



## VIRTUAL PUBLIC ENGAGEMENT IN AGENCY RULEMAKING

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Agencies use many different processes to make rules. For substantive rules, they are generally required to give interested persons an opportunity to participate in rulemakings, typically through submission of written comments or, in some cases, through other forms of public engagement such as public meetings.<sup>1</sup> Agencies might also choose to conduct additional public engagement, even when not required to do so by law. ACUS has repeatedly recommended that agencies consider additional methods for engaging with the public in appropriate circumstances, such as by undertaking targeted outreach and holding meetings with groups that—although affected by agency rules—might not otherwise submit comments.<sup>2</sup> Traditionally, public engagement efforts have often involved in-person meetings. But many agencies have developed new techniques for optimizing public engagement through virtual platforms in recent years, particularly in response to the COVID-19 pandemic.

Effective public engagement in the rulemaking process can promote public participation and increase transparency and accountability, thereby building trust and credibility.<sup>3</sup> Public engagement can also help agencies obtain more comprehensive information, improving the quality of their rules. To effectively engage with the public, agencies often must undertake public outreach and education to overcome barriers to participation, which may include geographical constraints, resource limitations, and language or other barriers. Previous ACUS projects have identified some best practices for overcoming such barriers. ACUS also addressed the potential for virtual platforms to reduce barriers in other contexts, including adjudication.<sup>4</sup> This project addresses the potential for virtual tools to broaden and improve participation in agency rulemaking.

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<sup>1</sup> 5 U.S.C. § 553.

<sup>2</sup> Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146, 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking*, 82 Fed. Reg. 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (July 19, 1976); Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973).

<sup>3</sup> Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924 (2009).

<sup>4</sup> Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in E-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011).

Of course, it may not be practical or beneficial for agencies to organize meetings or provide opportunities for oral presentation for every rulemaking. And even where a public meeting is legally required or an agency chooses to hold a public meeting, it may not be optimal or practical for the meeting to be conducted virtually or in a hybrid format. In such cases, agencies can explore other options for promoting concerns surrounding transparency and accountability, such as livestreaming the meeting or providing access to a recording or transcript after the fact.

ACUS has previously addressed the circumstances in which agencies should consider conducting meetings as part of a rulemaking, and this report does not revisit the subject. Instead, this report examines best practices for using virtual platforms in those circumstances in which an agency decides some kind of meeting or opportunity for oral presentation would be useful or when the law requires one. It also identifies best practices for agencies to adequately ensure their virtual sessions are accessible and structured and to allow for meaningful engagement opportunities.

After providing some background on the rulemaking process and ACUS's previous projects regarding public participation in rulemaking, this report will examine logistical and procedural elements of these virtual meetings which agencies should consider. The conclusions for this report were informed by agency and stakeholder interviews, review of *Federal Register* notices, observation of virtual public engagements related to ongoing rulemakings, ACUS's Interagency Roundtable, and academic research. An example of referenced notices and list of interviewees will be included as an Appendix in the final version of this report.

## BACKGROUND ON PUBLIC PARTICIPATION IN RULEMAKING

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The Administrative Procedure Act (APA) establishes default procedures for agency rulemaking. There are few requirements for procedural rules, interpretive rules, and policy statements. For substantive rules, however, agencies usually must publish a general notice of proposed rulemaking (NPRM) in the *Federal Register*. Then, agencies must “give interested persons an opportunity to participate” in the rulemaking through “submission of written data, views, or arguments with or without opportunity for oral presentation.”<sup>5</sup> Agencies are required to

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<sup>5</sup> 5 U.S.C. § 553(c), (e).

consider all “relevant matter presented” and, when adopting a final rule, respond to “significant” comments received.<sup>6</sup>

Statutes, executive orders, and agency rules supplement or supplant these default procedures in many circumstances; and meetings, hearings, and opportunities for oral presentation are provided in many rulemakings across the government. For example:

- ❖ Statutes require a few agencies, including the Department of Agriculture and the Food and Drug Administration, to use formal rulemaking in some circumstances. Formal rulemaking involves an on-the-record hearing.<sup>7</sup>
- ❖ Agencies such as the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Federal Trade Commission, conduct public meetings or hearings under hybrid-rulemaking statutes.<sup>8</sup>
- ❖ When agencies issue rules which will have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires them to ensure that small entities are given an opportunity to participate in the rulemaking such as through the “conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks.”<sup>9</sup> The Act also requires covered agencies—including the EPA and OSHA—to “collect advice and recommendations” from representatives of small entities, which they accomplish by convening Small Business Advocacy Review Panels to hear comments from small entities.<sup>10</sup>
- ❖ Some agencies, such as the Department of Education, are required to use negotiated rulemaking in certain contexts.<sup>11</sup> In negotiated rulemaking, agency and public representatives meet to develop and reach consensus on a proposed rule.<sup>12</sup> Negotiated rulemaking committees are generally subject to the requirements of the Federal Advisory Committee Act (FACA).<sup>13</sup> FACA requires that committee meetings be open to the public and permits interested persons “to attend, appear

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<sup>6</sup> *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2014).

<sup>7</sup> 5 U.S.C. § 556; *see e.g.*, 7 C.F.R. Part 1, Subpart P.

<sup>8</sup> *E.g.*, 42 U.S.C. § 7607(d).

<sup>9</sup> 5 U.S.C. § 609(a)(4).

<sup>10</sup> 5 U.S.C. § 603(d)(2).

<sup>11</sup> *E.g.*, 20 U.S.C. § 1098a.

<sup>12</sup> 5 U.S.C. § 561–570a.

<sup>13</sup> 5 U.S.C. § 565(a)(1).

before, or file statements with any advisory committee.”<sup>14</sup> Many multi-member boards and commissions are subject to the Government in the Sunshine Act, which requires open meetings on many rulemaking and other matters.<sup>15</sup>

- ❖ By executive order, agencies are required to consult state, local, and/or tribal governments when undertaking rulemakings that significantly affect them.<sup>16</sup>
- ❖ The Office of Information and Regulatory Affairs conducts listening sessions under Executive Order 12,866.<sup>17</sup>
- ❖ Agencies’ rules on rulemaking might expand requirements.<sup>18</sup> For example, certain rules promulgated under the Consumer Product Safety Act and Flammable Fabrics Act require the Consumer Product Safety Commission to “give interested persons an opportunity for the oral presentation of data, views or arguments in addition to the opportunity to make written submissions.”<sup>19</sup> The Federal Emergency Management Agency (FEMA) prioritizes offering opportunities for public participation in rulemaking, even for matters not subject to the notice-and-comment procedures. FEMA’s rules also indicate that the Administrator “will employ additional methods of inviting public participation,” which may include publishing an advanced NPRM; convening conferences, forums, or panels; and engaging in direct outreach.<sup>20</sup> The Department of Housing and Urban Development issued rules on rulemaking stating oral presentations may be provided for. When used, the transcript or minutes of the meeting must be filed with the docket.<sup>21</sup>

Agencies may adopt procedures for particular rulemakings, which often involve additional opportunities for public participation. As ACUS has previously noted, “[b]y providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their

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<sup>14</sup> 5 U.S.C. § 1009.

<sup>15</sup> 5 U.S.C. § 552b.

<sup>16</sup> *E.g.*, Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

<sup>17</sup> 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>18</sup> *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2020-1, *Rules on Rulemakings*, 86 Fed. Reg. 6613 (Jan. 22, 2021).

<sup>19</sup> 16 C.F.R. § 1052.1.

<sup>20</sup> 44 U.S.C. § 1.4(b), (d).

<sup>21</sup> 24 U.S.C. §§ 10.10, 10.12, 10.14.

rules.”<sup>22</sup> Those additional instances for public participation may include meetings or opportunities for oral presentation.<sup>23</sup> As mentioned, some agencies choose to use negotiated rulemaking or convene federal advisory committees to develop rules. Consistent with prior ACUS recommendations, some agencies organize public hearings and listening sessions. These forms of public engagement can be particularly useful where agencies expect they would receive information or perspectives different from those raised in written comments, and especially from communities and members of the public who have been traditionally underrepresented in the rulemaking process.

