transparency as well as meaningful opportunities to provide comments to expert regulatory advisory committees.