Administrative Conference of the United States

PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING

Final Report: November 19, 2018

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This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

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Michael Sant'Ambrogio & Glen Staszewski[1]

INTRODUCTION

Notice-and-comment rulemaking is frequently praised for its highly democratic character.[2] Before promulgating a final rule, federal agencies generally must apprise the public of their plans and afford any interested person the opportunity to comment on the proposal.[3] Moreover, agencies review the comments and must respond to any that raise significant regulatory issues, regardless of their source.[4] The public

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[1] The authors are both professors of law at Michigan State University College of Law. We are indebted to the many participants in this study who gave generously of their time. We also gratefully acknowledge the research assistance of Elliott Borchardt and the enormously helpful comments from the staff of the Administrative Conference of the United States, especially Cheryl Blake, Reeve Bull and Francis Massaro, attorney advisor for this project, and Cary Coglianese, Chair of the Committee on Rulemaking. Finally, we benefited enormously from discussions concerning many of the issues addressed in this report with Deb Dalton, Neil Eisner, Cynthia Farina, John Kamensky, Yogin Kothari, Carolyn Lukensmeyer, Nina Mendelson, Sabeel Rahman, Genna Reed, Peter Shane, and Bill West, as well as feedback based on early presentations of the project at the 2018 Annual Meeting of the Law & Society Association and the Third Annual Administrative Law New Scholarship Roundtable.

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[2] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 65-66 (1969) [hereinafter DAVIS, DISCRETIONARY JUSTICE] ("Rule-making procedure which allows all interested parties to participate is democratic procedure."); CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 31 (4th ed. 2011) ("Rulemaking adds opportunities for and dimensions to public participation that are rarely present in the deliberations of Congress or other legislatures."); Donald Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 601 (2018) ("The commenting power given to ordinary individuals is rather extraordinary.").

[3] *See* Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c) (2012). The notice and comment requirements of Section 553 do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* §§ 553(b)(A)-(B).

[4] *See, e.g.*, United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252-53 (2d Cir. 1977) (quoting Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (2d Cir. 1968) and

comments become part of the record in the event of judicial review of the final rule, encouraging agencies to give public comments careful consideration and respond to them in a reasoned fashion. Thus, it is hard to imagine a government decision-making process more open and accessible to the public, at least formally.

Yet there is a widespread perception that *in practice* certain sophisticated stakeholders dominate the notice-and-comment process.[5] These stakeholders typically include the regulated entities, industry groups, and professional associations that have the motivation, resources, and capacity to participate regularly and effectively in agency rulemaking.[6] National public interest organizations that focus on the benefits of regulation to a broader public do also sometimes participate, but these groups are generally not as active as parties concerned with compliance costs.[7] Typically less present, however, are most regulatory beneficiaries; smaller regulated entities; state, local, and tribal governments; unaffiliated experts; citizens with practical knowledge of the regulatory issues; and members of the general public.[8]

The absence of many stakeholders from the regulatory process can undermine the goals of public participation in rulemaking. First, it can undermine the effectiveness of regulations. Absent stakeholders may have important information "about impacts, ambiguities and gaps, enforceability, contributory causes, [and] unintended consequences" based on "their lived experience in the complex reality into which the

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Associated Indus. of N.Y. State, Inc. v. U.S. Dep't of Labor, 487 F.3d 342, 352 (2d Cir. 1973) (requiring agencies to address "major issues" discussed in the public comments)).

[5] *See* Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1191, 1194 (2012) [hereinafter Farina et al., *Knowledge in the People*] (citing Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005) (defining "sophisticated stakeholders" and discussing how "sophisticated stakeholders" make significantly more comments than others)).

[6] *See* Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 78 (2013) (collecting views that rulemaking is "dominated by regulated entities and industry groups, rather than public interest groups"). *But cf.* Daniel E. Walters, *Capturing Regulatory Agendas?: An Empirical Study of Industry Use of Rulemaking Petitions*, 43 HARV. ENT'L L. REV. (forthcoming 2019) (canvassing political science literature on agency capture and finding that changes triggered by rulemaking petitions "inure mostly to the benefit of regulated entities, but it is difficult to square with theories of excessive influence or capture of the regulatory process by business interests").

[7] *See* Johnson, *supra* note 6, at 78 n.2.

[8] *See* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 964, 967-68 (2006) [hereinafter Coglianese, *Citizen Participation*] (explaining that citizens are not infrequently involved in rulemaking and noting the collective actions problems of public engagement); Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 385-86, 386 n.6 (2011) [hereinafter Farina et al., *Rulemaking in 140 Characters or Less*] (citing evidence that only a "limited range of stakeholders" participate in notice and comment rulemaking).

proposed regulation would be introduced."[9] Harnessing such "situated knowledge" may improve the quality of agency regulations.[10] Although agencies frequently rely on interest group organizations to represent the views of individuals who do not participate in rulemaking, these groups do not always provide an adequate substitute.[11] Representative organizations may choose not to participate in a rulemaking for strategic institutional reasons or because of limited resources; they may not represent the full range of interests and views among their constituencies; they may lack relevant experiential knowledge; or in some cases, there may be no such organizations.

Second, barriers to broad and meaningful public participation in agency rulemaking can weaken democratic accountability and legitimacy. In our democratic system agencies have an obligation to consider the public's views when making discretionary decisions about how to implement their statutory mandates.[12] This certainly does not mean rulemaking is a plebiscite in which agencies should merely follow public opinion.[13] But we do expect federal agencies to render an account of what they are doing based on the "republican idea [that] the business of government is public business."[14] Indeed, the absence of electoral controls calls for heightened

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[9] Farina et al., *Knowledge in the People*, *supra* note 5, at 1197.

[10] *See* Memorandum from Barack Obama, President of the U.S., to the Heads of Executive Departments and Agencies (Jan. 21, 2009) ("Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge.").

[11] *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1767 (1975) ("There are no accepted means of determining whether the views of the organization are congruent with the interests of the broader class.").

[12] *See* Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) ("The essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.").

[13] *See* Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 633 (2013) [hereinafter Bull, *Making the Administrative State "Safe"*] (citing universal rejection of the idea that rulemaking should be a plebiscite); Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 131 (2012) [hereinafter Farina et al., *Rulemaking vs. Democracy]*; Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 429-30. *But see* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1372, 1374-75 (2011) [hereinafter Mendelson, *Torrents of E-Mail*] (suggesting that agencies give greater consideration to public policy and value preferences in certain circumstances).

[14] Jeremy Waldron, *Accountability: Fundamental to Democracy* 19 (N.Y. Univ. Sch. of Law, Working Paper No. 14-13, 2014), https://lsr.nellco.org/nyu_plltwp/462 (emphasis omitted). For a comprehensive extension of deliberative democratic theory to administrative

accountability on the part of agencies to both individuals and groups, by considering their interests and perspectives, responding to them in a deliberative fashion, and by giving justifications for regulatory decisions that could reasonably be accepted by citizens with fundamentally competing views.[15] Thus, agencies have an obligation not only to render an account of their thinking in a form that can be understood and accepted, but also in a way that gives the public a meaningful opportunity to participate in the decision-making process by sharing their experiences and views.

The Administrative Conference commissioned this Report to survey the tools and practices utilized by federal agencies to enhance public understanding of agency rulemaking and to foster meaningful participation in the regulatory process by stakeholders who have traditionally been absent. In addition, the Administrative Conference seeks to provide agencies with guidance on best practices to help them invest resources in a way that maximizes the probability that rulewriters obtain high quality public information throughout the course of the rulemaking process.

We are not writing on a blank slate. The Administrative Conference has already produced important studies resulting in recommendations on rulemaking comments,[16] legal considerations and agency innovations in e-Rulemaking,[17] the use of social media in rulemaking,[18] plain language in regulatory drafting,[19] negotiated rulemaking,[20] and other topics discussed in our Report, all of which seek to enhance public engagement with the regulatory process. Therefore, we seek to build on this body of work in two main ways.

First, we focus on when and how agencies can encourage greater participation by traditionally absent stakeholders in the regulatory process. We are less concerned

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law, see generally HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY (2002).

[15] *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 857 (2012) [hereinafter Staszewski, *Political Reasons*]; Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1255 (2009) [hereinafter Staszewski, *Reason-Giving*] (explaining that agencies are held "accountable by a requirement or expectation that they give reasoned explanations for their decisions").

[16] *See generally* Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,789, 48,791 (Aug. 9, 2011).

[17] *See generally id.*; Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789, 48,789 (Aug. 9, 2011).

[18] *See generally* Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269, 76,269 (Dec. 17, 2013).

[19] *See generally* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728, 61,728 (Dec. 29, 2017); CHERYL BLAKE & BLAKE EMERSON, ADMIN. CONFERENCE OF THE U.S., PLAIN LANGUAGE IN REGULATORY DRAFTING (2017).

[20] *See generally* Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,039, 31,040 (July 5, 2017).

with enhancing participation by the insiders who routinely participate, although our Report will touch upon ways in which the quality of public participation can be improved more generally. We focus on the absent public because of the significant barriers to participation in rulemaking faced by rulemaking novices, and the need for careful planning and outreach by agencies to overcome these barriers.[21] Public participation in rulemaking is not like a field of dreams—if you build it, they will not necessarily come.[22] Absent stakeholders are often unaware that potential rules are being considered and that they have opportunities to participate.[23] Even when they are aware, many members of the public lack the incentive to become involved. The interests at stake for individual beneficiaries of regulation may simply be too small to justify the time and attention required.[24] Or they may assume someone else will represent their views or that the agency has already made up its mind.[25]

Moreover, even when members of the public are sufficiently motivated to participate, rulemaking novices may not have the capacity to participate effectively. Although submitting a comment requires only a few clicks on Regulations.gov, submitting an effective comment requires much more. In most cases, understanding the proposed rule requires reading a lengthy, complex, dense, and (for most people) quite boring NPRM, written at an advanced level of education.[26] And even if rulemaking novices make it this far, they generally do not know how to submit effective comments—*i.e.*, comments containing the kinds of information agencies

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[21] *See* Farina et al., *Rulemaking in 140 Characters*, *supra* note 8, at 389–90 (emphasis omitted) (citing "[i]gnorance about the rulemaking process[, u]nawareness that rulemakings of interest are going on[,] and [i]nformation [o]verload from the length, and linguistic and cognitive density, of rulemaking materials" as three barriers to participation).

[22] *See, e.g.*, CYNTHIA R. FARINA & MARY J. NEWHART, IBM CTR. FOR THE BUS. OF GOV'T, RULEMAKING 2.0: UNDERSTANDING AND GETTING BETTER PUBLIC PARTICIPATION 21 (2013) [hereinafter FARINA & NEWHART, IBM CENTER].

[23] *See id.* at 11; Cynthia R. Farina et al., *Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project*, 41 FORDHAM URB. L.J. 1527, 1550 (2014) (discussing barriers to participation).

[24] Regulations often impose concentrated costs on regulated entities and diffuse benefits on a broader public, creating collective action problems exacerbated by cognitive biases. *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53-65 (8th prtg. 1980) (explaining how small, organized groups are usually more effective than larger, diffuse groups in shaping policy); James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICAL ECONOMY: READINGS IN THE POLITICS AND ECONOMICS OF AMERICAN PUBLIC POLICY 82, 87-88 (Thomas Ferguson & Joel Rogers eds., 1984).

[25] Wilson, *supra* note 24, at 85.

[26] *See* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 12 (describing a Department of Transportation NPRM as written at a "late-college/early-graduate school reading level").

seek and the types of arguments agencies are likely to find persuasive.[27] Rulemaking novices therefore frequently need additional instruction and support to provide agencies with beneficial information.

Although many believed that the advent of e-Rulemaking and the proliferation of social media would lower many of the barriers to public participation, this has proven challenging for various reasons, and technological innovations have not yet revolutionized public engagement in rulemaking or fully democratized the regulatory process.[28]

Thus, our Report focuses on how agencies have attempted to overcome these barriers and reach beyond the usual suspects in their rulemakings. Some of these efforts could be widely adopted in a cost-effective manner, whereas others would likely prove beneficial only in a limited range of circumstances.[29] Therefore, agencies must think carefully about precisely when additional efforts are most likely to prove worthwhile, and we hope to provide some useful guidance on this score.

Second, we seek to broaden the discussion of public participation in rulemaking beyond the notice-and-comment process and include regulatory agenda setting, early and advanced rule development, and retrospective review or regulatory "lookbacks." The literature on agency rulemaking and efforts to more fully democratize it has focused overwhelmingly on the notice-and-comment stage.[30] The agenda-setting and rule-development stages, in contrast, have received much less focused attention.[31] The existing literature generally treats what happens before publication of the notice of proposed rulemaking (NPRM) as "a black box," and suggests that rule

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[27] *See* Farina et al., *Knowledge in the People, supra* note 5, at 1187 (explaining that while agency decision-makers value "objective," empirical evidence and quantitative data, presented in analytical, premise-argument-conclusion reasoning, rulemaking novices tend to offer "highly contextualized, experiential information, often communicated in the form of personal stories").

[28] *See* MICHAEL HERZ, ADMIN. CONFERENCE OF THE U.S., USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS 2 (2013) [hereinafter HERZ, USING SOCIAL MEDIA] ("[T]he move online has not produced a fundamental shift in the nature of notice-and-comment rulemaking."); *see also* Coglianese, *Citizen Participation*, *supra* note 8, at 958 ("[N]either agencies' acceptance of comments by e-mail nor the development of the Regulations.gov portal have led to any dramatic changes in the general level or quality of public participation in the rulemaking process.").

[29] *See* Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 423 ("[T]he public *in general* likely has little useful knowledge to add to federal rulemaking *in general*. This does not mean that *segments* of the public have nothing useful to add to *specific* rulemakings.") (emphasis added).

[30] *See* William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 577 (2009).

[31] *See id.* at 583-84; CORNELIUS M. KERWIN, IBM CTR. FOR THE BUS. OF GOV'T, THE MANAGEMENT OF REGULATION DEVELOPMENT: OUT OF THE SHADOWS (2008) [hereinafter KERWIN, OUT OF THE SHADOWS].

development is primarily influenced by political considerations and pressure from well-organized interest groups.[32] Yet in conducting our research we have spoken to numerous agency officials who described significant efforts to engage the public with their agenda setting and rule development activities. In addition, some agencies have used some of these same tools in the context of retrospective review.

Thus, evaluating public engagement in rulemaking requires a broader and more holistic view of the regulatory process than taken by much of the literature focused on the notice-and-comment process. In most cases, agency engagement with the public does, and should, begin long before the publication of an NPRM.[33] Agency agenda setting is of the utmost importance to regulatory governance because it determines which issues or problems agencies will address and which issues or problems will go unresolved. In addition, the best prospects for more fully democratizing the rulemaking process may be meaningful and consistent efforts to solicit informed public engagement during rule development, before the agency has made up its mind about which course of action to pursue. And regulatory lookbacks could be handicapped without the participation of stakeholders who live under the regulatory regime under review.

The public—and, indeed, different publics[34]—may have different contributions to make at each stage of the regulatory process. For example, agencies may seek to understand the general public's values, priorities, and preferences when setting their regulatory agendas or choosing among alternative approaches to a regulatory problem. Agencies may seek the situated knowledge of stakeholders based on their practical experiences early in the process of developing a rule or conducting a regulatory lookback. And agencies may be most interested in technical data about compliance costs and potential benefits, as well as unanticipated consequences that stakeholders might reveal, when drafting an NPRM, revising a Final Rule as part of the notice-and-comment process, or conducting retrospective review. One of the themes of this Report is that agencies must think carefully at each stage of the rulemaking process about what information and stakeholders may be missing and use the available tools that are most likely to generate this information.

To engage the public successfully, agencies need to plan for public participation early in the regulatory process. This includes developing policies for public engagement in rulemaking and establishing mechanisms to ensure that those policies

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[32] *See, e.g.*, Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 153 (2011) [hereinafter Wagner et al., *Rulemaking in the Shade*]; West, *supra* note 30, at 583-84.