Most recently, on April 11, 2023, President Biden issued Executive Order 14,094, *Modernizing Regulatory Review*, affirming agencies’ promotion of opportunities for “equitable and meaningful participation by a range of interested or affected parties, including underserved communities.” The Order further mandates that agencies undertake proactive engagement with those parties, including by utilizing alternative platforms and media, and suggests that the Office of Information and Regulatory Affairs issue guidance or tools to modernize the notice-and-comment process.<sup>24</sup>

As with any form of public engagement, agencies must consider the potential benefits and costs of holding a meeting, hearing, or opportunity for oral presentation in a particular rulemaking. Such events may allow agencies to obtain more comprehensive information and provide democratic legitimacy for agency rulemaking. (There is a longstanding debate, beyond the scope of this report, regarding the precise purpose of public participation in agency rulemaking.<sup>25</sup>) Compared with written comments submitted through the notice-and-comment procedures, meetings for oral presentations may foster better dialogue between agencies and interested persons; they may also allow for more diverse views to be presented and provide an opportunity for those who feel they are better at communicating orally than in a written format to voice their opinions. Public engagement sessions also offer agencies an additional opportunity to explain their reasoning behind a proposed rule—an important factor if the rule is controversial or complicated—and

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<sup>22</sup> Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146, 2146 (Feb. 6, 2019).

<sup>23</sup> For the purposes of this report, the term “oral presentation” will be used, but should be understood to encompass public hearings, listening sessions, panels, and the like.

<sup>24</sup> 88 Fed. Reg. 21,879 (Apr. 11, 2023).

<sup>25</sup> *E.g., Mass Comments in Administrative Rulemaking*, Essay Series, THE REGUL. REV. (Dec. 13, 2021), <https://www.theregreview.org/2021/12/13/mass-comments/>.

provide information and guidance on the process itself, such as how to go about filing comments on Regulations.gov.

On the other hand, there are also costs associated with facilitating meetings. At a practical level, this includes staff time spent preparing for the meeting, ensuring adequate outreach and notice is provided, traveling to the meeting (especially if it is held in the field), managing the meeting itself, preparing a transcript or recording of the meeting, and, if applicable, responding to substantive comments. At a broader level, some have also raised concerns that agencies risk creating unreasonable expectations or incorrect assumptions about agency rulemaking—for example, that rulemaking is essentially a public vote. Whether the benefits of holding a public event in a particular rulemaking are likely to justify the costs requires agencies to weigh certain factors including the interests affected by a proposed rule, the stage of the rulemaking, and the types of questions at issue.<sup>26</sup> Many people may be able to offer useful input on value and policy issues and matters of personal experience, but broad public engagement may be less useful for highly technical issues.

For many decades, policymakers have explored options for using technology to reduce logistical barriers that inhibit public participation in rulemaking. Most notably, the E-Government Act of 2002<sup>27</sup> established the eRulemaking Program. The program—currently managed by the General Services Administration—develops and maintains Regulations.gov. Past ACUS projects have focused on ways to use technology to improve submission of written comments and raise awareness of ongoing rulemakings.<sup>28</sup>

Policymakers have also considered ways to use audio and video transmission to expand public engagement. As early as 1972, ACUS adopted a recommendation regarding the radio or television broadcast of rulemaking proceedings such as public hearings and oral presentations.<sup>29</sup>

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<sup>26</sup> *But see* K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. 315 (2018).

<sup>27</sup> Pub. L. No. 107-347, 116 Stat. 2899.

<sup>28</sup> *See* Admin. Conf. of the U.S., Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Dockets*, 84 Fed. Reg. 2143 (Feb. 6, 2019) (“The purposes of the E-Government Act of 2002 are to ‘improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency,’ and to ‘enhance public participation in Government by electronic means, consistent with [the Administrative Procedure Act].”); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in E-Rulemaking*.

<sup>29</sup> Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973).



The growth of online video meeting platforms in the 21<sup>st</sup> century opened new opportunities for public engagement. The COVID-19 pandemic clearly marked an increased usage of such platforms as humans and workforces around the globe were forced to move online. While some agencies indicated they used an online video meeting platform to conduct some public hearings or offer oral presentations before the pandemic, a significant amount only started doing so, or prioritized its use, because of the pandemic.

Virtual meetings are a way for agencies to broaden their reach and impact, particularly among groups and communities outside of the—typically—Washington, D.C., area. The Office of Management and Budget’s Office of Information and Regulatory Affairs addressed this topic in a listening session on “Opening the Federal Regulatory Process to More Voices” in November 2022.<sup>30</sup> Key takeaways included expanding access to participatory rulemaking, improving guidance on the use of other participatory methods, and increasing broader community reach.

While members of the public and other interested stakeholders always have the opportunity to submit written comments, the visual aspect of in-person or video participation may generate more trust and accountability among participants who might otherwise question whether the agency actually received or truly considered their comment.<sup>31</sup> Virtual meetings, therefore, can also be an effective way for agencies to hear views on a rulemaking that the agency would not otherwise obtain through written comments or even an in-person meeting, including views from communities and individuals that have been traditionally underrepresented in the rulemaking process. Certain aspects of virtual meetings also support the accessibility of public meetings. For example, most platforms used for virtual meetings are equipped with automated closed captioning. Virtual meetings can also result in time and cost savings for agencies. Instead of holding multiple meetings on the same topic in venues around the country, for example, agencies can hold a single virtual meeting, saving time and costs associated with travel. With no need to reserve meeting spaces or attend to in-person participants, virtual meetings can also be logistically simpler. This can be

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<sup>30</sup> *Opening the Federal Regulatory Process to More Voices: OIRA to Hold Open Government Engagement Session This Month*, EXEC. OFF. OF THE PRESIDENT (Nov. 7, 2022), available at <https://www.whitehouse.gov/omb/briefing-room/2022/11/07/opening-the-federal-regulatory-process-to-more-voices-oira-to-hold-open-government-engagement-session-this-month/>.

<sup>31</sup> *See In-Person Meetings: When (and Why) They Make Sense*, FELLOW (Mar. 7, 2022), <https://fellow.app/blog/meetings/when-and-why-an-in-person-meeting-would-make-more-sense/#trust>. See also *Goldberg v. Kelly*, 397 U.S. 254 (1970), for a comparative adjudication analysis of written versus verbal participation.

particularly beneficial for agencies that wish to broaden engagement but have limited staff, funds, or time to prepare.

However, in-person meetings might also offer other benefits that virtual video participation might not. Virtual public engagement sessions might not always be prudent or applicable in certain instances. It is without a doubt that these virtual platforms have greatly expanded agencies' reach and impact. More members of the public from more diverse backgrounds and locations are able to attend public hearings or listening sessions. However, there were concerns among some agencies about virtual sessions lacking some of the spontaneity and ability for networking or follow-up that can be found at in-person events. Agencies that deal with more specialized or demographic-specific rules, such as the Department of Interior or Small Business Association, indicated that in-person meetings might be preferable when the locale of those affected is in a finite area, for example. Many interviewees expressed hesitancy at transitioning to hybrid events, primarily due to technological concerns. And the issue was also raised that the technology used for conducting hybrid meetings innately creates an imbalance where those in the room are more easily and likely to dominate conversations. Imagine a listening session on Atlantic crustacean catching were to take place in Washington, D.C., for example, where lobbying groups are prominent—they are more likely to attend in-person events than, say, the citizen in Maine affected by stricter lobstering rules.<sup>32</sup> Other technology concerns may also arise with virtual components. For example, a platform's automated closed captioning, although generally helpful, might not be accurate due to poor audio quality or overly technical language which the program misinterprets.