[33] *See* West, *supra* note 30, at 584 (noting such efforts occur but they tend to be unstructured and ad hoc).

[34] *See* Archon Fung, *Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 J. POL. PHIL. 338, 338-39 (2003) [hereinafter Fung, *Recipes for Public Spheres*] (describing efforts to convene groups of citizens "in self-consciously organized public deliberations" as "minipublics").

are consistently followed.[35] In addition, agencies should develop specific plans for public engagement for each regulatory initiative they undertake or seriously consider. These plans should include internal and external situation assessments, and consider: (1) *why* the agency wants to engage the public, (2) *who* the agency is trying to reach, (3) *what types of information* the agency seeks, (4) *how* this information might be obtained, (5) *when* these efforts should occur, and (6) what the agency *will do* with the information.

Thus, our Report recommends first and foremost that agencies take a holistic approach to enhancing public engagement in rulemaking. In addition, our Report highlights the kinds of information most useful to agencies at each stage of the regulatory process, the tools and practices that are available to generate such information from otherwise missing stakeholders, and the best practices for soliciting meaningful public input or comment. Finally, we suggest how agencies can approach public engagement as part of a comprehensive plan that utilizes different modes of public engagement at different stages of rulemaking in a synergistic fashion. In this way, we hope to contribute to efforts already underway to more fully democratize the regulatory process.

I. STUDY METHODOLOGY

We began this project by reviewing the substantial literature on public participation in notice-and-comment rulemaking and in regulatory governance generally. This included the literature on enhanced deliberative exercises on public policy questions. In addition, we reviewed the relevant statutory, executive, administrative, and judicial authorities bearing on public engagement in the rulemaking process. Finally, we reviewed previous reports produced for ACUS that touch on public participation in rulemaking and the recommendations adopted by ACUS based on those reports.

Then, with the assistance of ACUS and its federal agency contacts, we sent the written questionnaire included in Appendix A to forty-three federal agencies to identify the different institutional structures, procedures, and practices used to engage the public with their regulatory agendas, their rulemaking proceedings, and retrospective review. We received partial or complete responses from fourteen agencies. During our follow-up contacts, we also gave agencies the option of responding to the questionnaire by telephone interview. Between the survey responses and telephone interviews, we obtained information concerning the efforts to engage the public of twenty-one federal agencies.[36] They included a mix of large

[35] *See e.g.*, ENVTL. PROT. AGENCY, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003) [hereinafter EPA PUBLIC INVOLVEMENT POLICY]; NAT'L PARK SERV., DIRECTOR'S ORDER #75A: CIVIC ENGAGEMENT AND PUBLIC INVOLVEMENT (2007) [hereinafter DIRECTOR'S ORDER #75A].

[36] The agencies are listed in Appendix B. We use the definition of "agency" set forth in section 551(1) of the Administrative Procedure Act: "each authority of the Government of the

and small agencies, executive branch and independent agencies, and agencies that engage in rulemaking both frequently and infrequently. Based on the survey responses, other follow-up with our agency contacts, and our literature review, we conducted twenty in-depth telephone interviews of agency officials, leading scholars in the field, and others who have been involved in projects designed to enhance meaningful public engagement in government policymaking. During our interviews, we frequently identified other potential sources of information to explore. Where necessary, we reviewed the rulemaking dockets and public comments associated with rulemakings that we studied and discuss in this Report. We also reviewed numerous agency websites and other on-line material relevant to public engagement in government decision-making.

Finally, we presented preliminary findings and solicited feedback at several public forums. In April 2018, we met with the Rulemaking Committee of ACUS to discuss the project and obtain additional input on the reasons for enhancing public engagement, the tools agencies have found most useful, those which have proved less successful, and to consider the potential benefits and challenges of enhancing public engagement. In addition, we discussed various issues addressed in this report in June 2018 at the Annual Meeting of the Law & Society Association held in Toronto, Canada, and the Third Annual Administrative Law New Scholarship Roundtable held at the University of Michigan Law School. We are tremendously grateful to everyone for the time they spent talking with us, and the insights they shared during this process. A complete list of agencies and non-governmental organization that we spoke with during the study is included in Appendix B.

II. REASONS FOR PUBLIC ENGAGEMENT IN RULEMAKING

Before turning to the modes of public engagement in rulemaking it is important to understand the reasons why agencies might want to enhance public participation in this process, including participation by traditionally absent stakeholders. Scholars, judges, and agency officials have offered three sets of justifications.[37] First, and likely of most interest to agencies themselves, the public is an important source of information for agencies designing regulatory programs. Thus, public engagement can improve the effectiveness of regulations by providing agencies with better and more comprehensive information. Second, in a system founded on the principle that government officials are the agents or trustees of "the people," public engagement enhances the democratic legitimacy and accountability of agency regulations. Third, it is often suggested that the opportunity to participate in an agency's decision-making process will enhance public support for the final rule, even if the agency does

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United States, whether or not it is within or subject to review by another agency[.]" Administrative Procedure Act, 5 U.S.C. § 551(1) (2012).

[37] *See, e.g.*, Cary Coglianese et. al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 927 (2009) (describing how transparency and public participation can "enhance regulators' ability to achieve society's goal of high-quality and legitimate rules").

not adopt all of the participants' views. We discuss each of these justifications in turn.

A. More Effective Regulations

One of the primary goals of public participation in rulemaking is to provide agencies with the information they need to promulgate effective rules and regulations. Rules and regulations are effective when they achieve roughly their intended benefits at roughly their expected costs in the way anticipated by the agency decision-maker. This largely turns on the quality of information available to the agency when it is developing the rule. Congress delegates decisions to agencies, in part, because of their subject-matter expertise in their regulatory areas.[38] Agencies develop this expertise through the personnel they hire, the research they conduct, and the experience they develop administering federal programs. But even agencies with deep in-house knowledge depend upon outside parties for a great deal of information. In particular, agencies need information from the industries they regulate, other experts, and citizens with situated knowledge of the field in order to understand the problems they seek to address, the potential regulatory solutions, their attendant costs, and the likelihood of achieving satisfactory compliance.[39]

The notice-and-comment process "ensure[s] that agency regulations are tested via exposure to diverse public comment."[40] The Administrative Procedure Act (APA) generally requires agencies to publish proposed rules in the Federal Register and accept comments on their proposals from any interested member of the public.[41] Moreover, agencies must read the public comments and respond to those that raise

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[38] *See* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 135 (2000) ("[A] commonly cited and crucial reason for the delegation to agencies is the desire to have decisions made by public officials with expertise and extensive information-gathering capabilities.").

[39] *See* STEPHEN BREYER, REGULATION AND ITS REFORM 109 (1982) ("The central problem of the standard-setting process and the most pressing task facing many agencies is gathering the information needed to write a sensible standard."); *see also* Cary Coglianese, et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 277 (2004) ("Information is the lifeblood of regulatory policy."); Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1147-48 (1988). *But see* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1351–52 (2010) [hereinafter Wagner, *Administrative Law*] ("[I]nformation gluts . . . can estrange marginally financed interest groups, undermine the hope of pluralistic engagement that could help the agency sift through at least some of the incoming information, and ultimately put the agency at the mercy of the party in control of most of the relevant information.").

[40] United States v. Reynolds, 710 F.3d 498, 517 (3d Cir. 2013) (quoting Prometheus Radio Project v. Fed. Commc'ns Comm'n, 652 F.3d 431, 449 (2011)).

[41] *See* Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c).

salient issues, explaining why and how they decided to proceed in light of or in spite of particular comments.[42]

These procedures, and public participation in rulemaking more generally, are designed to provide agencies with more and better information upon which to base their regulatory choices.[43] Public participation in rulemaking "broadens an agency's perspective, which otherwise might not extend beyond the views of the staff or the client groups with whom the staff regularly consults."[44] The public may raise problems the agency has not seen, illuminate direct and collateral effects, propose solutions the agency has not considered, and identify unintended consequences of certain actions. Potential regulatory beneficiaries and their advocates can provide agencies with information about the problems agencies seek to address and the impact of policies on individuals.[45] Regulated parties can provide agencies with information about the workability and costs of different proposals, collateral consequences, and the difficulty of achieving compliance.[46] At the most basic level, public participation may help to clarify ambiguities in an agency proposal that would undermine the agency's goals merely due to confusion on the part of the public regarding what a rule requires.

The information justification for public participation does not necessarily call for engaging all members of the public in all rulemakings. Rather, it requires agencies to engage those members of the public with information the agency needs based on the particular regulatory decision the agency must make. This will usually be a smaller "public" than the public as a whole. It will generally include those who are likely to benefit or be burdened by a regulatory proposal, and those with situated knowledge of the subject of regulation. But members of these groups may not all have useful information in equal measure. For example, the agency may possess more information about the public health consequences of a pollutant than about the

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[42] *See, e.g.*, United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.").

[43] *See, e.g.*, TOM. C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) ("The objective [of notice and comment] should be to assure informed administrative action and adequate protection to private interests."); *cf.* FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 6 (Senate Document No. 8, 77th Congress, First Session, 1941).

[44] Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402–03 (1985).

[45] *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202-03 (1982) (describing regulatory beneficiaries); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 429 (2007) (same).

[46] *See* Wagner, *Administrative Law*, *supra* note 39, at 1346; Stewart, *supra* note 11, at 1713-14 ("[T]he information upon which the agency must ultimately base its decision must come to a large degree from the groups being regulated.").

feasibility of installing different pollution control devices. Thus, the slice of the public likely to have the most useful information for the agency will depend upon the nature of the specific rulemaking.[47]

Therefore, the information justification for public participation requires agencies to design public engagement in a way that is most likely to obtain the information they need in each particular rulemaking. There is no one-size-fits-all approach. To be sure, agencies are not always aware of all the information they need. It is one thing to plan for soliciting public comments on "known unknowns"; another to plan for "unknown unknowns," such as unintended consequences. Thus, while designing public engagement around specific rules, agencies also need more general strategies to ensure they obtain information they might not anticipate but nevertheless would be quite valuable for crafting effective regulation. The notice-and-comment process is one such tool, notwithstanding the shortcomings discussed in this Report. But in most cases the agency will be able to identify specific information that it needs for a particular rule and the members of the public most likely to have it. Accordingly, the need for better information has generally been the primary justification for agency efforts to enhance public engagement beyond the general provisions of the notice-and-comment process.

B. Democratic Accountability and Legitimacy

A second justification for public participation in rulemaking is to enhance the democratic legitimacy and accountability of federal agencies and the regulations they promulgate.[48] The administrative state has long suffered from questions regarding its constitutional status and concerns that agencies exercise immense policy-making authority without electoral checks.[49] Of course, agencies are delegated authority by Congress and supervised by the political branches. But some question the ability of Congress and the President to provide sufficient democratic legitimacy to agency action on their own. Political scientists have long observed that Congress faces acute

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[47] Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 423 ("[T]he public *in general* likely has little useful knowledge to add to federal rulemaking *in general*. This does not mean that *segments* of the public have nothing useful to add to *specific* rulemakings.") (emphasis added).

[48] *See, e.g.*, Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 436 (2004) [hereinafter Noveck, *The Electronic Revolution*] ("Participation . . . makes regulatory rulemaking more legitimate and accountable.").

[49] JAMES O. FREEDMAN, CRISIS AND LEGITIMACY 10 (1978) ("[C]riticism of the administrative agencies has been animated by a strong and persisting challenge to the basic legitimacy of the administrative process itself."); *see also* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4 n.5 (1997) ("The crisis of legitimacy in administrative law stems from the lack of constitutional status accorded to administrative agencies and the need for oversight from the three branches of government to ensure that agency decision making is accountable to the public."); David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 100, 100 n.118 (2005).

challenges controlling agency discretion after it has been delegated through legislation.[50] The President is in a better position to shape the actions of his appointees, and over the past four decades presidents of both parties have built an institutional framework for centralized review of agency rulemaking.[51] Accordingly, some legal scholars (and to a large extent the Supreme Court) have turned to the President to bring greater democratic accountability to agency decisions.[52] But the President is unlikely to be able to supervise the vast majority of rules promulgated by federal agencies in any meaningful way.[53] In addition, even if he could, some question whether any single political representative can provide regulatory actions with much democratic accountability given the diverse interests and perspectives of the American public.[54]

Moreover, in a democratic republic founded on principles of popular sovereignty, Congress and the President are not an agency's only "principals," and public

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[50] *See, e.g.*, Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 250-51 (1987) (explaining challenges to congressional control of the administrative state); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434-47 (1989) (same); Stewart, *supra* note 11, at 1695 n.128 (same).

[51] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263-67 (2006).

[52] *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001) ("Presidential administration promotes accountability in two principal and related ways. First, presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former.").

[53] *See* OFFICE OF MGMT. & BUDGET, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 7 (2016) ("From FY 2006 through FY 2015, [f]ederal agencies published 36,289 final rules in the *Federal Register*.").

[54] Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) ("Strong presidentialism . . . is premised upon a fundamentally untenable conception of the consent of the governed. The 'will of the people,' as invoked in that effort, is artificially bounded in time, homogenized, shorn of ambiguities—in short, fabricated."); Staszewski, *Political Reasons*, *supra* note 15, at 867-72 (criticizing the presidential control model as "deeply problematic").

engagement in democratic governance does not end with elections.[55] Consequently, agencies have a continuing obligation to consider the public's views when making discretionary decisions about how to implement their statutory mandates.[56] This does not mean that rulemaking is a plebiscite in which the agency should merely follow public opinion.[57] Agencies are not designed to be electorally accountable, and direct democracy is completely alien to our federal representative system.[58] But agencies' lack of electoral accountability may be an advantage rather than a defect if we conceive of democratic accountability more broadly than merely standing for periodic elections. Political theorists note that democratic accountability also requires government officials to render a justifiable account of what they are doing on behalf of the public based on the "republican idea [that] the business of government is public business."[59] Furthermore, the relevant public is not only the electorate as a whole, much less the constituents of a prevailing party suggested by majoritarian politics. The government does not merely owe a duty of account to "We the People" as a disembodied, collective whole or the majorities that elected it. Rather, the duty of account by government "is owed to persons individually, to persons arrayed in ragged and sometimes ad hoc sub-sets of 'the people,' as well as to 'the people' itself as a notionally and occasionally unified entity."[60] In other words, public officials in a democracy should be held accountable to everyone who is interested in or affected by their decisions.

Thus, democratic accountability imposes on agencies an obligation to render an account to the public of what they are doing and to "[do] so in a form that can be understood by the [public]."[61] While elected officials are ultimately accountable (in some sense) to their constituents through elections, the absence of electoral controls for agencies calls for heightened accountability on their part to individuals and groups by considering their interests and perspectives, responding to them in a deliberative

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[55] *See* Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1883-84 (2015) (discussing the relationship between the people and the federal government established by the Constitution).

[56] Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) ("The essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.").

[57] *See* Bull, *Making the Administrative State "Safe"*, *supra* note 13, at 633 (citing universal rejection of the idea that rulemaking should be a plebiscite); Farina et al., *Rulemaking vs. Democracy*, *supra* note 13, at 131; Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 436-37. *But see* Mendelson, *Torrents of E-Mail*, *supra* note 13, at 1375-76 (suggesting that agencies give greater consideration to public policy and value preferences in certain circumstances).

[58] Sant'Ambrogio, *supra* note 55, at 1888-90 (discussing the Framers' rejection of direct democracy while embracing popular sovereignty).

[59] Waldron, *supra* note 14, at 19.

[60] *Id.* at 16.

[61] *Id.* at 7.

fashion, and by giving justifications for regulatory decisions that could reasonably be accepted by citizens with fundamentally competing views.[62] We might take this a step further and say that agencies have an obligation not only to render an account of their thinking in a form that could reasonably be understood and accepted, but also in a way that gives the public a meaningful opportunity to participate in the decision-making process.[63]

The democratic justification for public engagement in rulemaking conceives of a broader public than the information justification. To be sure, we might still be particularly concerned that the most significantly affected interests, whether benefited or burdened, are heard in the rulemaking process.[64] But democratic theory supports opportunities for engagement by a broader, and more diverse, public. Democratic theory suggests that agencies should be accountable in some form to each and every citizen. At the same time, unlike the information justification for public participation, democratic theory does not require an agency to design public engagement around the specific information it needs for each particular rule. To date, agencies have relied

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[62] Staszewski, *Political Reasons*, *supra* note 15, at 857; Staszewski, *Reason-Giving*, *supra* note 15, at 1255 (agencies are held "accountable by a requirement or expectation that they give reasoned explanations for their decisions"); *see also* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 144 (2004) [hereinafter GUTMANN & THOMPSON, WHY DELIBERATIVE DEMOCRACY?] (explaining that the justifications given by decision-makers must be understandable to those governed by them); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005) (defining accountability as "the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation"); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) ("Having administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity."); Peter L. Strauss, *Legislation that Isn't—Attending to Rulemaking's "Democracy Deficit"*, 98 CAL. L. REV. 1351, 1354 (2010) ("political will alone cannot suffice to validate regulations[—] acts of reasoned judgment along legislatively prescribed lines are required").

[63] *Cf.* RICHARDSON, *supra* note 14, at 17 (claiming that "our ideal of democracy commits us to reasoning together, within the institutions of a liberal republic, about what we ought to do in such a way that it is plausible to say that we, the people, rule ourselves"); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1637 (1985) ("The job of the public administrator is not merely to make decisions on the public's behalf, but to help the public deliberate over the decisions that need to be made.").

[64] *See* Stewart, *supra* note 11, at 1712. ("Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review . . . so that its dominant purpose is . . . the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies."); *see also* Fontana, *supra* note 49, at 82 ("The more public participation in the promulgation of an agency rule, the more deference that rule should receive when it is challenged in court.").

largely on the notice-and-comment procedures and Regulations.gov to provide broad democratic accountability and legitimacy.[65]

C. Public Support for Regulations

Finally, public engagement in agency rulemaking is sometimes justified on instrumental grounds as enhancing public support for agency regulations.[66] The theory is that stakeholders will be more supportive of agency rulemaking when their voices are heard by the agency, even when they do not get everything they want.[67] Thus, public engagement fosters support for the administrative state, which is currently viewed with suspicion by many Americans.[68] Indeed, this is one of the leading justifications for negotiated rulemaking, in which a group of stakeholders affected by regulation negotiate in the hope of reaching a consensus rule that the agency will then propose using the normal notice-and-comment process.[69]

There is some evidence to support the idea that individuals view government decisions that affect them as more legitimate if they have the opportunity to participate and be heard in the decision-making process.[70] Yet it is questionable whether the interest groups that typically challenge agency action in court are any less likely to do so when they participate actively in the rulemaking process. Interest groups may be more likely to get what they can from participation in the regulatory

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[65] *See* Cynthia R. Farina et al. *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 407 (2011) [hereinafter Farina et al., *Rulemaking 2.0*] (discussing the idea that e-rulemaking "should enable citizens to monitor what unelected agency decisionmakers are doing, and to participate actively in the rulemaking process in ways that, until now, have been available only to well-resourced interests").

[66] This is sometimes described as "sociological legitimacy." *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795-96 (2005).

[67] *See* Guardian Fed. Savs. & Loan Ass'n v. Fed. Savs. & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1978) ("[T]he procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance."); *see also* SIDNEY A. SHAPIRO, AGENCY, ADMIN. CONFERENCE OF THE U.S., REVIEW OF EXISTING REGULATIONS 434 (1995) ("Unless an agency speaks with all stakeholders, the consultation process is not likely to be considered legitimate.").

[68] *See* Bull, *Making the Administrative State "Safe"*, *supra* note 13, at 615 ("[W]idespread antipathy towards administrative agencies may also reflect a sense that the public has been foreclosed from making decisions regarding the proper allocation of resources, decisions that instead are made by relatively insulated bureaucrats.").

[69] Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256–57 (1997).

[70] CYNTHIA R. FARINA & CeRI, IBM CTR. FOR THE BUS. OF GOV'T, RULEMAKING 2.0: UNDERSTANDING WHAT BETTER PUBLIC PARTICIPATION MEANS, AND DOING WHAT IT TAKES TO GET IT 12 (2013) [hereinafter FARINA & CeRI, IBM CENTER] (citations omitted) ("Political psychology research confirms that individuals who are able to provide meaningful input into government decisions that affect them are more likely to view the process as legitimate—and to accept the outcome, even if it is not what they had hoped for.").

process and then turn to judicial review when the outcomes are less than ideal and adversely affect them or their constituencies. Indeed, the politically charged context of some rulemakings may further mobilize opposition to agency proposals.[71] At least one study of negotiated rulemaking suggests that there is no relationship between this robust form of stakeholder participation in regulatory decision-making and acceptance of the outcome, at least as measured by whether the participants seek to challenge the rule in court.[72] Moreover, members of the general public unfamiliar with the rulemaking process may be unhappy with the outcome if their views are rejected and they do not receive an explanation they regard as persuasive.[73]

Finally, even under the best of circumstances, only a slice of the public will participate in agency rulemaking. The vast majority of people who do not participate in the process are unlikely to view rules more favorably merely because other members of the public do participate.[74] Nonetheless, robust and widely publicized efforts by agencies to engage with the public during the rulemaking process could enhance the sociological legitimacy of regulatory decision-making.[75]

III. ENHANCING PUBLIC PARTICIPATION IN RULEMAKING

A. The Notice-and-Comment Process

The most well-known tool for engaging the public in rulemaking is the notice-and-comment process required by the APA. Pursuant to Section 553, agencies must

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[71] *See, e.g.*, Gail L. Achterman & Sally K. Fairfax, *The Public Participation Requirements of the Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 501, 508 (1979) ("[T]here is no reason to assume that the opportunity to participate leads to more readily accepted decisions. Public involvement programs . . . may easily mobilize dissent."); Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1488 (2015) ("[T]he potential for NLRB rulemaking to result in a final product that enjoys public legitimacy seems doubtful in the highly politically charged moment in which Board actions of all stripes are likely to be targeted with allegations of illegitimacy and union favoritism.").

[72] Coglianese, *supra* note 69, at 1309 ("As a means of reducing litigation, negotiated rulemaking has yet to show any demonstrable success.").

[73] Bill Funk, *The Public Needs a Voice in Policy. But is Involving the Public in Rulemaking a Workable Idea?* CPRBLOG (Apr. 13, 2010) ("How will people feel about their experience participating in government when they discover that their comments in fact have no impact whatsoever on the rulemaking?").

[74] The vast majority of people unhappy with a regulation are also unlikely to avail themselves of judicial review.

[75] *See* E. Allan Lind & Christiane Arndt, *Perceived Fairness and Regulatory Policy: A Behavioural Science Perspective on Government-Citizen Interactions* 9 (Org. for Econ. Co-operation and Dev. Regulatory Policy, Working Paper No. 6, 2016) (discussing research that supports this proposition and noting that citizens' perceptions of fair treatment turn heavily on whether they have had a chance to express their views, been treated with respect by the agency, and been given a reasoned explanation for the agency's decision).

publish a "notice of proposed rulemaking" (NPRM) in the *Federal Register* including the "terms or substance of the proposed rule or a description of the subjects and issues involved."[76] Although the language of the APA does not seem to require much in the way of notice, the practice has become much more elaborate over time. Today, agencies generally publish the full text of their proposed rules along with detailed preambles explaining the "basis and purpose" of the proposed rule.[77] Agencies must then provide interested members of the public with the opportunity to "participate in the rule making through submission of written data, views, or arguments":[78] the "comment" piece of the process. Moreover, as a result of judicial glosses on the APA over many years, the agency must generally address all significant public comments when issuing the final rule.[79] And if the Final Rule is not the "logical outgrowth" of the proposed rule, a court may require an additional round of public comment.[80]

Notice-and-comment rulemaking is considered an open and participatory decision-making process because any member of the public with the wherewithal can learn what the agency is planning, submit their views on the proposal, and provide the agency with information relevant to the rulemaking decision. Moreover, with the advent of regultions.gov, agency proposals, public comments, and various supporting documents are now available online to anyone with access to the Internet. In the foregoing ways, the notice-and-comment process augments the information resources of agencies and enhances their democratic legitimacy and accountability.[81] Indeed, it is hard to imagine a more open, transparent, and democratic process, at least formally.

Nevertheless, there is a widespread perception that representatives of industry, large trade groups, professional associations, and national advocacy organizations typically dominate notice-and-comment rulemaking.[82] These "sophisticated

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[76] Administrative Procedure Act, 5 U.S.C. § 553(b)(3) (2012). The notice and comment requirements of Section 553 do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* §§ 553(b)(A)-(B).

[77] KERWIN & FURLONG, *supra* note 2, at 64.

[78] Administrative Procedure Act § 553(c).

[79] *See, e.g.*, United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252-53 (2d Cir. 1977) (quoting Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (2d Cir. 1968) and Associated Indus. of N.Y. State, Inc. v. U.S. Dep't of Labor, 487 F.3d 342, 352 (2d Cir. 1973)) (requiring agencies to address "major issues" discussed in the public comments); *see also* Lisa Schultz Bressman & Glen Staszewski, *Judicial Review of Agency Discretion*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 195, 225-29 (Michael E. Herz et al. eds, 2d ed. 2015).

[80] *See, e.g.*, Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985).

[81] There is little evidence that it increases public support for agency regulations.

[82] *See* Johnson, *supra* note 6, at 78 (collecting views that rulemaking is "dominated by regulated entities and industry groups, rather than public interest groups"); *see also* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005)

stakeholders"[83] have the motivation, resources, and capacity to submit comments that provide agencies with the types of information they need and that advance the kinds of arguments agencies are most likely to find persuasive. By contrast, regulatory beneficiaries and many smaller regulated parties, as well as state, local, and tribal governments, and members of the general public rarely participate.[84] Although advocacy groups may participate on behalf of many absent stakeholders, public interest groups do not participate as frequently as regulated industries and are frequently out-resourced. In addition, advocacy groups sometimes make strategic decisions not to participate even when their members may be rich sources of information, and representative groups may not represent the diversity of views or experiences of their members.

B. Obstacles to Broader Public Participation in Rulemaking

Scholars suggest that many members of the public who might participate in rulemaking, including those with a direct stake in the outcome either as potential beneficiaries or as regulated entities, lack awareness, motivation, and capacity to comment effectively.[85] First, they may not be aware that the rulemaking process is taking place or that it is open to public participation. News coverage of agency rulemaking rarely mentions the opportunities for public comment.[86] Particularly in the era of "Presidential Administration," the media often depicts agency decision-making as an opaque, politically driven process, in which political appointees choose regulatory initiatives based on the agenda of the President and his supporters.

Second, many members of the public may lack the motivation or incentive to become involved in rulemakings, even when they are aware of them and have a stake in their outcomes. The interests at stake for many potential beneficiaries of regulatory action may simply be insufficient to justify the expenditure of time and attention on participating. Regulations often impose concentrated costs on regulated entities and diffuse benefits on the general public, creating collective action problems.[87] Absent stakeholders may assume that someone else will represent their

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(noting that "the sophistication with which a comment is written seems to affect the probability that the agency will accept suggestions in that comment").

[83] *See* Farina et al., *Knowledge in the People*, *supra* note 5, at 1191 (defining "sophisticated stakeholders").

[84] *See* Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 385-86 (citing evidence that only a "limited range of stakeholders" participate in notice and comment rulemaking).

[85] *See* Coglianese, *Citizen Participation*, *supra* 8, at 967 (noting collective actions problems of public engagement); Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 389–90 (citing "[i]gnorance about the rulemaking process[,] [u]nawareness that rulemakings of interest are going on[,] and [i]nformation [o]verload from the length, and linguistic and cognitive density, of rulemaking materials" as three barriers to participation).

[86] *See* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 11.

[87] *See* OLSON, *supra* note 24, at 53-65 (explaining how small, organized groups are usually more effective than larger, diffuse groups in shaping policy).

views. Indeed, not unreasonably, many members of the public may assume that regulatory agencies charged with pursuing the "public interest" or ensuring clean air, clean water, safe air transportation, and other statutory mandates will advocate on their behalf. Others may believe that interest groups will represent their views. Or they may believe the agency has already made up its mind about the course it will pursue and their participation will have no impact.[88]

In addition, due to loss aversion, individuals are more motivated to protect themselves from losing something than to obtain a new benefit. Because regulations often involve the imposition of new costs on industry and new benefits for a broader public, the potential beneficiaries will not be as motivated to fight for the benefit they have lived without as regulated parties will be to avoid a new cost.[89]

Third, even if parties are aware of the opportunity to participate in the rulemaking and are motivated to become involved, they may not have the capacity to participate effectively. Although agencies accept comments on their NPRMs through Regulations.gov anytime day or night, proposed rules are often quite lengthy and complex, address many different issues, are written at an advanced level of education,[90] and can be downright boring to many readers.

Perhaps most importantly, many members of the public do not know how to submit effective comments. Several scholars have suggested that there is "a fundamental incongruence between the ways that 'insiders' think and talk in rulemaking and the ways that novice commenters do."[91] They suggest that the "insiders" who regularly participate in rulemaking—*i.e.*, executive branch officials, regulated industries, trade associations and major advocacy organizations—form a "community of practice," with a "shared rhetoric, competencies, experiences, and expertise[, developed] over sustained interactions."[92] While agency decision-makers value "objective," empirical evidence and quantitative data, presented in analytical, premise-argument-conclusion reasoning, unsophisticated stakeholders tend to offer "highly contextualized, experiential information, often communicated in the form of personal stories."[93]

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[88] Ironically, the substantial efforts that agencies undertake before publishing a NPRM, including the many different forms of public outreach and consultation described in this Report, may contribute to this perception of the notice-and-comment process because the agency has already thought about most of the salient issues. In other words, if the agency does a good job engaging the public when developing a proposed rule, it may not learn anything new during notice and comment that causes it to revise the final rule.

[89] Wilson, *The Politics of Regulation*, *supra* note 24, at 85.

[90] *See* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 12 (describing a Department of Transportation NPRM as written at a "late-college/early-graduate school reading level").

[91] Farina et al., *Knowledge in the People*, *supra* note 5, at 1187.

[92] *Id.*

[93] *Id.*

The absence of certain important stakeholders is not the only perceived shortcoming of public engagement in notice-and-comment rulemaking. There is also criticism of the quality of participation by those who do regularly participate. Sophisticated stakeholders may be less interested in engaging in a dialogic process with the agency and other stakeholders or improving the substance of a proposed rule than in preparing a favorable record for a subsequent judicial challenge.[94] This may be due in part, however, to the participation of these groups in the rule development that precedes the publication of the NPRM. If an interested party has already articulated its position to the agency and the agency has rejected it in the NPRM, the party may correctly decide that it is more worthwhile to prepare for judicial review than to try, try again.