As a compromise between purely virtual and purely in-person meetings, agencies might instead opt for hybrid meetings in which members of the public can choose to participate remotely or in person. Hybrid meetings allow in-person participants to connect with each other, have the face-to-face interaction, but also include non-local participants in a remote setting. They require a more technologically robust infrastructure, however, which can lead to complications causing one group or the other to have a different participation experience. Successful hybrid meetings ensure that in-person attendees can hear and see virtual attendees and vice versa. If materials are presented, they must be accessible to both types of attendees. Hybrid meetings also pose challenges on balancing participant management, so agencies using this format should consider how they plan

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<sup>32</sup> See also, e.g., Cary Coglianese, *Weak Democracy, Strong Information: The Role of Information Technology in the Rulemaking Process* (2007), available at <http://papers.ssrn.com/abstract=961641>.

to manage attendees. Some of the agencies interviewed indicated that they do not think the current technology is adequate enough to really provide equal participation opportunities for remote and in-person participants at hybrid meetings.

When agencies decide to provide an opportunity for oral presentation in a particular rulemaking, they should consider whether it would be best to hold the event in person, virtually, or in a hybrid format. Because virtual meetings provide their own unique challenges in terms of logistics, notice, accessibility, and record maintenance, agencies must also consider how to conduct virtual or hybrid events effectively and formulate internal guidelines on how these meetings should be conducted. Relevant considerations are discussed in the following sections.

As previously discussed, agencies might use a virtual component for oral presentation through public hearings, listening sessions, or the like. When they have decided to do so, they need to consider whether the meeting should be coordinated with other offices, the time of the meeting, the platform used, and the platform's ease of use (by both the agency and public participants). Agencies should also make clear throughout the process the agency's reason for offering an opportunity for virtual oral presentation: Is it to solicit input, provide educational material, or something else? Identifying and communicating the purpose of the meeting and the agency's goals to participants both before and at the start of the meeting can go a long way to ensuring virtual oral presentations are successful and meaningful.

### *Purpose*

Agencies use virtual engagements at many stages of the rulemaking process and to obtain different kinds of public input. While many agencies use virtual engagement during the notice-and-comment period of a rulemaking to supplement solicitation of written submissions, they might also use virtual engagements to determine whether there is a need for a proposed rule, what matters or issues the agency should focus on, or how the agency can best provide information to the public for the purposes of meaningful engagement. ACUS has previously studied the potential role of agency regulatory plans in promoting public engagement on the agency's rulemaking initiatives and identifying issues and opportunities for public participation.<sup>33</sup> These types of public meetings might aid agencies in learning how they can better help affected groups to understand the proposed rule or the rulemaking process in general.

Agencies also use virtual engagements to accomplish different goals. First, agencies often use virtual engagements to educate the public, explaining the rule and reasoning behind a proposed rule and explaining how to submit comments on Regulations.gov. This occurs more frequently with virtual engagements because the broader audience reached likely involves people who do not regularly engage with notice-and-comment rulemaking—a key distinction from in-person attendees who are more likely to be familiar with the rulemaking process. Second, virtual

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<sup>33</sup> See, e.g., Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 35–37, 50–52, 61–62 149, 157–58 (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.).

engagements provide an opportunity for members of the public to share their views or ask questions.

Some advocate groups interviewed for this project indicated that separating educational sessions from listening sessions might provide a more efficient use of time. Tailoring an event for the specific purpose of educating the public about a proposed or contemplated rule and the process of submitting comments on Regulations.gov means agencies can present on and prepare the public for the best ways to have their voices heard. This also assuages any frustration by stakeholders who, for example, may already be familiar with Regulations.gov but spend a significant portion of a listening session hearing about how to submit a written comment. Devoting time to explaining a rule, the reasons behind it, and the rulemaking process itself might be necessary, but then it should also balance with time available for public comment.<sup>34</sup> Another practice would be to separate educational sessions from oral presentations sessions and have them be distinct meetings. Although potentially more work for the agency, it would allow for more dedicated time for public comments and also ensure attendees are better prepared to meaningfully contribute (albeit, this assumes you have overlapping participants at both sessions).

There is no one-size-fits-all approach, and the appropriate approach might vary from agency to agency and rulemaking to rulemaking. Participants themselves are likely to have different preferences. Some participants might appreciate the explanation of the rule and a demonstration of how to submit written comments; others might get frustrated that half of a “listening session” is occupied by agency members presenting. It is incumbent on agencies to assess who their audience for a particular engagement is and how those participants can best be benefitted by attending.<sup>35</sup> Communicating the purpose and goal of the virtual meeting to participants beforehand and at the beginning of the meeting manages the participants’ expectations and further bolsters trust and accountability in the process.

### *Intra-agency Coordination*

This goal assessment then highlights an increasingly prevalent topic pertaining to the broader aspects of virtual public engagement in rulemaking: targeted outreach and intra-agency

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<sup>34</sup> Cynthia R. Farina et al, *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 383 (2011).

<sup>35</sup> Exec. Order No. 14,094 specifically urges agencies to conduct proactive outreach and use alternative platforms and media to more broadly reach interested and historically underrepresented parties.

coordination. The agency’s intent in holding a virtual or hybrid event, as opposed to an in-person one, may be to expand public engagement. Among several interviewees—agencies and stakeholders participants alike—the goal of targeted outreach ensures that the people affected by a rule or who represent community-wide interests are invited to participate. This also enables agencies to tailor their sessions accordingly based on prospective attendees. Many agencies have some form of an “Office of Public Engagement” and a communications or public affairs office. Successful targeted outreach occurs when these offices and the team overseeing the rulemaking are able to collaborate on what that outreach plan should look like. The amount of “siloeing” between these offices came up often in interviews. The notion of collaboration across these offices either was not considered or, admittedly, could be vastly improved upon. In identifying a virtual meeting’s purpose, an agency must ensure these offices are utilizing their collective knowledge so that the affected stakeholders are informed and properly prepared to participate.

### *User Experience Considerations*

Similar to the factors considered to determine which platform agencies might want to use—discussed later—agencies should also consider factors for when to hold virtual or hybrid meetings. The biggest consideration among these is the technological capabilities of the agency and technological capabilities of participants. A virtual public engagement session is useless if audio, and video, are unintelligible, unreliable, or just plain bad. Additionally, technical issues will inevitably arise. As society has navigated the COVID-19 pandemic and a jump to online life, many have learned to troubleshoot those issues, but it behooves agencies to also ensure they have a technological expert available to assist them. Although three popular platforms have emerged during the course of the pandemic, Zoom became the fastest-growing video meeting platform and was widely adopted by many individuals and businesses. While most people nowadays are familiar with Zoom, they may be less familiar with or have less experience using Microsoft Teams and Cisco WebEx, which serves as a barrier to participation itself. Providing information on how best to access and interface with whatever tools an agency decides to use for purposes of public hearings, listening sessions, or meetings is also necessary. Agencies should also consider their target audiences and provide that information in another language when applicable. When it comes to accessibility and ensuring those affected by a potential rule or underrepresented groups are able to fully participate, agencies should utilize tools that also provide a dial-in option. Participants,

especially those in rural areas, might lack access to reliable and affordable broadband access to connect via laptop or a mobile application.<sup>36</sup>

When determining whether a virtual or hybrid format would be ideal, agencies consider the goal of the meeting—is it to educate the public or gain information; whether the rulemaking is significantly technical or requires explanatory material; who the target audience is; and whether there are budgetary constraints.<sup>37</sup> Virtual meetings have also allowed for quicker and safer planning by agencies for when there might be concerns about maintaining a physical space, unexpected inclement weather, or physical security.<sup>38</sup> While a hybrid type meeting may offer the greatest amount of reach and participant flexibility, there are unique technological concerns.<sup>39</sup> The right space and the right cameras, screens, microphones, and speakers are paramount if all participants are going to have an equal voice.