Although many have hoped that e-Rulemaking and "Rulemaking 2.0" would lower the barriers to public engagement beyond the usual suspects and lead to a more dialogic regulatory process, to date the impact of the move online has been modest.[95] While it is certainly easier for interested parties to obtain access to the relevant information, the dawn of e-Rulemaking has not dramatically increased the level or quality of participation. Moreover, even in the few high-profile rulemakings that have attracted mass comments from individual members of the public, "rulemaking novices" rarely participate effectively. In most cases, their comments are little more than a "thumbs up" or "thumbs down," adding little information agencies can use in deciding how to proceed, other than providing perhaps a broad sense of the general sentiment of those who have submitted mass comments.[96]

C. The Challenges of Mass Comments

The "mass comments" occasionally submitted in great volume in highly salient rulemakings are one of the more vexing challenges facing agencies in recent years. These comments are typically the result of orchestrated campaigns by advocacy groups to persuade members or other like-minded individuals to express support for or opposition to an agency's proposed rule. Advocacy groups that organize these campaigns frequently provide text or recommended language for individuals, although they increasingly urge commenters to customize their input by adding language or thoughts or their own, and they often provide portals through which commenters can easily submit their views for inclusion in the rulemaking record. A

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[94] KERWIN & FURLONG, *supra* note 2, at 115.

[95] *See* Coglianese, *Citizen Participation*, *supra* note 8, at 958 ("[N]either agencies' acceptance of comments by email nor the development of the Regulations.gov portal have led to any dramatic changes in the general level or quality of public participation in the rulemaking process."); *see also* Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 387; HERZ, USING SOCIAL MEDIA, *supra* note 28, at 2 ("[T]he move online has not produced a fundamental shift in the nature of notice-and-comment rulemaking.").

[96] *See* Coglianese, *Citizen Participation*, *supra* note 8, at 958; HERZ, USING SOCIAL MEDIA, *supra* note 28, at 40-42 (noting many instances in which engagement by the "lay public" with agency regulation has failed to produce novel or helpful ideas).

significant number of mass comments may therefore be identical or vary from each other in only relatively marginal ways.

Because the public has a right "to participate in the rule making through submission of written data, views, or arguments,"[97] and agencies are legally required to consider those comments in a reasoned fashion, mass comments pose serious practical challenges. First, simply reviewing the "torrents of email"[98] that agencies receive in mass comment campaigns is resource intensive. While natural language processing technology can be used to identify the identical comments and otherwise streamline and improve the review process,[99] the costs of reviewing this material may still potentially exceed its benefits. There may also be concerns about whether the mass comments are genuine or truly representative of the views of the general public.[100] The latter concern applies to some degree to all public comments, but they are especially pressing in the context of mass comments that are specifically designed to show that a significant segment of the public strongly supports or opposes a proposed rule. If those comments are not genuine or truly representative, then they cannot reliably perform this function.

There is also a more fundamental debate in the literature regarding whether mass comments have any real value in rulemaking—and, relatedly, how agencies ideally should respond to them.[101] Agencies currently tend to devote most of their attention to relatively sophisticated comments that include technical data or analytical arguments, and they are generally reluctant to engage with comments that merely provide "a simple statement of viewpoint, value, or preference."[102] Cynthia Farina and her colleagues at the Cornell e-Rulemaking Initiative support this approach because mass comments that simply reflect preferences about public policy outcomes tend to be the product of relatively uninformed "spontaneous preferences" or "group framed preferences," rather than the type of reasoned deliberation that is supposed to

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[97] Administrative Procedure Act, 5 U.S.C. § 553(c) (2012).

[98] *See* Mendelson, *Torrents of E-Mail*, *supra* note 13.

[99] *See* Michael A. Livermore et al., *Computationally Assisted Regulatory Participation*, 93 NOTRE DAME L. REV. 977, 993 (2018).

[100] We focus here on mass comments rather than fake comments, which are largely beyond the scope of this report.

[101] *See* Michael Herz, *"Data, Views, or Arguments": A Rumination*, 22 WM. & MARY BILL RTS. J. 351, 368-69 (2013) [hereinafter Herz, *Data, Views, or Arguments*].

[102] Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENVTL. & ADMIN. L. 173, 173 (2012) [hereinafter Mendelson, *Should Mass Comments Count?*] (noting that such content tends to be characteristic of mass comments). For a leading empirical study that finds a disparity between agencies' treatment of comments based on their level of sophistication, see generally Cuéllar, *supra* note 82. *See also* Mendelson, *Torrents of E-Mail*, *supra* note 13, at 1363-64 ("In general, rulemaking documents only occasionally acknowledge the number of lay comments and the sentiments they express; they very rarely appear to give them any significant weight.").

characterize rulemaking.[103] While mass comments might legitimately serve as a fire alarm that could alert politicians to a potential need to intervene, they should not influence the work of agencies' rulemaking teams.[104] "Rulemaking is not supposed to be a plebiscite,"[105] and thus "the types of preferences expressed in these comments may be good enough for electoral democracy, but they are not good enough for rulemaking, even when rulemaking is heavily laden with value choices."[106]

While agreeing wholeheartedly that rulemaking is not a "plebiscite," Nina Mendelson notes the propensity of most agencies to avoid responding to the positions expressed in mass comments, even if they merely express support for or opposition to the outcome of a proposed rule or strengthening or relaxing a regulatory standard.[107] Most agencies have broad discretionary authority, and rulemaking therefore necessarily involves making value-laden policy judgments of precisely this nature.[108] Mendelson claims that the democratic responsiveness of rulemaking is undermined if agencies ignore the preferences or values expressed by the people during the notice-and-comment process.[109] She responds to Farina's concern about the lack of deliberation and poor information environment surrounding mass comments by pointing out that "[a]gencies, not public commenters, are the decision makers, and so the critical locus of deliberation is in the agency."[110] Mendelson therefore contends that agencies "should commit to acknowledging mass comments in the final rule document and to offering a brief answer."[111] More specifically, she suggests that agencies should

> recognize the possibility that public views, as expressed in comments, point in an unexpected direction or a direction contrary to the agency's initially preferred policy. This should prompt the agency to use additional

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[103] *See* Cynthia R. Farina et al., *Rulemaking vs. Democracy*, *supra* note 13, at 132-45. Farina and her colleagues also believe that situated knowledge presented through narrative stories does have potential value, and they suggest that rule making teams should undertake efforts to be more receptive to this kind of information. *See* Cynthia R. Farina et al., *Knowledge in the People*, *supra* note 5, at 1188.

[104] *See* Farina et al., *Rulemaking vs. Democracy*, *supra* note 13, at 13, 141.

[105] *Id.* at 131.

[106] *Id.* at 137. *See also* Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23 (2009) (criticizing this trend).

[107] *See* Mendelson, *Torrents of E-Mail*, *supra* note 13, at 1361-62.

[108] *See id.* at 1347-48.

[109] *See id.* at 1359 ("An agency's dismissal or pro forma treatment of significant numbers of public comments would be very hard to square with a vision of rulemaking as a democratic process.").

[110] Mendelson, *Should Mass Comments Count?*, *supra* note 102 , at 180.

[111] *Id.* at 182.

> procedures to engage public views or at a minimum to engage in more extended deliberation, possibly including Congress or the White House.[112]

Mendelson recognizes, however, that courts should be very deferential to agency decisions in this context as long as agencies have given "*some* acknowledgment of significant views expressed through lay comments."[113]

While commentators disagree about the extent to which mass comments have value and thus merit a response from agencies, there is widespread consensus that comments that include data or well-reasoned analytical arguments are more valuable to agencies.[114] Yet comments in general, and mass comments in particular, may blend simple statements of preference, the provision of relevant technical data, situated knowledge, and analytical arguments regarding the strengths or weaknesses of an agency's proposed rule. Accordingly, even if everyone agreed that simple statements of preference or value are not worthwhile contributions, agencies would still need to review the comments to determine whether they contain useful data, situated knowledge, or analytical arguments and respond appropriately.

We strongly agree that rulemaking is not a plebiscite, and that agencies should not treat comments as "votes" or base their decisions on the unfiltered preferences of a majority. We are therefore sympathetic to Professor Farina's position that comments reflecting simple preferences about outcomes are "not good enough for rulemaking." On the other hand, majoritarian preferences are not necessarily irrelevant, even from a deliberative perspective,[115] and thus we tend to share Professor Mendelson's intuition that it would be troubling for agencies to ignore mass comments on questions of value.

What tends to get glossed over in this debate, however, is the fact that rulemaking is a multi-stage process, and that public notice and comment only occurs after agencies have already devoted substantial attention to the basic issues at stake. This means that the simple statements "of viewpoint, value, or preference" that tend to be reflected in mass comments will generally already have been considered and resolved by the agency when it set its agenda and developed the proposed rule. Agencies should not be required to redo all of this work in response to mass comments when they issue their final rules. While agencies are often criticized for being inflexible and treating notice-and-comment as "Kabuki Theater,"[116] a certain

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[112] Mendelson, *Torrents of E-Mail*, *supra* note 13, at 1377.

[113] *Id.* at 1379 (emphasis added).

[114] Moreover, situated knowledge conveyed in the form of personal stories by individuals with lived experience in the area being regulated can have substantial value as well. *See* Farina et al., *Knowledge in the People*, *supra* note 5, at 1217-38.

[115] *See* Staszewski, *Political Reasons*, *supra* note 15, at 894-912 (discussing potential roles for majoritarian preferences in agency decision making from a deliberative perspective).

[116] *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) ("Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to

amount of path dependence is a natural and not entirely undesirable element of the rulemaking process. At the same time, however, this pragmatic position puts a premium on the importance of agencies conducting meaningful public engagement during the agenda setting and rule development stages, when their highest priorities are established and these basic questions of value tend to be resolved, and when agencies are most open-minded about the proper treatment of policy questions as a general matter. Consistent with this report's emphasis on treating rulemaking in a holistic fashion, we think that if agencies provide a reasoned explanation for pursuing a proposed rule and address relevant questions of value in the course of developing a rule proposal, then they should generally be able to rely on this information as an adequate response to mass comments even if the explanation or justification was initially provided during the agenda setting or rule development stages. If, however, mass comments reflect a genuine groundswell of grassroots opposition to the agency's proposal that was not anticipated or addressed at earlier stages of the rulemaking process, then the agency should either (1) address these comments on their merits when it promulgates the final rule, or (2) treat the comments as a "yellow light" that warrants further deliberation. In other words, the agency should consider treating genuine and unanticipated grassroots opposition to a proposed rule as a trigger for the kind of enhanced deliberation discussed in Part XI.[117]

Finally, although we cannot fully resolve the debate over mass comments, we will offer suggestions on how agencies might address some of the practical challenges

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human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.").

[117] *See* Herz, *Data, Views, or Arguments*, *supra* note 101, at 377 ("[Mass] comments are a *prompt*; they flag an issue that the agency should focus on, but the agency should then determine whether the more accepted bases of agency decisionmaking justify a particular outcome") (emphasis added); *see also* Mendelson, *Should Mass Comments Count?*, *supra* note 102, at 181 ("[W]ithout dictating the outcome, mass comments might give agency officials a reason to pause and to engage a wider range of viewpoints. Public comments might also prompt the agency to take steps to more systematically consider public views, whether that is though focused polling, focus groups, public deliberation efforts, so-called citizen juries, or other devices.").

NHTSA followed this approach in response to a disproportionate number of comments from the general public that the agency believed reflected an unfounded fear of air bags. *See generally* Air Bag On-Off Switches, 62 Fed. Reg. 62,406 (Nov. 21, 1997) (to be codified at 49 C.F.R. pts. 571 and 595); Mendelson, *Torrents of E-Mail*, *supra* note 13, at 1366 (discussing this example). Rather than changing its proposed rule, the agency conducted focus groups on whether it could correct the public's misperceptions. Based on the feedback that it received from the focus groups, NHTSA ultimately promulgated a rule that adhered to its substantive position "but added a 'public education information campaign to put air bag risks and benefits into their proper perspective.'" Mendelson, *Torrents of E-Mail*, *supra* note 13, at 1366 (quoting Air Bag On-Off Switches, 62 Fed. Reg. at 62,423). This is an excellent illustration of an agency using what we would regard as the best practices for responding to mass comments during notice-and-comment rulemaking.

of reviewing mass comments and extracting the information of relevance to their rulemakings.

D. Lowering the Barriers to Participation by Absent Stakeholders

Enhancing public engagement in rulemaking by traditionally absent stakeholders can improve the effectiveness, democratic legitimacy, and public acceptance of certain regulations.

1. Improving the Effectiveness of Regulation

Absent stakeholders may have relevant information "about impacts, ambiguities and gaps, enforceability, contributory causes, unintended consequences," and similar information based on "their lived experience in the complex reality into which the proposed regulation would be introduced."[118] Scholars call this "situated knowledge." Proponents of greater participation by absent stakeholders believe that they can provide additional information based on their experiences that will improve the effectiveness of regulation. Absent stakeholders may also have information that is relevant to agenda-setting and retrospective review.

Cynthia Farina and her colleagues have documented many examples of situated knowledge helpful to agency rulemaking from the Regulation Room project discussed more fully below.[119] For example, when the Consumer Financial Protection Bureau (CFPB)[120] conducted a rulemaking aimed at ensuring borrowers were offered opportunities to restructure their mortgage payments before foreclosure on their homes, individual borrowers shared their experiences with foreclosures that could have been avoided but for erroneous calculations of their home's net present value. Based on these comments, the CFPB modified the final rule to require lenders to disclose these calculations prior to foreclosure so that the borrowers might correct them. Similarly, during a rulemaking by the Department of Transportation (DOT) to require the installation of electronic on-board recording equipment (EOBR) in commercial motor vehicles, independent commercial vehicle drivers noted that strict enforcement of hours-of-service rules based on automatic monitoring could have absurd and unintended consequences, such as requiring drivers to pull off the highway just short of their destination or in an unsafe location.[121] There are many other examples despite limited systematic efforts to date by agencies to reach these types of individuals and groups.

In many cases, agencies rely upon interest group organizations to represent the views of individuals who rarely participate in rulemakings. Yet these groups may not

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[118] Farina et al., *Knowledge in the People*, *supra* note 5, at 1187, 1197.

[119] *See infra* Part IX.C & F.

[120] Since the public engagement activities described in this Report, the CFPB has undergone several changes, including adopting a different name, the Bureau of Consumer Financial Protection.

[121] *See* FARINA & CERI, IBM CENTER, *supra* note 70, at 17.

always provide an adequate substitute.[122] For example, in a DOT rulemaking involving tarmac delays, many of the professional associations and unions representing employees in the air travel industry, such as pilots, flight attendants, air traffic controllers, gate personnel, ground crews, and travel agents, made a strategic decision not to participate in the rulemaking lest they upset either the airlines (their employers) or air travelers (their customers).[123]

Even when organized interest groups do participate, they may not represent the range of interests and views among those they purport to represent. For example, some workers do not participate in unions because they do not think their unions represent their views.[124] Some gun owners oppose the positions of the NRA.[125] Furthermore, national advocacy organizations generally take a position on issues rather than convey a diversity of constituent views. For example, during a DOT rulemaking concerning the accessibility of airport check-in kiosks and travel websites to individuals with physical and cognitive disabilities, organizations representing persons with disabilities uniformly sought the increased independence offered by accessible technologies. But some individuals with disabilities were concerned that requiring accessible technologies would result in fewer airline agents who could assist travelers and adapt to their particular needs.[126] In the DOT rulemaking proposing the installation of EOBR equipment, large trucking companies, most of whom already used the technology, generally supported the proposal, while small trucking companies and independent commercial motor vehicle drivers, most of whom did not use the technology, generally opposed the proposal.[127] Among other things, the commercial drivers and small companies noted that it would be more difficult for them to absorb the costs of installing the equipment and suggested that the agency's cost-benefit analysis was "skewed toward a big business model."[128]

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[122] *See* Stewart, *supra* note 11, at 1767 ("There are no accepted means of determining whether the views of the organization are congruent with the interests of the broader class.").

[123] *See* Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 406 n.59, 413.

[124] *See, e.g.*, Janus v. AFSCME, 138 S.Ct. 2448, 2461 (2018) (involving an employee who refused to join his union because he opposed many of its polices).

[125] *See generally* Christopher Ingraham, *Most Gun Owners Don't Belong to the NRA—and They Don't Agree with it Either*, WASH. POST (Oct. 15, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/15/most-gun-owners-dont-belong-to-the-nra-and-they-dont-agree-with-it-either/?noredirect=on&utm_term=.33ce8b43b5a9.

[126] *See* Farina et al., *Knowledge in the People*, *supra* note 5, at 1204; FARINA & CERI, IBM CENTER, *supra* note 70, at 17.

[127] Farina et al., *Knowledge in the People*, *supra* note 5, at 1200, 1214 n.106.

[128] *Id.* at 1200.

In some cases there may be no organization that represents stakeholders affected by a rulemaking, or the organizations that do exist may not be strong enough to participate regularly or effectively.[129]

Finally, there may be rulemakings in which the agency needs individual rather than collective responses. For example, the agency may seek to understand consumer reaction to the content and form of disclosure requirements or trade-offs between functionality and efficiency.[130] Or the representative organization (and especially the lawyers who typically write comments on their behalf) may not have the experiential knowledge the agency needs. During the DOT EOBR rulemaking, independent commercial drivers and small trucking companies conveyed "rich and nuanced detail of individual experiences and operations[, illuminating] a variety of business practices around completing driving logs and … concerns about inflexibility."[131]

To be clear, the absence of many stakeholders will not always undermine the effectiveness of regulations. In many rulemakings absent stakeholders will not possess situated knowledge that is relevant to the decision or that is not available from other sources. For example, when EPA is setting the permissible exposure level for a pollutant, many people adversely affected by the pollutant may have relevant health experiences to share. But the agency can likely obtain more valuable information about the pollutant's health effects in the aggregate from other sources.[132] Part of what this report emphasizes is that agencies should make an assessment as early as possible when developing rules concerning whether there are individuals and groups who are likely to be absent from the rulemaking without robust, targeted outreach and whether these individuals or groups have experiences, views, or other information relevant to the rulemaking that would not otherwise be available to the agency without their participation.

2. Enhancing the Democratic Accountability, Legitimacy, and Public Support For Regulation

The level of participation required to lend democratic accountability and legitimacy to rulemaking, or to enhance public support for regulations, is much less clear and remains theoretically contested. Some would argue that the notice-and-comment process and the ability of any interested person to use Regulations.gov to review proposed rules and submit comments is all that democracy requires—perhaps

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[129] *See, e.g.*, Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 16 (1996) ("The current political market is stacked against the poor, who lack the political capital needed to influence politics, as well as against other large, diffuse groups that have difficulty overcoming collective action problems, like some racial minorities.").

[130] *See* Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 429 (discussing DOT design of tire labeling to provide information related to fuel efficiency).

[131] FARINA & CERI, IBM CENTER, *supra* note 70, at 17.

[132] *See id.* at 18.

more.[133] Whatever the validity of that view, we think that the legitimacy of the process can still be enhanced through further engagement by the public in rulemaking. As discussed above in Part II.B, government agencies have a democratic obligation not only to render an account to the public of what they are doing, but to do so in a way that can be understood and accepted by the public.[134] In addition, agencies should ensure that the public has a meaningful opportunity to participate in the decision-making process and that the entire range of relevant interests and perspectives is considered. Thus, democratic theory does not necessarily require the public to participate in every rulemaking. But it does require that citizens be able to participate in a meaningful way when they have the motivation and incentive to do so, particularly when they can present information or views that would otherwise be missing. This means that agencies should explain what they are doing in plain language form, publicize their plans early enough in the rulemaking process so that the public can participate when it still might make a difference, and educate the public on how to participate effectively in rulemaking if they are so inclined.

E. Beyond Notice and Comment

Section 553 sets forth only the minimum requirements for informal rulemaking. But agencies are free to and do provide additional opportunities for public engagement in their regulatory work. This Report will address many of the different tools for public engagement beyond the notice-and-comment process, with the goal of helping agencies to think systematically about when and how to engage members of the general public or unorganized stakeholders in their rulemakings. In doing so, we describe various successes in which agencies, sometimes with the assistance of non-governmental parties, have thoughtfully supplemented the APA procedural requirements to overcome the barriers to participation by rulemaking novices.[135] In addition, we offer suggestions on how to improve the use of social media and eRulemaking as a way of obtaining broader participation or additional useful information.

Of course, most agency rulemakings are not controversial, and substantially enhancing public engagement beyond the basic APA requirements may not be a wise use of resources. In addition, in many rulemakings absent stakeholders may be adequately represented by organized interests who do participate; or rulemaking novices may not have much useful information to add. Identifying and engaging absent stakeholders in most cases will be more difficult than relying on sophisticated stakeholders who are ubiquitous in agency rulemaking. Nevertheless, many of the agency officials we spoke to who have managed to increase participation in rulemaking by the public and traditionally absent stakeholders acknowledged its

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[133] *See* DAVIS, DISCRETIONARY JUSTICE, *supra* note 2, at 65-66.

[134] *See* Waldron, *supra* note 14, at 7.

[135] Farina et al. report that "agency rulemakers . . . reacted positively to the usefulness of comments received from Regulation Room, even when they were initially skeptical about the value of the project." Farina et al., *Knowledge in the People*, *supra* note 5, at 1198.

value in furthering both the information and democratic functions of public participation in the regulatory process.

We do not suggest that it is necessary for agencies to enhance public participation in every rulemaking. Nevertheless, we recommend that agencies think purposefully about the value of broader public engagement in every rulemaking they undertake and consider whether it is worthwhile to supplement the traditional opportunities for public participation. This includes thinking about whether there are stakeholders affected by the potential regulations that do not traditionally participate in the agency's work or that are not likely to be adequately represented by other groups. In addition, we recommend that agencies consciously consider the appropriate level of public engagement in each and every rulemaking, develop a public engagement plan when appropriate, and periodically revisit their plan as the rulemaking progresses from early rule development to the notice-and-comment process and beyond.

Finally, agencies should seek to promote the democratic goal that the public understands what they are doing in their rulemakings and why. As discussed herein and in other ACUS reports,[136] this requires explaining complex regulatory matters in a way that is understandable to unsophisticated stakeholders. It may also include broadening the types of comments that count in rulemaking[137] and developing a greater appreciation for the non-technical values that inform discretionary policymaking.[138]

IV. LEVELS OF PUBLIC ENGAGEMENT

The existing literature on public engagement in rulemaking suffers from a couple of limitations. There is no standard definition of what counts as "public engagement," and there is no definitive catalogue of the countless available mechanisms for engaging the public and their particular characteristics.[139] Nor is there general agreement about the best mechanisms for engaging with the public in any particular situation. There is, however, widespread agreement that the best mechanisms for engaging with the public will vary depending upon the situation.

For purposes of this report, we define public engagement to include (1) efforts to enhance public understanding of agency rulemaking and (2) efforts to foster meaningful participation in the rulemaking process by members of the public. Consistent with our charge, we are especially interested in identifying ways of enhancing public engagement with "absent stakeholders," meaning individuals or groups that a regulation may benefit or burden, or otherwise have a direct stake in the

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[136] *See generally* BLAKE & EMERSON, *supra* note 19.

[137] *See* Farina et al., *Knowledge in the People*, *supra* note 5, at 1188.

[138] Cuéllar, *supra* note 82, at 468.

[139] *See* Gene Rowe & Lynn J. Frewer, *A Typology of Public Engagement Mechanisms*, 30 SCI., TECH., & HUM. VALUES 251, 252-53 (2005).

outcome of the agency's rulemaking, but who do not traditionally participate in the agency's rulemaking process. We are also interested in identifying ways of enhancing public engagement with "unaffiliated experts," meaning scientific, technical, or other professionals with expertise relevant to the agency's rulemaking who are neither direct stakeholders nor employed or retained by a stakeholder.

It is vital to recognize that there are *different levels* of public engagement in rulemaking, and scholars have previously identified typologies of participation that we find useful.[140] For example, the International Association for Public Participation ("IAP2") has developed a "Spectrum of Public Participation" that identifies five types of public participation ranging from least to greatest citizen influence, and articulates the goal, the promise to the public, and examples of techniques at each point along the spectrum.[141] The main categories of the spectrum and their accompanying goals are as follows:

Inform	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities, and/or solutions.
Consult	To obtain public feedback on analysis, alternatives, and/or decisions.
Involve	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.
Collaborate	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.
Empower	To place final decision-making in the hands of the public.[142]

The notice-and-comment rulemaking process outlined in section 553 of the APA is widely viewed as a prominent form of consultation, although it also involves informing the public of an agency's plans. Forms of participation that "involve" the

[140] For the classic example, see generally Sherry R. Arnstein, *A Ladder of Civic Participation*, 35 J. AM. INST. PLANNERS 216 (1969); *see also* CAROLYN J. LUKENSMEYER ET AL., IBM CTR. FOR THE BUS. OF GOV'T, ASSESSING PUBLIC PARTICIPATION IN AN OPEN GOVERNMENT ERA: A REVIEW OF FEDERAL AGENCY PLANS App. III at 59-61 (2011) (discussing these typologies).

[141] *See* CAROLYN J. LUKENSMEYER & LARS HASSELBLAD TORRES, IBM CTR. FOR THE BUS. OF GOV'T, PUBLIC DELIBERATION: A MANAGER'S GUIDE TO CITIZEN ENGAGEMENT 7 (2006) (presenting the IAP2 spectrum).

[142] *Id.*

public or result in "collaboration" tend to be more ongoing and deliberative in nature, and they will also figure prominently in our report. In contrast, efforts to "empower" the public by giving them final decision-making authority are outside the scope of our report, since agencies are typically the authoritative decision-makers in rulemaking under federal regulatory statutes.

Archon Fung has developed another influential typology of public participation: "the democracy cube."[143] He explains that forms of public participation vary along three key dimensions: (1) who participates (or how participants are selected), (2) how participants communicate and make decisions, and (3) the impact of public participation. Each of these dimensions can, in turn, be understood along a spectrum ranging from least to most inclusive, deliberative, or potent. Thus, for example, the spectrum of "participant selection" ranges from relatively exclusive methods that are limited to public officials (expert administrators or elected representatives), to relatively inclusive methods that do not involve the state at all.[144]

We are concerned primarily with methods of public participation that fall within the middle-range of the spectrum and involve the creation of "mini-publics."[145] From most to least exclusive (or least to most inclusive), these methods can involve participation by professional stakeholders, lay stakeholders, a random selection of citizens, or mini-publics that are open to all (the latter of which can involve targeted recruitment or outreach or rely solely on self-selection). Although notice-and-comment rulemaking is ostensibly open to anyone who wishes to participate, in practice the process tends to be dominated by sophisticated stakeholders.[146] Our report therefore focuses on methods of participation that would likely include lay stakeholders, or that would involve targeted outreach efforts to recruit otherwise missing stakeholders or unaffiliated experts. We will also discuss some methods of participation by random selections of ordinary citizens.

Fung's democracy cube also includes six "modes of communication . . . and decision making" in democratic governance ranging from "least intense" to "most intense."[147] At the least intensive end of the spectrum participants merely listen as spectators. As communication becomes more intensive, participants may express their preferences or even develop their preferences through deliberation and discussion. These are the most common modes of citizen participation in democratic governance. Moving further along the spectrum participants become decision-makers in governance by aggregating and bargaining over their preferences; deliberating and negotiating over their preferences; and finally, at the most intensive end of the spectrum, deploying technical expertise to make a decision. The last mode of

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[143] *See* Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. 66, 70-71 (2006) [hereinafter Fung, *Varieties of Participation*].

[144] *See id.* at 67-68.

[145] *See* Fung, *Recipes for Public Spheres*, *supra* note 34, at 338-39.

[146] *See* Johnson, *supra* note 6, at 78.

[147] Fung, *Varieties of Participation*, *supra* note 143, at 69.

decision-making usually involves agency officials and professional experts rather than citizens.[148]

Finally, the third dimension of the democracy cube involves the "extent of authority and power" exercised by the participants, ranging from the least to the greatest authority. The least authoritative methods of public participation provide participants with personal benefits (such as enhanced knowledge or a sense of civic virtue), while the most authoritative methods provide participants with direct lawmaking authority. In the middle, ranging from least to greatest authority, participants exert communicative influence on decision makers; advise and consult with decision makers; or engage in collaborative, co-governing partnerships with governmental policymakers. Notice-and-comment rulemaking is, of course, a prominent form of advice and consultation because "officials preserve their authority and power but commit themselves to receiving input from participants."[149]

An important feature of public engagement that is omitted from the preceding typologies, however, involves the timing of an agency's efforts to engage the public. We think that different methods of public engagement will often make sense at different stages of the rulemaking process. Accordingly, we incorporate a fourth dimension into our analysis: the timing or chronology of public engagement.

V. THE CHRONOLOGY OF PUBLIC ENGAGEMENT IN RULEMAKING

We believe that any effort to develop a set of best practices for public engagement in rulemaking must take a broad and holistic view of the rulemaking process. Rulemaking begins with agenda setting, when the agency decides which matters will be the subject of rulemaking, continues with early and advanced development of a rule for publication in the *Federal Register*, followed by the notice-and-comment process itself, and also includes retrospective review, when the agency evaluates the effectiveness of previously promulgated rules. Taking a broad approach to rulemaking and considering each stage is important for several reasons.

Chronology of Public Engagement Efforts

Agenda Setting	→	Rule Development	→	Notice & Comment	→	Retrospective Review

First, a broad and holistic view of rulemaking is valuable because to date the literature on agency rulemaking, and efforts to more fully democratize it, have focused overwhelmingly on the notice-and-comment stage.[150] The agenda setting

[148] *See id.*

[149] *Id.*

[150] *See* West, *supra* note 30, at 577; *see also* ALBERTO ALEMANNO, STAKEHOLDER ENGAGEMENT IN REGULATORY POLICY 44 (2015) ("While there seems to be mounting awareness about the need to integrate engagement practices in the entire policy cycle, this

and rule development stages, in contrast, have received much less focused attention.[151] The existing literature generally treats what happens before publication of the notice of proposed rulemaking as "a black box," and suggests that rule development is primarily influenced by political considerations and pressure from well-organized interest groups.[152] Meanwhile, the democratic value of notice-and-comment rulemaking, which was once praised as "one of the greatest inventions of modern government,"[153] has been called into question by recent concerns regarding the veracity of public comments and reasons to believe that agencies are reluctant to make changes to their proposed rules after they have been published in the *Federal Register*. Yet in conducting research for this project, we have spoken to numerous agency officials who have described significant efforts to engage the public with their agenda setting and rule development activities. We believe it is helpful to shed more light on those efforts, and that the most productive way to improve the democratic legitimacy and effectiveness of the rulemaking process may be to build on this foundation and construct the best possible infrastructure for meaningful public engagement before publication of a proposed rule in the *Federal Register* for public comment. Nonetheless, we should not ignore potential ways to improve notice-and-comment rulemaking itself. Accordingly, we will also present examples of and suggestions for enhancing public engagement during the notice-and-comment process and retrospective review.

Second, agencies need to plan for public engagement as early as possible in the rulemaking process and consider which modes of public engagement are likely to be most useful at each stage of the process. As agencies develop a public engagement plan, they should think about: (1) *why* they want to engage with the public; (2) *who* they are trying to reach with their public engagement efforts; (3) *what type of information* they are seeking to obtain from those individuals or groups; (4) *how* this information could most likely be secured – *i.e.*, through which participation methods; (5) *what to do* with the input they receive and precisely how to respond; and (6) *when* during the rulemaking process agencies should carry out these efforts. The answers to the first five questions may vary at different stages of the process and according to the particular decision the agency must make. For example, an agency may want information about the general public's values and priorities when setting its regulatory agenda. The agency may seek the situated knowledge of absent stakeholders based on their practical experiences with a regulatory program when designing a proposed rule or engaging in retrospective review. The agency may need technical data about compliance costs and anticipated benefits from regulated entities, regulatory beneficiaries, or unaffiliated experts during advanced rule development or the notice-and-comment process. A well-designed rulemaking process should

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requires embracing a significant cultural shift in both the policymakers' mind-set and that of stakeholders.").