### *Time*

Stakeholders often express dissatisfaction with the timing of public meetings or listening sessions—many of which occur during regular business hours when many people are working.<sup>40</sup> Federal agencies should expand the availability of these meetings to include evening times and weekends, when members of the public are more likely to attend and have more flexibility.<sup>41</sup> This was a concern prior to the COVID-19 pandemic when public meetings were likely predominantly held in-person and continues in the virtual environment as well. It's unclear what considerations

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<sup>36</sup> Exec. Order No. 14,036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36,987 (July 14, 2021); Exec. Order No. 13,821, *Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America*, 83 Fed. Reg. 1507 (Jan. 11, 2018). The Internet for All Initiative was launched in 2022 by the Biden-Harris Administration and provides states and territories that sign on with “reliable high-speed Internet for less through the Broadband Equity Access and Deployment and State Digital Equity Planning Grant Programs.” More information on the Initiative can be found at <https://www.internetforall.gov>.

<sup>37</sup> *Virtual vs. Hybrid Events*, IEEE, <https://ieeemce.org/planning-basics/virtual-hybrid/virtual-vs-hybrid-events/> (last visited Mar. 23, 2023).

<sup>38</sup> *Live, Virtual or Hybrid Events—Which Approach is Best?*, NAT’L PRESS CLUB, <https://www.press.org/live-virtual-or-hybrid-events-which-approach-best> (last visited Mar. 22, 2023).

<sup>39</sup> Anna Linthicum, *Hybrid Events in 2023: What You Need to Know*, CVENT (Nov. 16, 2021), <https://www.cvent.com/en/blog/events/hybrid-events-what-you-need-know>.

<sup>40</sup> *See, e.g.*, Letter from James Goodwin, Senior Pol’y Analyst, Ctr. for Progressive Reform, to K. Sabeel Rahman, Assoc. Adm’r, Off. of Info. & Regul. Affs. (Dec. 2, 2022), available at <http://cpr-assets.s3.amazonaws.com/wp/uploads/2022/12/Letter-to-OIRA-re-Public-Participation-Reform-Final.pdf>; Lindsey Volz, *Making Public Meetings Accessible to All*, NAT’L LEAGUE OF CITIES, <https://www.nlc.org/article/2022/06/20/making-public-meetings-accessible-to-all/> (last visited Feb. 14, 2023); Matt Patston, *Yes, It Can Be Hard to Attend Public Meetings. No, It Shouldn’t Be.*, COMO MAGAZINE (June 23, 2017), <https://comomag.com/2017/06/23/yes-can-hard-attend-public-meetings-no-shouldnt/>. The issue was also raised by some interviewees.

<sup>41</sup> *E.g.*, Jackson Nichols, *Improving Public Engagement in the Regulatory Process*, THE REGUL. REV. (Apr. 20, 2023), <https://www.theregview.org/2023/04/20/nichols-improving-public-engagement-in-the-regulatory-process/>.

might be given to holding meetings at certain times other than staff scheduling and whether holding such meetings at more accessible times has affected attendance or the quantity or quality of feedback.

### *Platform*

Nowadays, most virtual meetings occur on one of three platforms: Zoom, Microsoft Teams, or Cisco WebEx. The federal government uses all three. For various reasons, different agencies have chosen to use different platforms when engaging with the public. For example, the Department of Homeland Security (DHS) takes the position that Zoom does not provide adequate security for their purposes as compared to Microsoft Teams or WebEx. The agency, therefore, does not license or use the platform. This stance was adopted prior to the COVID-19 pandemic, during which such platforms underwent massive growth. Relatedly, Zoom for Government was subsequently developed when agencies and much of the world were forced to conduct business virtually. On the other hand, the White House has adopted the position that using Microsoft Teams for public engagement or even interagency meetings does not provide adequate security. The Executive Office exclusively uses and licenses Zoom for Government for such purposes. In instances where agencies such as DHS or its subagencies partner with the White House to host public events, one office must log in from the web version of the platform as a guest without hosting capabilities.

When contemplating which platform(s) to use for the purposes of rulemaking-related public meetings, agencies should confirm whether the platform they plan on using is easily accessible on mobile devices and ensure that members of the public have access to a dial-in phone number in case they do not have reliable access to the Internet. There are minimal differences regarding user experience of all three platforms, but, as discussed above, participants might be more familiar and comfortable with one platform over another. Agencies should test out and assess what platform(s) best suit their needs and the needs of their targeted audiences. For example, users might have to download the client application to their computer or might be required to set up an account. Tasks like these might prove difficult for those with less technological expertise and could prove harder if users are attempting to join from their phones. Agencies might want to compare various aspects of each platform as it relates to security, pricing, the ability to control what meeting attendees can see, participant and chat management, the quality of closed captioning services, whether streaming options are included, the amount of cloud storage for recordings, capabilities of sharing rulemaking-related content within the platform, and whatever other features suit their



needs while maintaining the maximum amount of accessibility by the public.<sup>42</sup>

### ***Participant Management***

At the front end, likely through the meeting’s notice in the *Federal Register*, agencies should lay out the “rules of engagement” for participants to manage expectations. Those guidelines should also be reiterated at the start of the meeting. They might include the agenda of the meeting, how individuals will be called on and in what manner and order, whether the participant must state their name, whether there will be a time limit for comments, whether participants should refrain from using the chat function if available, and how their comments will be included in the record.

Agencies must carefully plan meetings to help ensure that they will elicit the type of information sought. An agency can structure a meeting to generate open-ended dialogue, allowing participants the opportunity to raise their own concerns or issues. Alternatively, an agency can structure a meeting so that the agency’s priorities dictate the agenda or discussion topics. In instances of listening sessions or pre-rule meetings, the agency might receive “useful feedback on potential regulatory alternatives and elicit information through a process of interactive dialogue.” As previously discussed, agencies can further use these sessions to “educate participants and allow them to consider and respond to differing views, thereby informing decision-makers in the process,” allowing for new ideas and creative solutions to arise.<sup>43</sup> To elicit the desired information—and for it to actually be useful—agencies might also want to consider framing questions in ways that gauge participant feedback rather than having participants provide analyses on general topics.<sup>44</sup>

Virtual public meetings provide for easier participant and time management.<sup>45</sup> The platforms used are equipped with hand raising features, allowing a queue to form; hosts have the ability to mute or remove unruly participants; and time limits can be strictly enforced in a similar fashion. These platforms also offer a chat function, which can usually be disabled when organizing an event as a “webinar.” Agencies should indicate, if the chat function is available, whether they

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<sup>42</sup> E.g., Janette Novak & Rob Watts, *Webex vs. Zoom: Which is Best for Your Team?*, FORBES (Mar. 3, 2023), <https://www.forbes.com/advisor/business/software/zoom-vs-webex/>; Katherine Finnell, *Teams vs. Webex vs. Zoom: Comparing Collaboration Features*, TECH TARGET (OCT. 7, 2021), <https://www.techtarget.com/searchunifiedcommunications/feature/Teams-vs-Webex-vs-Zoom-Comparing-collaboration-features>.

<sup>43</sup> Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Agency Rulemaking*, 84 Fed. Reg. 2146, 2147 (Feb. 6, 2019).

<sup>44</sup> Farina et al., *supra* note 34 at 436–446.

<sup>45</sup> See, e.g., *How Local and State Governments Can Run Better Virtual Meetings* GOV’T TECH. (Nov. 11, 2020), <https://www.govtech.com/gov-experience/how-local-and-state-governments-can-run-better-virtual-meetings.html>.

will be monitoring the chat, whether it will be incorporated into the transcript or record, or if participants should refrain from using the chat.

The rule and its related information can also be made readily available through these platforms (in addition to being provided beforehand). For example, Microsoft Teams allows for document integration. Other platforms might offer a way to link materials or provide a chat feature for hosts to communicate with participants.

Lastly, agencies might want to consider who is managing the participants. While most of the agencies interviewed indicated a staff member from their office monitors the queue, one agency stated they utilize a third-party operator to manage the queue of those wishing to speak. Although this is a separate cost and service, the agency felt it freed them up to actively listen to oral presenters and proffered a sense of impartiality by having a third person run the queue.