[151] *See* West, *supra* note 30, at 583-84; KERWIN, OUT OF THE SHADOWS, *supra* note 31.

[152] *See, e.g.*, Wagner et al., *Rulemaking in the Shade*, *supra* note 32, at 109-13; West, *supra* note 30, at 583-84.

[153] DAVIS, DISCRETIONARY JUSTICE, *supra* note 2, at 65.

provide avenues for various segments of the public to provide agencies with all of this information and more.

Therefore, the bulk of this report—Parts VI through X—is organized around the relevant stages of the rulemaking process. For each stage, we describe the most common modes of public engagement in rulemaking, provide examples of how agencies have used them effectively, and discuss the primary limitations or challenges associated with each mode of engagement. Part XI then discusses the potential value of incorporating more ambitious forms of deliberative democracy into the rulemaking process in appropriate circumstances. In addition, Appendix C summarizes the function, strengths, weaknesses or challenges, and other pertinent information about each mode of public engagement, including the stage in the regulatory process when each can be used.

Finally, the last section of the report turns to issues that cross the different stages of rulemaking and require a broader lens. Part XII addresses the vital importance of planning, outreach, and communication, and suggests institutional reforms that might facilitate these efforts.

VI. AGENDA SETTING

Agency agenda setting is of the utmost importance to regulatory governance because it determines which issues or problems agencies will address and which problems will go unresolved. While the agenda-setting stage of the policymaking process has received substantial attention from social scientists in other contexts,[154] this vital topic has thus far received minimal attention from scholars of administrative agencies and the regulatory process.[155] This Part builds on the exploratory work in this area by identifying innovative practices currently used by agencies to communicate with interested members of the public when setting their rulemaking agendas and discussing strategies for enhancing those efforts.

An agency's agenda includes the plans or activities identified in the semi-annual *Unified Agenda of Regulatory and De-Regulatory Actions* ("Unified Agenda") and the agency's annual *Regulatory Plan*. Agencies must prepare these documents under the supervision of the Office of Information and Regulatory Affairs ("OIRA") to comply with the requirements of the Regulatory Flexibility Act and Executive Order 12,866.[156] While not much is known about how agencies prepare and update these documents (and agencies presumably use a variety of different approaches), it is

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[154] *See generally* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984).

[155] *See* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 865, 866 (2016).

[156] *See generally* Regulatory Flexibility Act, 5 U.S.C. § 602 (2012); *see also* Exec. Order No. 12,866 § 4(b), 58 Fed. Reg. 51,735 (Sept. 30, 1993); CURTIS W. COPELAND, ADMIN. CONFERENCE OF THE U.S., THE UNIFIED AGENDA: PROPOSALS FOR REFORM 6 (2015).

widely understood that they are frequently incomplete and contain some inaccuracies.[157] Accordingly, the *Unified Agenda* and *Regulatory Plan* do not reliably capture everything agencies are working on, or considering working on, at any given time. Therefore it is useful to adopt a broader definition of agenda setting, which includes "all the choices and opportunities that both agency officials and other participants in the regulatory process have about what problems agencies emphasize and what alternatives they consider."[158] We are interested in potential ways of enhancing public engagement both in the process of producing the *Unified Agenda* and *Regulatory Plan* and in the process of otherwise determining which rules an agency will (or will not) pursue.

Agencies do not always have complete control over their rulemaking agendas. On the contrary, the White House sometimes directs agencies to promulgate rules (or, at least, to consider promulgating rules) to address a specified problem. Moreover, Congress frequently requires agencies to promulgate rules on designated subjects in its enabling legislation. Mandatory rulemaking of this nature sometimes requires agencies to meet statutory deadlines, and Congress sometimes provides "hammers" that punish agencies that fail to comply with the requisite timeline. Federal courts periodically enforce mandatory rulemaking obligations and associated statutory deadlines in successful litigation brought pursuant to the APA to "compel agency action unlawfully withheld or unreasonably delayed."[159] Congress sometimes also requires agencies to engage in periodic "lookbacks" or retrospective reviews of previously enacted rules. For these reasons, the few scholars who have examined agency agenda setting empirically have concluded that Congress plays a major—and perhaps the dominant—role in this process.[160] Consistent with these findings, several officials told us that much of their agency's rulemaking activity is mandated by statute, and that their agency's rulemaking agendas are largely filled by those statutory requirements.

Of course, even when an agency engages primarily in mandatory rulemaking, it must still decide which rules to tackle first and which alternatives to consider, so the agency still has some agenda-setting discretion. Moreover, many agencies promulgate a combination of mandatory and discretionary rules, or have nearly

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[157] *See* COPELAND, *supra* note 156, at 11; Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 736 (2016).

[158] Coglianese & Walters, *supra* note 155, at 869 (adopting this broader definition).

[159] 5 U.S.C. § 706(1) (2012); *see also* Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004) (holding that such actions "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*") (emphasis in original).

[160] *See* MARISSA MARTINO GOLDEN, WHO CONTROLS THE BUREAUCRACY? THE CASE OF AGENDA SETTING 19, 21 (2003); William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495, 502, 504-05 (2013); *see also* Coglianese & Walters, *supra* note 155, at 875-77 (reviewing the literature and discussing Congress's "highly influential" role in agency agenda setting).

unfettered discretion to decide which rulemaking projects to undertake. Accordingly, while the distinction between mandatory and discretionary rules is important to agenda setting, agencies nearly always have at least some (and often substantial) policy-making discretion in this area that could fruitfully be informed by public engagement efforts.

There are a variety of different ways for agencies to engage with the public when establishing or modifying their rulemaking agendas. The following sections discuss these various modes and provide examples.

A. Rulemaking Petitions

Consistent with a longstanding constitutional tradition,[161] the APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment or repeal of a rule."[162] The APA also requires agencies to respond to rulemaking petitions within a reasonable time,[163] and suggests that agencies must give a reasoned explanation for denying such requests.[164] Federal courts review the denial of rulemaking petitions under an especially deferential version of the arbitrary and capricious test.[165] Accordingly, unlike most of the other available mechanisms for agencies to engage with the public when they set their rulemaking agendas, citizens have a legal right to file rulemaking petitions and effectively to compel agencies to respond to their requests in a reasoned fashion.

Congress has periodically established more elaborate petition processes for particular statutory schemes, including major environmental laws such as the Endangered Species Act.[166] These customized petition processes typically impose statutory deadlines for agencies to accept or reject petitions and may provide more

[161] For discussions of the constitutional roots of the right to petition the government for a redress of grievances, see Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1142-56 (2016) and JASON A. SCHWARTZ & RICHARD L. REVESZ, ADMIN. CONFERENCE OF THE U.S., PETITIONS FOR RULEMAKING 7-8 (2014).

[162] Administrative Procedure Act, 5 U.S.C. § 553(e) (2012).

[163] *See id.* § 555(b) (providing that "within a reasonable time, each agency shall proceed to conclude a matter presented to it").

[164] *See id.* § 555(e) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.").

[165] *See* Massachusetts v. EPA, 549 U.S. 497, 527-28 (2007); Am. Horse Prot. Ass'n, Inc. v. Lyng, 812 F.2d 1, 4-5 (D.C. Cir. 1987). ACUS has previously endorsed a "limited" scope of judicial review in this context. *See* Admin. Conf. of the U.S., Recommendation 95-3, *Review of Agency Regulations*, 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

[166] *See* Endangered Species Act, 16 U.S.C. §§ 1533(b)(3)(A)-(C) (2012); *see also* Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 327-38 (2010) (providing examples); SCHWARTZ & REVESZ, *supra* note 161, at 31-35 (same).

detailed procedural requirements for the processing of petitions.[167] While rulemaking petitions—like agency agenda setting more generally—are understudied in the scholarly literature,[168] ACUS has produced two sets of reports and recommendations on this important subject,[169] and several empirical studies have recently been produced on various aspects of the topic.[170]

Rulemaking petitions can be a valuable form of public engagement for several reasons. First, they promote democratic responsiveness because rulemaking petitions can be filed by anyone and they engender a legal right to a meaningful response.[171] Scholars have also pointed out that the petition process has been a fruitful avenue for networking and coalition building by nascent social movements.[172] From an agency's perspective, rulemaking petitions can "be a source of some valuable ideas for regulatory change, though this may vary from agency to agency and over time."[173] Rulemaking petitions may be particularly valuable when they include detailed proposals and are accompanied by supporting data, and when interested members of the public are able to provide agencies with "dispersed or diffuse" information that would otherwise be unavailable or difficult to collect.[174]

To be sure, sophisticated stakeholders may be in the best position to make effective use of rulemaking petitions for many of the same reasons discussed above in Part III.B. Yet a study of petitions to the U.S. Fish and Wildlife Service seeking listings of endangered or threatened species under the Endangered Species Act (ESA)[175] found that "environmental or scientific organizations that have a primary focus on species protection" made the greatest use of them.[176] Indeed, it is reasonable to assume that public interest groups make greater use of pro-regulatory petitions for

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[167] *See* William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 14-20 (1988) (describing petition processes under statutes other than the APA).

[168] *See* Biber & Brosi, *supra* note 166, at 328-29 ("[D]espite the prevalence of agency petition provisions at the federal level, they have been almost completely ignored in the legal and political science literature.").

[169] *See generally* WILLIAM V. LUNEBURG, ADMIN. CONFERENCE OF THE U.S., PETITIONS FOR RULEMAKING: FEDERAL AGENCY PRACTICES AND RECOMMENDATIONS FOR IMPROVEMENT (1986); SCHWARTZ & REVESZ, *supra* note 161.

[170] *See generally* Biber & Brosi, *supra* note 166; ROBIN COOPER FELDMAN ET AL., EMPIRICAL EVIDENCE OF DRUG COMPANIES USING CITIZEN PETITIONS TO HOLD OFF COMPETITION (2018); Walters, *supra* note 6.

[171] *See* Walters, *supra* note 6 (manuscript at 14-16).

[172] *See, e.g.*, McKinley, *supra* note 161, at 1138.

[173] Luneburg, *supra* note 167, at 62.

[174] Biber & Brosi, *supra* note 166, at 364. *See also* SCHWARTZ & REVESZ, *supra* note 161, at 62.

[175] *See* Endangered Species Act, 16 U.S.C. §§ 1533(b)(3)(A)–(C) (2012).

[176] Biber & Brosi, *supra* note 166, at 363-64.

rulemaking while regulated industries make greater use of de-regulatory petitions to amend or repeal a rule, discussed more fully below in Part X (Retrospective Review). Thus, petitions for rulemaking may provide a vital tool for shaping an agency's rulemaking agenda in the public interest.[177] Nevertheless, agencies may find it valuable to undertake greater efforts to involve missing stakeholders and unaffiliated experts in the petition process in appropriate circumstances.

At the same time, rulemaking petitions raise some potential concerns. First, agencies must devote limited resources to reviewing and responding to rulemaking petitions, even when they are unsupported by data or otherwise unmeritorious. This obligation "can impose a strain on already tight agency budgets and can be perceived as an undesirable disruption of internally-established regulatory priorities."[178] At times, excessive devotion to rulemaking petitions pursuant to unusually demanding statutory mandates has overwhelmed an agency's agenda and interfered with its ability to establish or pursue what would otherwise be the most sensible priorities.[179] There are related concerns that because many rulemaking petitions are filed by regulated entities that are seeking regulatory relief, rulemaking petitions can provide a relatively low visibility mechanism for facilitating regulatory capture. Rulemaking petitions can also be filed by business interests in an effort to gain an advantage over their competitors.[180]

Despite these concerns, there is some recent empirical evidence that agencies tend to decide rulemaking petitions in a reasonably independent and even-handed way that tends to favor relatively narrow and incremental changes,[181] and that rulemaking petitions can provide agencies with valuable information that improves

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[177] *See supra* notes 171-176 and accompanying text.

[178] Luneburg, *supra* note 167, at 62.

[179] *See* Biber & Brosi, *supra* note 166, at 323 ("[T]he little scholarly commentary on petitions has been strongly negative, focused on the idea that petitions divert agencies from pursuing the most serious problems that deserve regulatory attention."). The classic cautionary tale involves the Consumer Product Safety Commission during the 1970s and early 1980s. *See* Richard A. Merrill, *CPSC Regulation of Cancer Risks in Consumer Products: 1972-1981*, 67 VA. L. REV. 1261, 1309 (1981); Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 48 (1982).

[180] *See* Walters, *supra* note 6 (manuscript at 6-7) ("Rulemaking petitions . . . give business interests the means to further 'corrosive capture' via deregulatory petitions, as well as to further 'anti-competitive capture' via proposals for new regulatory requirements that disproportionately affect competitors or establish a monopoly by creating barriers to firm entry."); *see also* FELDMAN ET AL., *supra* note 170, at 5 (concluding that big pharmaceutical companies file rulemaking petitions with the Food and Drug Administration strategically to delay entry of generic competitors into the market).

[181] *See* Walters, *supra* note 6 (manuscript at 31-36) (finding little evidence of "business influence," and reporting that "agencies favor rulemaking petitions that request narrow, technical changes in a deregulatory direction" regardless of the petitioner's identity).

the quality of their agenda-setting processes in some situations.[182] The success of any rulemaking petition process, particularly as a tool for public engagement, will necessarily depend to a large extent on the quality of its procedures. Yet the APA does not provide any procedural requirements for the processing of rulemaking petitions.[183] Accordingly, ACUS set forth a set of recommendations in 1986 that agencies could adopt to improve the quality of their rulemaking petition processes, some of which would also facilitate public engagement. These include:

- Establishing by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking;
- Maintaining a publicly available petition file;
- Providing guidance on the type of data, argumentation, or other information the agency needs to consider petitions; and
- Developing effective methods for providing notice to interested persons that a petition has been filed and identifying the agency office or official to whom inquiries and comments should be made.[184]

A more recent ACUS study in 2014 found that most agencies still did not have official procedures for handling rulemaking petitions.[185] ACUS explicitly recognized that "[a]lthough the petitioning process can be a tool for enhancing public engagement in rulemaking, in practice most petitions for rulemaking are filed by sophisticated stakeholders and not by other interested members of the public."[186] ACUS suggested that the petition process could be improved by increased transparency, improved communication between agencies and petitioners, and more prompt and thorough responses. Moreover, ACUS recognized that petitioners and agencies would both benefit "from greater clarity as to how petitions can be filed, what information should be included to make a petition more useful and easier for the agency to evaluate, whether or when public comment will be invited, and how long it may take to resolve a petition."[187] Accordingly, ACUS recommended a set of best

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[182] *See generally* Biber & Brosi, *supra* note 166 (examining data from the listing of species protected by the Endangered Species Act and finding that rulemaking petitions and citizen suits did not result in suboptimal agenda-setting by the U.S. Fish and Wildlife Service, and suggesting that public participation can affirmatively improve the performance of environmental agencies by providing access to diffuse information about environment conditions).

[183] As noted above, some statutes do impose relatively detailed procedural requirements on the petition processes they establish. *See supra* note 166-167 and accompanying text.

[184] *See* Admin. Conf. of the U.S., Recommendation 1986-6, *Petitions for Rulemaking*, 51 Fed. Reg. 46,985, 46, 988, 46,988 (Dec. 30, 1986).

[185] *See* Admin. Conf. of the U.S., Recommendation 2014-6, 79 Fed. Reg. 75,114, 75,117 (Dec. 17, 2014).

[186] *Id.* at 75,117-18.

[187] *Id.* at 75,118.

practices that could improve the rulemaking petition process, which included the following suggestions:

- Establish procedures that, among other things, explain what type of data, argumentation, and other information make a petition more useful and easier for the agency to evaluate, and that identify any information that is statutorily required for the agency to act;
- Accept the electronic submission of petitions via email, Regulations.gov, or an existing online docketing system;
- Designate a particular person or office to receive and distribute all petitions for rulemaking to ensure that each petition is expeditiously directed to the appropriate agency personnel for consideration and disposition;
- Encourage and facilitate communication between agency personnel and petitioners, both prior to submission and while petitions are pending for disposition;
- Use online dockets to allow the public to monitor the status of petitions;
- Consider inviting public comment on petitions for rulemaking by either (a) soliciting public comment on all petitions for rulemaking; or (b) deciding, on a case-by-case basis, whether to solicit public comment on petitions for rulemaking;
- Use available online platforms, including the agency's website and Regulations.gov, to implement this recommendation, including by informing the public about the petitioning process, facilitating the submission of petitions, inviting public comment, providing status updates, improving the accessibility of agency decisions on petitions, and annually providing information on petitions for rulemaking that have been resolved or are still pending.[188]

In connection with this final recommendation, ACUS also suggested that OIRA should ask agencies to "include in their annual regulatory plan information on petitions for rulemaking that have been resolved during that year or are still pending."[189]

The report accompanying ACUS's most recent set of recommendations on rulemaking petitions identified several examples of agencies that follow some of these best practices. For instance, the Nuclear Regulatory Commission has developed some of the "best practices for educating the public about the right to petition, transparently reporting the status of petitions, and regularly communicating with

[188] *See id.* at 75,118-19.

[189] *Id.* at 75,119.

petitioners."[190] These best practices include the NRC's provision of a "plain language" description of the process for filing a rulemaking petition on its website,[191] the announcement of filed petitions in the *Federal Register,* the public docketing of all related communications on Regulations.gov, and the provision of reasoned explanations for its decisions that are responsive to public comments.[192] The NRC also communicates effectively with interested members of the public by providing contact information on its website and by both permitting and encouraging potential petitioners to consult with agency staff prior to filing their petitions.[193]

Scholars have also identified the rulemaking petition process that is used by the Fish and Wildlife Service to make listing decisions under the Endangered Species Act as a notable success story. Biber and Brossi found in this context that public petitions "result in the identification of species that are at least as deserving of protection under the Act as species identified by the agency on its own."[194] Not only do these findings undermine the claim that rulemaking petitions will necessarily distract an agency from establishing the most sensible priorities, but Biber and Brossi contend that rulemaking petitions can improve the rationality of an agency's agenda setting by providing the agency with dispersed information that will help the agency to achieve its goals.[195]

Biber and Brossi recognize, however, that the ESA petition process is unusual in various ways that may limit the transferability of the FWS's experience to other contexts.[196] In particular, ESA petitions require a discrete decision (whether or not to list a species as threatened or endangered) that turns on a relatively specific technical determination upon which relevant scientific knowledge is highly dispersed and indeed often not otherwise publicly available. Moreover, the FWS has a designated budget for listing decisions, which means that such efforts do not affect the agency's budget for other activities.[197] Biber and Brossi therefore suggest that public participation, and rulemaking petitions in particular, can help to promote regulatory rationality "where there is dispersed information that could lead to better decisionmaking," and "the agency is (a) making a relatively simple set of decisions

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[190] SCHWARTZ & REVESZ, *supra* note 161, at 49.

[191] *See id.*; *The Rulemaking Petition Process*, U.S. NUCLEAR REG. COMMISSION, http://www.nrc.gov/about-nrc/regulatory/rulemaking/petition-rule.html (last updated Nov. 7, 2017).

[192] *See* SCHWARTZ & REVESZ, *supra* note 161, at 50.

[193] *See id.*

[194] Biber & Brossi, *supra* note 166, at 321. *See also* SCHWARTZ & REVESZ, *supra* note 161, at 60-62 (discussing this example).

[195] Biber & Brossi, *supra* note 166, at 325.

[196] *See id.* at 378-82.

[197] *See id.* at 379.

(b) using technical factors that do not require complicated trade-offs with a range of other activities."[198]

The foregoing studies, ACUS recommendations, and examples of best practices with rulemaking petitions suggest several lessons regarding how the petition process can be used to enhance public engagement in agency agenda setting. From a substantive perspective, Biber and Brossi suggest that agencies interested in making greater use of petition processes as an agenda-setting tool should:

> (a) focus on tasks that are relatively simple and cheap to accomplish; (b) result in the imposition of a default regulatory standard to minimize the administrative burden on the agency; (c) allow for some sort of safety valve if the default standard is inappropriate; (d) commit the agency to take action on petitions for which the necessary standard has been met; and (e) impose a cap on the maximum number of petitions that can be granted in a year, in order to keep the petition process from swamping the rest of the agency's regulatory agenda.[199]

Biber and Brossi suggest, for example, that a variety of other areas of environmental law may fit these criteria, as well as the regulation of airline and traffic safety and the securities industry.[200]

From a procedural standpoint, the best ways to improve the capacity of rulemaking petitions to facilitate public engagement in agency agenda setting involve increased education and enhanced communication. First, this would include, on the front end, plain language explanations of the opportunity to submit rulemaking petitions in a prominent location on the agency's website, along with clear guidance regarding the appropriate format and the kinds of supporting information that are most helpful for evaluating a petitioner's request. Second, agencies should consider providing examples of "model" rulemaking petitions that potential petitioners could use for additional guidance. Third, agencies should provide contact information on their websites and encourage potential petitioners to consult with agency staff prior to filing their petitions. Fourth, the filing of rulemaking petitions should be announced in the *Federal Register* and on Regulations.gov and the agency's website. Fifth, agencies should maintain publicly available dockets of all related communications on their websites and Regulations.gov, and use these online platforms to otherwise keep the public informed about the status of petitions that have been resolved or are still pending. Sixth, as ACUS has previously recommended, agencies should consider inviting public comment on rulemaking petitions either as a matter of course or on a case-by-case basis, depending on whether a petition addresses a question of policy or of general interest and whether members of the public could potentially provide the

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[198] *Id.* at 378-79.

[199] *Id.* at 382.

[200] *See id.* at 379-80, 383.

agency with relevant information that is not already in the agency's possession.[201] When agencies provide opportunities for public comment on rulemaking petitions, they can effectively provide *two layers* of mechanisms for public engagement.[202]

While the rulemaking petition process provides the potential for relatively robust public engagement, it may also be worthwhile for agencies to consider additional ways to facilitate greater balance in the interests that are represented. On the front end, agencies should consider affirmatively soliciting rulemaking petitions from absent stakeholders and unaffiliated experts when they are likely to have dispersed knowledge that is otherwise unavailable to agencies, particularly when the other circumstances identified by Biber and Brossi are present. Agencies could, in turn, affirmatively solicit comments from absent stakeholders and unaffiliated experts on rulemaking petitions filed by regulated entities to ensure that agencies are able to make fully informed decisions.[203] Both of these strategies would require enhanced education and communication of the kinds recommended above, as well as the use of listserves and other outreach techniques that could potentially encourage more absent stakeholders and unaffiliated experts to participate in the rulemaking petition process.[204]

B. Federal Advisory Committees

A second mode of public engagement that agencies can use in agenda setting is to solicit and obtain advice from federal advisory committees. The use of federal advisory committees is governed by the Federal Advisory Committee Act ("FACA"),[205] which formalizes the process for agencies that seek advice from groups that include non-federal employees and imposes a variety of procedural obligations that are designed to promote transparency and ensure that the composition of committees reflects an appropriate balance "of the points of view represented and the functions to be performed."[206] While chartering a new advisory committee can take a substantial amount of time, and complying with FACA's procedural obligations entails certain burdens, studies conducted on behalf of ACUS have concluded that FACA generally strikes an appropriate balance between the goals of permitting

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[201] *See* Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,114, 75,117, 75,118 (Dec. 17, 2014).

[202] We discuss best practices related to the notice-and-comment process below in Part XIII.D.

[203] We discuss best practices for petitions for repeal or amendment of a rule in the context of retrospective review below in Part XIII.E.

[204] We discuss the importance of outreach and planning in more detail below in Part XII.

[205] Federal Advisory Committee Act, 5 U.S.C. App. § 2 (2012).

[206] *Id.* §§ 5(b)(2)-(3), (c). For excellent overviews of FACA's requirements, see generally REEVE T. BULL, ADMIN. CONFERENCE OF THE U.S., THE FEDERAL ADVISORY COMMITTEE ACT: ISSUES AND PROPOSED REFORMS (2011) [hereinafter BULL, THE FEDERAL ADVISORY COMMITTEE ACT]; Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997).

agencies to obtain valuable information in a relatively efficient and cost-effective manner and promoting transparency and avoiding capture by narrow special interests.[207] Steven Croley and Bill Funk concluded that considering the breadth and amount of quality advice that agencies can obtain at a marginal cost from federal advisory committees, "the main virtue of the FACA is that it enables the federal government to solicit *what is tantamount to free advice*."[208] ACUS has, nonetheless, made recommendations to improve FACA and promote agencies' ability to obtain quality advice from federal advisory committees in an efficient manner while also promoting transparency.[209] Several of those recommendations would facilitate public engagement in rulemaking, and therefore merit brief reiteration here:

- "Upon creating a new advisory committee, agencies should announce the committee's mission in the Federal Register and/or on the agencies' Web site and invite nominations for potential committee members, from the public, from expert communities with experience in the subject matter of the committee's assignment, and/or from groups especially likely to be affected by the committee's work."[210]

- "Agencies should identify and prioritize those factors for achieving balance among committee members that are directly relevant to the subject matter and purpose of the committee's work."[211]

- Agencies should recognize that they may hold committee meetings via online forums, and that such "virtual meetings . . . can occur electronically in writing over the course of days, weeks or months on a moderated, publicly accessible web forum."[212]

- "Agencies should provide live webcasts of open committee meetings and/or post recordings following such meetings unless the costs are prohibitive."[213]

- Agencies should post documents related to an advisory committee's work on a publicly-accessible committee website as soon as possible.[214]

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[207] *See* BULL, THE FEDERAL ADVISORY COMMITTEE ACT, *supra* note 206, at 32-33; Croley & Funk, *supra* note 206, at 526-27.

[208] Croley & Funk, *supra* note 206, at 527 (emphasis added).

[209] *See generally* Admin. Conf. of the U.S., Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, 77 Fed. Reg. 2,257, 2,261 (Jan. 17, 2012).

[210] *Id.* at 2,264.

[211] *Id.* at 2,263.

[212] *Id. See also* BULL, THE FEDERAL ADVISORY COMMITTEE ACT, *supra* note 206, at 45-47 (discussing "asynchronous virtual meetings of advisory committees").

[213] *The Federal Advisory Committee Act—Issues and Proposed Reforms*, 77 Fed. Reg. at 2,264.

While advisory committees can be used as a mode of public engagement at any stage of the rulemaking process (and we have several examples of agencies that routinely use them for purposes of rule development),[215] there is a significant and perhaps relatively untapped potential for using federal advisory committees to inform an agency's rulemaking agenda. The goal of this form of public engagement would be to obtain advice from a balanced group of well-informed stakeholders and unaffiliated experts in setting the agency's rulemaking priorities. Federal advisory committees could be used generally to engage in strategic planning or otherwise to obtain quality advice on a variety of more specific questions related to agenda setting:

- Which rulemaking projects should an agency consider?
- What should be in the agency's *Regulatory Plan* or submission for the *Unified Agenda*?
- Should the agency initiate a particular rulemaking project?
- How should an agency prioritize among the rulemaking projects it may or must pursue?

In using advisory committees to obtain advice on such questions, there are several distinctive issues that an agency would need to consider. First, the agency would need to consider which advisory committee or what type of advisory committee is best suited for its purposes. Many agencies could use existing advisory committees to obtain advice on the foregoing questions, especially when those committees are composed of a balanced group of interested stakeholders or unaffiliated experts and their charters are broad enough to include these functions. This approach would have the obvious advantage of limiting the costs, delays, and other potential obstacles associated with chartering a new advisory committee.[216] It would also allow agencies to take advantage of the knowledge and experience that members of existing groups have already developed about the regulatory program at issue.

On the other hand, existing advisory committees may not have the proper charge or composition to provide the agency with sufficiently balanced advice on its prospective regulatory agenda. The agency may therefore want to consider chartering a new advisory committee (or committees) for these purposes. In this regard, the agency should consider whether it is necessary or appropriate to charter a new advisory committee to provide advice on whether to undertake a particular rulemaking initiative. It seems likely that this level of effort would only be sufficiently worthwhile in the agenda-setting context for particularly important or controversial rulemaking initiatives, or perhaps where the agency is considering

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[214] *Id.*

[215] *See infra* Part VII.A.

[216] *Cf.* Exec. Order No. 12,838, 58 Fed. Reg. 8,207 (Feb. 10, 1993) (limiting the creation of new advisory committees).

entering a new field of regulation that would have significant long-term implications for its future direction. Consider, for example, the delegation to the Consumer Financial Protection Bureau (CFPB) of new powers to regulate certain nonbank financial institutions, such as mortgage companies, payday lenders, and private education lenders, under the Dodd-Frank Wall Street Reform and Consumer Protection Act. It may be appropriate in such situations to charter an advisory committee to procure advice on how to proceed, and to ensure that representatives of all relevant stakeholders—including both traditionally absent borrowers and small lenders—are involved in the deliberations.

For more routine agenda-setting decisions, agencies should consider establishing standing advisory committees that are explicitly charged with providing advice on the agency's rulemaking agenda. Such "agenda-setting advisory committees" could regularly provide specific advice to agency officials on the kinds of questions identified above. While advisory committees of this nature could be composed of a balanced and representative group of the agency's primary stakeholders—including traditionally absent stakeholders and perhaps members of the general public—it would be worthwhile for certain agencies (and especially those agencies whose constituencies closely mirror the general public, such as the Department of Education or the Consumer Financial Protection Bureau) to consider establishing agenda setting advisory committees that are composed entirely of a representative sample of ordinary citizens. Citizens advisory committees of this nature seem especially appropriate in the agenda setting context, where agencies are establishing priorities and determining how they will use their limited resources.[217] If an agency was interested in comparing the priorities of its more traditional clientele with those of reasonably informed members of the general public, the agency could seek advice on its rulemaking agenda from *both* a traditional advisory committee *and* a citizens advisory group.

Of course, the use of advisory committees as a means of public engagement in agenda setting is not without challenges or limitations. First, as noted above, establishing a new advisory committee in particular requires significant time and effort. Second, in comparison to some other modes of public engagement, the use of federal advisory committees is heavily regulated by law. Third, the membership of an advisory committee may not truly be representative, either because some important stakeholders are absent or because a representative's supposed constituency has competing interests and perspectives.[218] It is also possible for advisory committees to

[217] For a proposal that advocates the use of citizen advisory committees in appropriate circumstances, see Bull, *Making the Administrative State "Safe"*, *supra* note 13, at 640-647.

[218] *See* JENNIFER NASH & DANIEL E. WALTERS, PENN PROGRAM ON REGULATION, PUBLIC ENGAGEMENT AND TRANSPARENCY IN REGULATION: A FIELD GUIDE TO REGULATORY EXCELLENCE 22 (2015), https://www.law.upenn.edu/live/files/4709-nashwalters-ppr-researchpaper062015.pdf (discussing research finding that balanced interests and viewpoints enhance both the effectiveness and credibility of advisory committees).

be stacked in a particular partisan direction.[219] Fourth, advisory committees cannot function effectively or provide sound advice if they are not properly informed of the relevant issues. And, achieving this task is significantly more difficult when advisory committees are composed of unsophisticated stakeholders or ordinary citizens who lack background knowledge of relevant technical or legal issues.