## PROCEDURAL & CONTENT CONSIDERATIONS

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When informing members of the public about opportunities for oral presentation in a virtual setting, agencies need to consider not just the requirements of aspects like notice and accessibility, but how those and other aspects can best be met by the agency. This might require agencies to expand their policies regarding the publication of the virtual meeting; the accessibility of information prior to, during, and after the meeting; and the retention of a more robust record—a facet that can be more easily met when utilizing a virtual component.

### *Notice & Publicity*

#### 1. *The Federal Register*

When agencies engage in notice-and-comment rulemaking, they must provide the public with adequate notice of a proposed rule so as to provide a “meaningful opportunity to participate.” Agencies publish NPRMs in the *Federal Register* but might also provide notice through other outlets such as their websites and social media and through direct outreach to interested persons. The *Federal Register* notices associated with NPRMs are categorized under Proposed Rules and they must include, among other things, “the time, place, and nature of public rulemaking

proceedings.”<sup>46</sup> Other statutes, such as the Government in the Sunshine Act and FACA, impose additional notice requirements in some circumstances. Agencies might also host sessions for oral presentation of public comment before an NPRM is issued, or during or after its public comment period.

Information related to listening sessions, publicly open advisory meetings, or meetings for other public comments are typically listed in the *Federal Register* and categorized as Notices. The Administrative Committee of the Federal Register has adopted requirements for publishing content in the *Federal Register*. For documents falling under the Notices category (such as meetings and listening sessions), appropriate document headings, the authority citation, and content must be included. Regarding content, the Office of the Federal Register (OFR) provides optional standard preamble headings which, if used, must be in a specific order.<sup>47</sup> They include: Agency, Action, Summary, Dates, Addresses, For Further Information Contact, and Supplementary Information. Otherwise, there are variations among agencies regarding what information to include and under which heading.

Several different agencies’ notices—related to NPRMs, federal advisory committees, and general public meetings or requests for comments—were examined to identify some trends among agency practices and potential issues that may pose challenges to members of the public being able to easily access information.<sup>48</sup> The process of finding information on virtual sessions required searching the *Federal Register* for terms such as “public meeting” and “listening session,” followed by filtering based on recency (“last 365 days”).

When engaging with members of the public virtually, agencies should—and most do—include in these notices information on attending virtual (or hybrid) meetings and accessing relevant docket materials. It is worth briefly discussing the formulation and layout of these notices,

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<sup>46</sup> 5 U.S.C. § 553(b)(1)–(3).

<sup>47</sup> OFF. OF THE FED. REG., DOCUMENT DRAFTING HANDBOOK ch. 4 (revised 2022).

<sup>48</sup> See, e.g., OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, DEP’T OF ENERGY, *Energy Conservation Program: Energy Conservation Standards for Small Electric Motors*, 88 Fed. Reg. 7629 (Feb. 6, 2023); *Energy Conservation Program: Energy Conservation Standards for External Power Supplies*, 88 Fed. Reg. 7284 (Feb. 2, 2023); *Energy Conservation Program: Energy Conservation Standards for General Service Lamps*, 88 Fed. Reg. 1638 (Jan. 11, 2023); DEP’T OF HEALTH & HUM. SERVS., *National Biodefense Science Board; Public Meeting*, 88 Fed. Reg. 4832 (Jan. 25, 2023); NOAA, *Pacific Fishery Management Council; Public Meeting*, 88 Fed. Reg. 2888 (Jan. 18, 2023); NAT’L PARK SERV., *Tule Springs Fossil Beds National Monument Advisory Council Notice of Public Meeting*, 88 Fed. Reg. 5037 (Jan. 26, 2023); U.S. CITIZEN & IMMIGR. SERVS., *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 88 Fed. Reg. 402 (Jan. 4, 2023).

many of which comprise tens of pages in the *Federal Register* and contain technical and comprehensive information, especially in NPRMs.

In some instances, dates for any public meetings or listening sessions were listed at the beginning of the notice, directly under the notice’s summary with the caption “Dates”;<sup>49</sup> in others, that information was buried towards the end of the notice while the “Date” section only indicated the deadline for written comment submissions. There were only a few instances where the date for meeting(s) was also included in another section, typically “Addresses,” which is generally near the top. In only one instance examined was the date included in the Date, Addresses, *and* Supplementary Materials sections.

In some examples, participation information for these sessions, other than the date, was similarly located later in the notice under a section titled “Public Participation.” In that section, the notice would not include the date of the meeting, but rather, redirect readers to the “Date” section back at the beginning of the notice.<sup>50</sup> Location and accessibility of attendance information varied greatly across the notices. Some instructed interested parties to go to the agency’s website. In those cases, agencies differed in linking to their general website—which made it very hard to find information related to public meetings—or to a specific webpage for the event or for current rulemakings. Other notices included registration links (with most directed to Zoom and one directed to Eventbrite). There was only one notice that provided the actual meeting URL and dial-in information in the body of the notice. It was also unclear in many instances whether virtual attendance was through video platforms only or if participation by phone was an option.

Information on accessing the docket was generally found at the front of the notice under the summary. And some agencies, such as the Department of Energy, provide web addresses for the specific dockets associated with the notice while others simply link to Regulations.gov (although in all instances, the Regulations.gov Docket Number is located in the sidebar and hyperlinked to the specific webpage).<sup>51</sup>

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<sup>49</sup> For example: [Agency] will hold a public meeting via webinar on [date and time]. See section, “Public Participation,” for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

<sup>50</sup> For example: The time and date of the webinar meeting are listed in the **Dates** section at the beginning of this document.

<sup>51</sup> For example: The docket for this activity, which includes *Federal Register* notices, comments, and other supporting documents/materials, is available for review at [www.regulations.gov](http://www.regulations.gov). Contrast with: The docket web page can be found at [www.regulations.gov/docket/EERE-2022-BT-STD-0022](http://www.regulations.gov/docket/EERE-2022-BT-STD-0022).

The organization of notices for virtual meetings in the *Federal Register* varies greatly between agencies and could benefit from some guidance and uniformity. The information discussed above—the meeting’s date, the URL for the meeting or a registration link, and links to the agency’s webpage regarding the event or current rulemakings—should all be included in the notice and in easy-to-find locations. This might mean the information is predominantly located in the front matter or is listed multiple times in the notice. Agencies should consider how prospective participants, especially those who may have never accessed the *Federal Register*, interface with their notices.

## 2. Beyond the *Federal Register*

As ACUS has addressed in previous recommendations, agencies should also explore other options for providing notice of opportunities for public engagement.<sup>52</sup> This is especially true if the agency’s purpose for conducting a virtual or hybrid meeting is precisely to reach stakeholders it would not otherwise reach. An important lesson that emerged throughout this study is that rulemaking and program offices should work closely with other agency offices responsible for communications, public affairs, and public engagement to determine how best to organize, provide notice of, promote, facilitate, and follow-up on these virtual meetings. This is especially important if each department has developed different relationships or email campaigns with various stakeholders.

The role social media has played in public engagement cannot be overstated. Besides disseminating through their social media accounts, these offices likely have developed listservs or other email groups to which notice of public hearings or listening sessions can be sent. It is important to note that agencies should engage in targeted outreach and not rely solely on lists of “subscribers” to their website or email campaigns—those folks are a self-selected group who, while likely interested and perhaps more knowledgeable than the average person, might not represent the full gamut of those affected by a proposed rule.

The practice of also including public meeting information on an agency’s website also varies greatly among agencies. This was an issue seen repeatedly when trying to find meeting

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<sup>52</sup> Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (July 19, 1976).

information related to *Federal Register* notices on an agency's website. Either the information could not be found, or it took a long time to find. In some cases, a post on the meeting was found but it lacked information about how to register or directed users back to the *Federal Register*. Agencies should encourage offices involved in the substance of a rulemaking, communications, public affairs, IT/website management, and public engagement to work together to confirm and execute the best and most intuitive way to promote such events on their website. This might feel duplicative to some, but providing all the information that a reader would in a *Federal Register* notice will not alienate users less familiar with the rulemaking process, who do not want to read through long notices, or who for some reason or other cannot adequately access the notice's information. Agencies that have dedicated rulemaking pages should ensure that information about upcoming virtual engagements is easily accessible—which could include presenting the information in a calendar format or enabling RSS feeds or other automated subscription features. And the rulemaking page should itself be easily accessible from the agency's website home page.<sup>53</sup>

### ***Registration & Oral Presentation Requests***

When agencies hold a listening session or public meeting, virtually or not, some require members of the public to register by a certain date to attend and/or speak at the event. Most information and links for these virtual meetings directed prospective participants to a registration link rather than provide a direct link to the event itself. The reasons for registration might include collecting participants' names and contact information or accounting for the number of potential participants so as to best prepare an agenda. However, this process also raises some issues with accessibility and ability to participate. Some interested persons may struggle with accessing email or saving a link for a future date. For those finding out about a meeting close to the event date, adequate time may not be given to register, especially if registration links are set to close by a certain time rather than stay open throughout the duration of the meeting.

In some instances, prospective participants had to register by a certain time before the event if they knew they wanted to make an oral presentation. The mandatory registration date for oral presentations varied between a few days before the event and three weeks before the event. For some meetings, if an attendee was not planning on speaking or did not sign up to speak by the

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<sup>53</sup> See Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012).

requisite time, they would then be marked as an observer and participate in a “listen only” mode with the inability to unmute themselves for comment.

While it is understandable that agencies would want to be able to manage large groups of people, especially if the rulemaking is particularly high-profile or contentious, assigning different attendance categories and participatory abilities (i.e., “observer” versus “speaker”) may alienate members of the public or setting a registration deadline weeks in advance is likely to prevent interested persons who learned of the event late from having their voices heard via oral presentation. For example, an agency might require those interested in presenting an oral comment to register two weeks in advance. For those who register after that time, they may only be given a webinar link where they can only attend in “listening mode.” As previously mentioned, registration links might not work once the event has started. These are issues that inhibit members of the public from participating fully. On the other hand, requiring registration for oral presentation ensures that the agency can more appropriately plan their time and agenda, and allows agencies to better manage participants. Requiring registration is fine as long as members of the public are able to do so at any time prior to and during the meeting.

### *Accessibility Before, During, and After Public Engagement Sessions*

Agencies must obviously ensure public engagement is accessible. In addition to complying with the requirements of the Rehabilitation Act, agencies should ensure other basic accessibility services are provided or made readily available. During such public engagement meetings, accessibility might include providing closed captioning services, translator services or phone numbers for such services, and options for telephone dial-in to meetings—all of which are likely easier and more readily available to execute in a virtual setting. Some, but not all, of the examined notices specified a contact for special accommodations, with most of the agencies then indicating requests must be made a certain number of days in advance of the meeting (usually 3-7 days). A few provided phone numbers for TDD (telecommunications device for the Deaf) or auxiliary aids. Even fewer indicated that closed captioning would already be provided during the meeting. It was unclear whether other meetings had similar accommodations already in place (e.g., closed captioning, American Sign Language (ASL) interpretation) regardless of whether a request was made.

Some public interviewees expressed the overall lack of accessibility in engaging with the federal government’s rulemaking procedures—some of which apply to the virtual environment specifically and others that apply to general procedures. Major concerns included a lack of providing notices in different languages, making the underlying information available in different languages, and contemporaneous interpretation services; poor or inaccurate automated closed-captioning; inconvenient times of meetings; and overuse of technocratic language.<sup>54</sup> Part of these issues might stem from a lack of updated technologies and limited resources at the agency level, but, for the most part, these are doable minor changes that can have major impacts on participation.

As an example of accessible virtual meetings, the Food and Drug Administration held a series of listening sessions on proposed tobacco standards in June 2022. The agency enlisted an ASL interpreter for their sessions and also indicated in their *Federal Register* notice that live closed captioning would be provided.<sup>55</sup> The video recordings and the full transcripts from the listening session were made available on the event’s webpage. The video recordings also included accurate closed captioning.<sup>56</sup> The availability of video recordings and transcripts will be discussed as part of the rulemaking record, but both are also indicative of accessibility.

### ***Maintenance of Record***

In some cases, agencies are legally required to transcribe, record, or otherwise document public engagements that take place during rulemakings. This is especially common during the period after an agency publishes an NPRM. By including transcripts, recordings, summaries, or minutes of engagements in a public rulemaking docket, agencies can facilitate public participation. Documentation of engagements may also be important for judicial review.<sup>57</sup> Even when not legally required to transcribe, record, or otherwise document public engagements, agencies may do so as a matter of practice.<sup>58</sup>

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<sup>54</sup> See also THE CENTER FOR PROGRESSIVE REFORM, *The Federal Energy Regulatory Commission’s New Office of Public Participation: A Promising Experiment in ‘Energy Democracy’* 20 (Apr. 2022).

<sup>55</sup> *Proposed Regulations to Establish Tobacco Product Standards for Menthol in Cigarettes*, 87 Fed. Reg. 26,311, 26,313 (May 4, 2022).

<sup>56</sup> *Listening Sessions: FDA’s Recently Proposed Tobacco Product Standards*, U.S. FOOD & DRUG ADMIN. (June 13–15, 2022), <https://www.fda.gov/tobacco-products/ctp-newsroom/listening-sessions-fdas-recently-proposed-tobacco-product-standards-06132022>.

<sup>57</sup> Cf. Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

<sup>58</sup> See, e.g., Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).



At the bare minimum, agencies should include high-level meeting minutes or summaries in the record afterwards, but they should also consider recording and/or transcribing the meeting for transparency purposes if they are not already required to do so. For some of the meetings reviewed, the *Federal Register* notices indicated that the meeting or session would be transcribed and/or recorded, followed by posting on the agency's website.

Conversely, some agencies raised issues that doing this might stifle candid discussions, especially if the oral presentations include personal anecdotes or information or is centered on a sensitive topic. Other stakeholders, however, feel it's important to know who is raising substantive issues at any stage of the rulemaking process. In those instances, agencies should weigh the pros and cons of this trade-off.

It is important to note that agencies can—and often do—informally communicate with individuals or groups regarding the substance of a rulemaking. These types of communications are considered “ex parte” contacts, and, as a general matter, the APA does not prohibit or restrict them in the context of informal rulemaking.<sup>59</sup> ACUS previously issued Recommendation 2014-4, “*Ex Parte*” Communications in Informal Rulemaking, which urged agencies to prepare written policies on what constitutes ex parte communications.<sup>60</sup>

Similar to the issues discussed above, ex parte communications are treated very differently based on whether an NPRM has been issued. ACUS suggested that agencies may include the occurrence or content of ex parte communications prior to an NPRM being issued in the preamble of the later-issued NPRM or in the appropriate rulemaking docket once it's opened. But ACUS did not go so far as to say that agencies should indeed do that. If these communications occur after an NPRM has been issued, ACUS recommended that agencies should establish procedures for ensuring that the occurrence and content of those communications are included in the rulemaking docket. Relatedly, agencies should update their ex parte policies to account for any changes in virtual engagement, especially in light of the shift to online spaces due to the COVID-19 pandemic.

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<sup>59</sup> See *Sierra Club v. Costle*, 657 F.2d 298, 395–400 (D.C. Cir. 1981).

<sup>60</sup> 79 Fed. Reg. 35,993 (June 25, 2014).

## CONCLUSION

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Agencies can and should continue to expand their methods of public engagement. The ability of digital technologies to connect members of the public with agencies has greatly evolved over the past few years. Public engagements surrounding a rulemaking should allow for remote participation in any case. It allows for the agency to reach a broader audience, including those who have been traditionally underrepresented in the rulemaking process. It allows for diverse viewpoints to be included and increases transparency and accountability. Agencies must undertake public outreach and education to overcome barriers to participation, which may include geographical constraints, resource limitations, and language or other barriers; and they should do so by coordinating amongst their offices—each of which can offer unique insight, goals, and ways of communicating as related to the rulemaking and public engagement. There are several logistical and procedural elements which agencies must consider in order to foster effective virtual engagement. The recommendations that follow aim to provide agencies with those considerations.

## RECOMMENDATIONS

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Several agency representatives and private sector stakeholders were interviewed throughout this process. There were differing opinions as to the effectiveness and accessibility of virtual rulemaking-related events. Overall, agencies can aim to be more proactive in their outreach to engage stakeholders early-on in the process to allow them ample time to present their input—either orally or not. Many representatives indicated that there was serious siloing amongst departments that prevents them from reaching the types of participants from whom they need to hear. Those involved in agency rulemaking are separate from offices of public engagement or participation. Both are also separate from communications and marketing teams. The lack of cohesion and collaboration amongst these teams when it comes to virtual public engagement in rulemaking—in and of itself—warrants a recommendation from the Administrative Conference. Further, agencies can and should participate in other agencies’ listening sessions or interagency groups, like the one convened by the Administrative Conference, to learn how their practices compare with other agencies and whether their virtual public engagement can be improved upon.

**Recommendation 1.** Each agency that engages in rulemaking should use internet-based videoconferencing software as a way to broaden engagement with interested persons in a cost-effective way.

**Recommendation 2.** Each agency should ensure that its policies regarding informal communications between agency personnel and individual members of the public related to a rulemaking (described in Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*) are updated to cover communications that take place virtually.

**Recommendation 3.** As part of its overall policy for public engagement in rulemaking (described in Recommendation 2018-7, *Public Engagement in Rulemaking*), each agency should explain how it intends to use internet-based videoconferencing to engage with the public.

**Recommendation 4.** Each agency should prepare, disseminate, and publish guidance both internally and publicly on how it runs virtual meetings and ensure employees are trained on that guidance.<sup>61</sup>

**Recommendation 5.** When an agency plans to hold a public rulemaking engagement—that is, a rulemaking-related meeting, hearing, listening session, or other live event that is open to the general public—it should allow for interested persons to observe the engagement remotely and, when feasible, provide input and ask questions remotely.

**Recommendation 6.** When an agency decides to hold a public rulemaking engagement, rulemaking personnel should collaborate with personnel who oversee communications, public affairs, public engagement, and other relevant activities for the agency to ensure the engagement reaches the targeted audience and produces effective participation from interested persons, including groups that are likely affected by the rulemaking and have otherwise been underrepresented in the agency’s administrative process.

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<sup>61</sup> See, e.g., *Public Participation Guide: Public Meetings*, EPA, <https://www.epa.gov/international-cooperation/public-participation-guide-public-meetings> (last visited Mar. 28, 2023).

**Recommendation 7.** An agency should, as applicable, include the following information in the public notices for a public rulemaking engagement with a virtual or remote component:

- a. The date and time of the engagement, at the beginning of the notice;
- b. Options for remote attendance including direct links to the internet-based videoconferencing event or a registration page and the dial-in number for the meeting, at the beginning of the notice;
- c. A plain-language summary of the rulemaking and description of the engagement's purpose and agenda and the nature of the public input, if any, the agency is seeking to obtain through the engagement;
- d. A link to any materials associated with the engagement, such as an agenda, a program, speakers' biographies, a draft rule, or questions for participants (such as to the webpage described in Recommendation 10);
- e. Information about opportunities for members of the public to speak during the engagement, including any directions for requesting to speak and any moderation policies, such as limits on the time for speaking;
- f. The availability of closed captioning, language interpretation, and telecommunications relay services and access instructions;
- g. The availability of a recording, a transcript, a summary, or minutes and its location; and
- h. Contact information for a person who can answer questions about the engagement or arrange accommodations.

**Recommendation 8.** The Office of the Federal Register (OFR) should update the Document Drafting Handbook to provide agencies guidance on drafting *Federal Register* notices for public rulemaking engagements with virtual or remote components that include the information described in Recommendation 6.

**Recommendation 9.** OFR should update FederalRegister.gov to include in the "Document Details" sidebar for each notice for public rulemaking engagement a link to a specific agency webpage where interested persons can learn more about the engagement.

**Recommendation 10.** To encourage remote participation in a public rulemaking engagement, the agency should create a dedicated webpage for the engagement that includes the information described in Recommendation 6. The webpage should include, as applicable, a link to the internet-based videoconferencing event or its registration page; a link to the *Federal Register* notice; any materials associated with the engagement; a livestream of the engagement while it is ongoing; and, after the engagement has ended, any recording, transcript, summary, or minutes.

**Recommendation 11.** Each agency should allow interested persons to access a public rulemaking engagement remotely at any time while it is ongoing and should not require members of the public to register by a certain date or time to observe the engagement remotely.

**Recommendation 12.** To manage participant expectations, an agency should communicate to prospective participants at the beginning of the event:

- a. The purpose and goal of the engagement;
- b. The moderation policies, including speaking time limits and whether or why the agency can or cannot respond to oral statements made by participants;
- c. The management of the public speaking queue;
- d. Whether the chat function, if using an internet-based videoconferencing platform, will be disabled or monitored and, if monitored, whether the chat will be included in the record;
- e. How participants can access the rulemaking materials throughout the meeting; and
- f. Whether the event will be recorded or transcribed and where it will be made available.

**Recommendation 13.** Each agency should ensure it has adequate support to run public rulemaking engagements, including their virtual and other remote components. Adequate support might include technological or troubleshooting assistance, a third-party moderating service, or a sufficient number of staff members available.

**Recommendation 14.** Each agency should record or transcribe any public rulemaking engagement that takes place after it publishes a notice of proposed rulemaking (NPRM). When an agency holds a public rulemaking engagement before publishing an NPRM, or when no

NPRM is required, it should record, transcribe, summarize, or prepare meeting minutes of the engagement unless doing so would adversely affect the willingness of public participants to provide input or ask questions.

**Recommendation 15.** Each agency should make any recording, transcript, summary, or minutes of a public rulemaking engagement available in any public docket associated with the rulemaking and on the webpage described in Recommendation 9 and should do so in a timely manner.

## APPENDIX

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The following are screenshots of various *Federal Register* notices that show some of the discrepancies and issues discussed in this report. Agency names and identifying information have been redacted.

### *Notice*

- Non-specific website links
- Related information in different parts of the notice
- Unclear if other methods of publicizing the event were used

The image displays two screenshots from a *Federal Register* notice. The left screenshot, labeled 'page 7284', shows the 'DATES:' section where a public meeting is scheduled for Wednesday, March 1, 2023, from 1:00 p.m. to 4:00 p.m. It refers to section VII for registration information. The right screenshot, labeled 'page 7344', shows section VII, 'Public Participation', with a sub-section 'A. Attendance at the Public Meeting'. This section instructs attendees to refer back to the 'DATES' and 'ADDRESSES' sections for meeting details. It provides contact information for staff at (202) [redacted] or [redacted]@[redacted].gov. A note mentions that foreign nationals must have an Enhanced Driver's License or a military ID. It also provides a website for registration information and participant instructions, with a comment deadline. At the bottom, it lists an email address [redacted]@[redacted].gov and a phone number (202) [redacted].

Here, the notice indicates in the “Dates” subheading that readers should refer to section VII for webinar registration information. That information is then located 60 pages later in the *Federal Register*. The section also does not list the date of the event, but rather refers readers back to the “Dates” subheading at the front of the notice. It then specifies that interested participants should email or call the agency for attendance instructions. The agency is not clear

about the distinction between participants and attendees. But further down, the reader then finds no information for attending via webinar included in the notice, but is rather directed to the agency’s website where they then have to look again for the required information.

**Notice of Listening Sessions and Request for Information**

by the AGL.

**DATES:** Written submissions must be received on or before 11:59 p.m. May 23, 2022.

**ADDRESSES:** Please submit any written notes:

**Listening Session 1—April 25 (10:30 a.m.–12:00 p.m. EDT).** This listening session will focus on [redacted] products (including polyvinylchloride, composite building materials, and polymers used [redacted])

To register for Listening Session 1, visit: [https://www.eventbrite.com/e/public-listening-session-request-for-\[redacted\]](https://www.eventbrite.com/e/public-listening-session-request-for-[redacted])

**Listening Session 2—April 28 (2:00 p.m.–3:30 p.m. EDT).** This listening session will focus on glass [redacted]

To register for Listening Session 2, visit: [https://www.eventbrite.com/e/public-listening-session-request-for-\[redacted\]](https://www.eventbrite.com/e/public-listening-session-request-for-[redacted])

**Dates:**

Written submissions must be received on or before 11:59 p.m. May 23, 2022.

**Document Type:**

Notice

In this “Notice of Listening Sessions,” the “Dates” subheading and sidebar does not include the date of the actual listening sessions, but rather the deadline date for comment submission. Information on the listening session is, strangely, found under the “Addresses” subheading. Even more perplexing is the fact that prospective attendees must use Eventbrite to register, meaning they have to register through a third party to get attendance information such as a Zoom link.

### *Unclear Goals*

- “Listening sessions” used for education
- Whether questions will be answered
- Time limits
- Deadlines

The public meeting will be conducted in an informal, conference style. [REDACTED] will present a general overview of the topics addressed in this rulemaking, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by [REDACTED], before the discussion of specific topics. [REDACTED] will allow, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, [REDACTED] will permit participants to clarify their statements briefly. Participants should be prepared to answer questions by [REDACTED] and by other participants concerning these issues.

This example provides a very broad overview of the agenda and informs participants to be prepared to answer questions by the agency or other participants. There are also caveats about time limits. While difficult to predict, stipulating that participants will have “no more than 3 minutes, time allowing” or something that effect would be better than none.

1309). [REDACTED] will provide information on the proposed rules to the public and provide the public an opportunity to provide open public comment.

**DATES:** The listening sessions will be held on two separate days on June 13 and 15, 2022. All requests to make open public comment must be received by June 6, 2022, at 11:59 p.m. Eastern Time.

After introductions, [REDACTED] will begin each listening session with an overview of both proposed rules. Then the registered speakers will have approximately 5 minutes each to share their comments on any topics related to the product standards. [REDACTED] is

This example provides a more specific agenda including specifying what the agency will discuss and how much time registered speakers will have. However, note in the “Dates” subheading that, while the dates for the listening session are included, the agency has also listed a deadline for public comment requests. The deadline is a full week before the event, which causes concern if interested parties are finding out about the event after that date.



Some of the listening sessions attended or reviewed included a segment on education—explaining to attendees how they can submit comments, use Regulations.gov, or navigate the agency’s website. Choosing to devote time to an educational component is a careful decision agencies must weigh because it detracts from the “listening” part of the listening session and cuts in to attendees’ time to make public oral comments. Offices like the Federal Energy Regulatory Commission (FERC) Office of Public Participation has dedicated spaces on its website to educating members of the public on how to submit comments. They have also held separate webinar events dedicated solely to education.

The screenshot shows the FERC website's 'WorkshOPP on Filing Comments' page. The left sidebar contains navigation links: Industries & Data, Public Participation, Enforcement & Legal, News & Events, About, FERC Online, and Search. The main content area features a video player with the title 'WorkshOPP on Filing Comments | Aug 30, 2022' and a thumbnail showing a woman speaking. The video title is 'Not for FERC... continued'. Below the video player, there is a section titled 'Office of Public Participation Fundamentals for Participating in FERC Matters' with a brief description of the workshop. To the right of the video player, there is an 'Event Details' sidebar with information on Date and Time (Tuesday, Aug 30, 2022, 2:00 PM - 3:00 PM Eastern), Location (Virtual), and Point of Contact (Office of Public Participation (OPP)).

### *Record Maintenance*

- Whether transcription / recording occurring
- Whether and where made available

When agencies decide to transcribe or record a public engagement and make it available, they should be clear about where members of the public can then find the transcription or recording. For example, when told to generally refer to the agency’s website for a transcription or recording, users are likely unsure of where to go after that. It might make sense to users that this information would be included with the material of the proposed rule (e.g., under a “Rules and Regulations” page of the website), but the agency might post it somewhere else entirely (e.g., as part of their “Newsroom” page).

*Transcripts:* Please be advised that as soon as transcripts of the listening sessions are available, they will be accessible at <https://www.regulations.gov>. They may be viewed at the Dockets Management Staff (see ADDRESSES). A link to the transcripts and recordings will also be available on the internet at <https://www.███.gov/███>

## Rules and Regulations

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Rules, Regulations and Guidance

Rules and Regulations

Guidance

### A New Standard of Effective Regulation



Content current as of: 03/06/2023

Regulated Product(s)



#### Rules and Regulations

Title	Type	Date
<a href="#">Requirements for [redacted] Manufacturing Practice</a>	Proposed Rule	03/10/23
[redacted]	Proposed Rule	05/04/22
[redacted]	Proposed Rule	05/04/22

<https://www.federalregister.gov/>

MEETING

## Listening Sessions: [redacted] Recently Proposed [redacted] Product Standards

JUNE 13 - 15, 2022

Scheduled

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More Meetings, Conferences, and Workshops

Date: June 13 - 15, 2022

Organized By: [redacted]

Content current as of: 08/15/2022

Regulated Product(s)



Newsroom

Feature Stories

On this page:

- [Session Recordings](#)
  - [Listening Session - June 13, 2022](#)
  - [Listening Session - June 15, 2022](#)
- [Listening Sessions Objective](#)

### Session Recordings

Listening Session - June 13, 2022



## Department Siloing

- Goal and purpose alignment
- Broader and consistent outreach
- Collaborative processes

Agency offices can benefit from sharing what other offices are promoting, doing, or seeking input on—both internally and externally, such as through social media and communications initiatives. Resharing event posts, including links and tags, can help information reach broader audiences and keep information related to an event in one place.

**Office of Public Participation** @FERC.OPP · Mar 29  
Today is @FERC's EJ&E Roundtable in Infrastructure Permitting on FERC YouTube's channel and in person. @FERC.OPP present! #energytwitter #environmentaljustice

**@FERC** @FERC · Mar 28  
⚠ Happening Tomorrow @ 9:30 am ET | @FERC Roundtable on Environmental Justice and Equity in Infrastructure Permitting | Agenda & Event Details [ferc.gov/news-events/ev...](https://ferc.gov/news-events/ev...)  
[Show this thread](#)

**ROUNDTABLE**  
**Environmental Justice and Equity in Infrastructure Permitting**  
Wednesday, March 29, 2023  
FERC.GOV

**USCIS** @USCIS  
Thank you to the nearly 2,000 participants who joined our virtual public engagement on backlog reduction and processing times with over 1,700 thoughtful comments and questions! Watch it here if you missed it: [youtube.com/watch?v=QGzoxc...](https://youtube.com/watch?v=QGzoxc...)  
3:43 PM · May 19, 2022  
34 Retweets 5 Quotes 159 Likes 15 Bookmarks

**USCIS** @USCIS · May 19, 2022  
Replying to @USCIS  
@USCISDirector Jaddou briefed participants on the agency's priorities & emphasized USCIS' commitment to delivering timely decisions to those we serve in order to make the nation's immigration system more fair and humane. For upcoming engagements visit: [uscis.gov/outreach/upcom...](https://uscis.gov/outreach/upcom...)

**Upcoming Engagements**