Accordingly, it is important for agencies that use advisory committees as a means of public engagement in agenda setting to develop briefing materials that clearly explain the relevant issues in a manner that non-experts can readily understand. While this task can undoubtedly be difficult and resource-intensive, it is probably easier at the agenda-setting stage than it would be at later stages of the rulemaking process when the details of alternative approaches to a problem are evaluated. Moreover, the background materials that are prepared for federal advisory committees can be used by the agency as the basis for other public engagement efforts. For example, such materials could be presented as the basis for discussion with focus groups or at listening sessions or other public meetings. Similarly, those materials could be placed on the agency's website as the basis for soliciting public comment on the agency's potential priorities.

C. Focus Groups

A third tool that agencies can use to facilitate public engagement in agenda setting is focus groups. Focus groups involve facilitated small group discussions of a set of questions by participants who are randomly selected or who have other specific demographic characteristics, backgrounds, or qualifications.[220] They can be used to gauge participants' reactions to information, ideas, messages, or proposals, and to begin to identify preferred alternatives or potential concerns. Focus groups are a good way "to find out what issues are of most concern for a community or group when little or no information is available."[221] They are often used as a sounding board or as a way to "trouble spot" by identifying preliminary issues or concerns that will require further research and deliberation, and as a mechanism for obtaining relatively detailed knowledge of the primary concerns of the participants.[222] Focus groups will often produce ideas that would not emerge from surveys because they provide greater opportunities for interactive discussion and dialogue.[223] Their use should not trigger FACA so long as the agency is not seeking a report or set of recommendations from the group, *as a group*, concerning how the agency should

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[219] *See, e.g.*, Brian D. Feinstein & Daniel Jacob Hemel, Federal Advisory Committees & the Internal Separation of Powers 23 (Jan. 23, 2018) (unpublished manuscript) (on file with authors).

[220] *See* JAMES L. CREIGHTON, THE PUBLIC PARTICIPATION HANDBOOK: MAKING BETTER DECISIONS THROUGH CITIZEN INVOLVEMENT 113 (2005).

[221] ENVTL. PROT. AGENCY, INTRODUCTION TO THE PUBLIC PARTICIPATION TOOLKIT 58 [hereinafter EPA, PUBLIC PARTICIPATION TOOLKIT].

[222] *See id.*

[223] *See id.*

exercise its discretion, but rather is engaged in fact finding and seeking to understand the views of individual members of the group.[224]

The basic steps for conducting a focus group include (1) identifying the target population, (2) recruiting participants, (3) choosing and hiring a facilitator or moderator, (4) preparing the questions, (5) conducting (and recording) the session, and (6) preparing a report that summarizes the results.[225] The convener should also provide relevant background materials for the participants when necessary. The primary challenges or limitations of focus groups are that they require skilled facilitation and careful planning, the participants may face a steep learning curve, and their views may not be representative (even in an informal sense). Numerous federal agencies have used focus groups, primarily to ask questions about different approaches to consumer disclosure or product labeling, or to gauge public knowledge or attitudes regarding potential subjects of regulation, particularly when there may be widespread misinformation or confusion on the topic. For example, NHTSA has conducted focus groups to address public fears about airbags,[226] potential labels on tire fuel efficiency,[227] and whether drivers understand advanced crash avoidance technologies.[228] Similarly, FDA has conducted focus groups on food nutrition labeling,[229] the usefulness of prescription drug labeling under existing regulations,[230] and the public's views on genetically modified foods.[231]

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[224] *See* BULL, THE FEDERAL ADVISORY COMMITTEE ACT, *supra* note 206, at 13-14 (describing the "group" requirement of the statute, and explaining that "the case law has also created an amorphous exception to FACA that arises when an agency seeks advice from an assemblage of persons acting not as a formal group but as a collection of individuals"); Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L.J. AM. U. 111, 129 (1996); W. Herbert McHarg, *The Federal Advisory Committee Act: Keeping Interjurisdictional Ecosystem Management Groups Open and Legal*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 437, 465 (1995).

[225] *See* CREIGHTON, *supra* note 220, at 114-16.

[226] *See* Nina A. Mendelson, *Torrents of E-Mail*, *supra* note 13, at 1366 (discussing this example).

[227] *See* Douglas A. Kysar, *Politics by Other Meanings: A Comment on "Retaking Ratonality Two Years Later"*, 48 HOUS. L. REV. 43, 52 (2011).

[228] *See* Stephen P. Wood et al., *The Potential Regulatory Challenges of Increasingly Autonomous Motor Vehicles*, 52 SANTA CLARA L. REV. 1423, 1497 (2012).

[229] *See* Food Labeling: Format for Nutrition Label, 57 Fed. Reg. 32,058, 32,060 (July 20, 1992).

[230] *See* Erika Fisher Lietzan & Sarah E. Pitlyk, *Thoughts on Preemption in the Wake of the* Levine *Decision*, 13 J. HEALTH CARE L. & POL'Y 225, 250 n.141 (2010).

[231] *See FDA Report on Consumer Focus Groups on Biotechnology*, MERIDIAN INSTITUTE (Feb. 13, 2001), http://www.merid.org/en/Content/News_Services/Food_Security_and_AgBiotech_News/Articles/2001/02/13/FDA_Report_On_Consumer_Focus_Groups_On_Biotechnology.aspx.

Focus groups could also be a potentially useful tool for facilitating public engagement in regulatory agenda setting. The goal would be to obtain feedback from missing stakeholders, unaffiliated experts, or the general public on potential regulatory priorities and issues of greatest concern. Because agenda setting is primarily about an agency's need to establish sensible priorities in the face of limited resources, this may be an ideal setting to use focus groups "to find out what issues are of most concern for a community or group when little or no information is available."[232] Moreover, because the agency can choose its target audience and the precise questions for discussion, it could potentially use focus groups to get a better sense of the priorities of different sets of stakeholders and identify areas of consensus and disagreement. This use of focus groups would also produce information about the primary concerns of the various participants.

Therefore, we anticipate that focus groups could be a relatively easy and inexpensive way for agencies to obtain meaningful feedback on their regulatory agendas from missing stakeholders or unaffiliated experts who are otherwise difficult to reach and tend not to participate in public engagement efforts where participation is self-selecting.[233] It may also be useful for agencies to use focus groups composed of regulatory beneficiaries for purposes of agenda setting because this exercise would force participants to reckon with the agency's resource limitations and identify their highest priorities. In addition to the preceding recommendations, the best practices for using focus groups in agency agenda setting would include carefully selecting the facilitator and the participants, developing an agenda with just a handful of major questions or topics for discussion, providing participants with appropriate briefing materials to familiarize them with the relevant issues, and perhaps most importantly, compiling a report that summarizes the feedback and identifies topics for further study.

D. Requests for Information ("RFIs")

A fourth tool of public engagement that agencies frequently use early in the rulemaking process, including at the agenda-setting stage, is what is generally known as requests for information or "RFIs."[234] A request for information is typically

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[232] EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 58.

[233] *See id.* at 74 (recognizing that focus groups can be a useful way to obtain the views of people who do not generally participate in larger public meetings).

[234] Agencies sometimes refer to this method of public engagement by other names. For example, the FCC refers to this tool as a "notice of inquiry." RFIs are also very similar to, and in some cases, indistinguishable from Advance Notices of Proposed Rulemaking ("ANPRMs"), which are published in the *Federal Register* to obtain comments on a potential rule that is under consideration by an agency. For purposes of this report, we use the term "RFI" to refer to requests for comments early in the rule development process or retrospective review when the agency is still considering whether to engage in a rulemaking project and is just beginning to consider potential approaches to a problem. We use the term "ANPRM" to refer to requests for comments later in the rule development process when the agency has prepared a rough draft of a proposed rule or has significantly narrowed the

published in the *Federal Register* and on Regulations.gov, and generally describes a problem or an issue that is of interest to an agency. Agencies use RFIs to request data, comments, or other information from the public on a designated problem or issue. Responses to RFIs are intended "to assist the [a]gency in determining an appropriate course of action—which may or may not involve rulemaking—to address the problem."[235]

For some agencies, such as the Consumer Financial Protection Bureau (CFPB) and the Department of Energy (DOE), the issuance of an RFI is nearly standard practice in early rule development, discussed more fully below in Part VII.C. Interviewees told us that RFIs are valuable in part because commentators are more likely to communicate their situated knowledge in this setting rather than advocate a position for or against a proposed rule. Moreover, RFIs also provide agencies with valuable information about how to communicate their work to the affected communities. Interviewees told us they consistently found RFIs most useful when the agency is unsure of the best course of action or lacks important information regarding the nature of a problem, the appropriate regulatory strategies, or compliance-related questions. They recommended that RFIs remain neutral regarding the agency's future direction and ask lots of questions aimed at soliciting the relevant data.

For many of the same reasons, RFIs can also be a useful tool for facilitating public engagement in agency agenda setting. Indeed, some agencies have already been using RFIs for precisely this purpose. For example, the IRS has for some time issued an annual notice in the Internal Revenue Bulletin requesting public input on IRS priorities.[236] Similarly, many agencies recently used RFIs to seek input on the regulatory and deregulatory actions they should consider under Executive Order 13,771 ("Reducing Regulation and Controlling Regulatory Costs"). In response to such an RFI, the Pension Benefit Guaranty Corporation ("PBGC"), received 38 comments from individuals, which was both a quantitatively and qualitatively superior response than this agency ordinarily receives when it solicits public comments.

We endorse these practices and recommend that other agencies consider using RFIs to solicit public feedback on their agendas. In addition, we reiterate the advice of our interviewees that RFIs should (1) be used whenever the agency is open-minded about appropriate courses of action, (2) be neutral about whether or how the identified issues or problems will or should be addressed, and (3) pose detailed questions that are aimed at soliciting the situated knowledge and data necessary for the agency to make informed decisions. We would also encourage agencies to engage in robust

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options that are seriously under consideration. In any event, we recognize that RFIs and ANPRMs are neither legally nor categorically distinct.

[235] *Requests for Information (RFI)*, U.S. DEP'T LAB., https://arlweb.msha.gov/REGSRFI.asp (last visited Oct. 22, 2018) (defining "RFIs" and providing numerous examples).

[236] *See* Coglianese & Walters, *supra* note 155, at 887 (discussing the IRS's practice).

outreach efforts to bring their RFIs to the attention of missing stakeholders and unaffiliated experts to increase the likelihood that they will receive balanced comments that reflect all of the relevant interests and perspectives, and to maximize the likelihood that they will receive the situated knowledge and data they are seeking. For example, the CFPB's External Affairs and Consumer Education and Engagement Offices undertake efforts to ensure that different communities are aware of RFIs and able to participate. CFPB focuses its outreach efforts on specific communities of absent stakeholders, such as the elderly, students, and "the unbanked."[237]

E. Listening Sessions

A fifth tool of public engagement that agencies often use early in the rulemaking process, including at the agenda setting stage, is "listening sessions" or other forms of public meetings designed to gather information, comments, and data from the public on a designated problem or issue.[238] They also provide the agency with an opportunity to educate the public about a problem and the agency's current treatment or potential plans regarding the matter. Unlike focus groups, in which the participants are selected by the agency or outside consultants to represent particular demographic groups, listening sessions are typically open to the general public. Unlike RFIs, listening sessions are typically done in person, rather than in writing, although current technology allows such meetings to be conducted online or through video-conferencing. Even when the meetings are held in person, they can be live-streamed and recorded so interested persons can observe the proceedings remotely. Those observers could participate in the meeting electronically or offer written comments on the topic at a later date. Moreover, listening sessions can be done at regional sites around the country on important issues or problems that vary geographically. Listening sessions can be designed to allow for more "back-and-forth" than is generally possible solely through written communications. Even when the agency attends primarily to "just listen," agency officials can pose questions and encourage deliberation among the participants.[239] Listening sessions are another potentially valuable method of helping the agency to determine an appropriate course of action—which may or may not involve rulemaking—to address the problem.

Several agencies have used listening sessions as an effective method of gathering information. For example, the Nuclear Regulatory Commission ("NRC") frequently

[237] Telephone Interview with Consumer Financial Protection Bureau (Dec. 5, 2017).

[238] For a useful discussion of the potential value, challenges, and best practices associated with conducting public meetings in general, see EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 74-77. Once again we have adopted a nomenclature based on when these types of meetings are held. Therefore, we refer to them as listening sessions during agenda setting and early rule development when the agency's regulatory direction is more open and it primarily wishes to listen to stakeholders. By contrast, we refer to such events as public meetings during advanced rule development and the notice-and-comment process, when the agency is heading in a particular direction and seeks to explain its proposal in addition to gaining public input.

[239] Telephone Interview with Forest Service (Nov. 17, 2017).

holds public meetings around the country where the public can raise issues and express concerns about a topic. The NRC's meetings tend to focus on a particular topic rather than what should appear on the agency's rulemaking agenda, but the discussions sometimes influence the agency's agenda by suggesting that a new rule is necessary. While the NRC will travel for meetings if necessary, the agency prefers to host live webinars for budgetary reasons, and the public can nearly always participate in its meetings regarding rulemaking online. The agency has a policy of making the agenda and any related materials publicly available several days in advance of its meetings.

Similarly, the Forest Service conducted numerous public meetings and listening sessions as part of the process of developing its 2012 Planning Rule. Although these meetings were open to the public, the agency also conducted targeted outreach to important stakeholder communities, including (1) users of the forests for recreational and economic purposes, (2) Native American tribal communities, (3) state and local government officials, and (4) the scientific community. The Forest Service hired the U.S. Institute for Environmental Conflict Resolution (IECR) to design and facilitate the public engagement in connection with developing the Planning Rule. The Forest Service personnel were "there to listen." The public engagement efforts related to the Planning Rule also included a science forum, four national roundtables and thirty-three regional roundtables, national and regional public forums, national and regional tribal roundtables, tribal consultation meetings, Forest Service employee feedback, and comments posted to the Planning Rule blog. The agency considered all feedback received through these efforts, and used public input, science, and agency expertise to develop the 2012 Planning Rule.[240]

While these examples do not involve the use of listening sessions as a means of agenda setting *per se*, listening sessions could easily be an effective tool for this purpose. Their primary challenges or limitations include securing attendance from a broad range of interested stakeholders, obtaining balanced participation at the meetings, and obtaining sufficiently detailed or focused advice on potential regulatory actions. Nonetheless, similar to focus groups, listening sessions could be an ideal setting "to find out what issues are of most concern for a community or group when little or no information is available,"[241] and thus to help the agency establish its rulemaking priorities. Moreover, much like RFIs, listening sessions could routinely be used whenever agencies are open-minded about the appropriate course of action and seek situated knowledge from absent stakeholders or information about the values and priorities of interested members of the public. In conducting listening sessions regarding agenda setting, agencies should remain neutral about whether or how the identified issues or problems will or should be addressed and pose detailed questions aimed at soliciting the targeted information or data. Agencies should consider conducting listening sessions in multiple locations and use available

[240] *Id.*

[241] EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 58 (discussing focus groups).

technology to facilitate remote attendance. Agencies should also engage in robust outreach to bring listening sessions to the attention of missing stakeholders, unaffiliated experts, and other interested parties. Agencies should also strongly consider using a facilitator to plan its listening sessions and preside over the meetings to ensure that targeted stakeholders are included and the discussion is balanced and productive. Perhaps most important, agencies should recognize that the primary purpose of listening sessions is to learn from the participants rather than to explain or justify their decisions. Accordingly, agencies should use listening sessions to "listen" rather than as another opportunity to speak.

One particularly ambitious listening session to inform a regulatory agenda was Global Pulse 2010, which was "organized by the U.S. Agency for International Development (USAID) with the assistance of the Commerce, Education, Health and Human Services, and State departments." USAID described Global Pulse as "a three-day virtual event aimed at bringing together thousands of people from around the globe to discuss the world's most pressing challenges and envision solutions."[242] USAID organized this event in partnership with a broad range of stakeholders "to enable listening, learning and sharing of ideas" regarding "10 pressing global challenges within the fields of science and technology, economic opportunity, and human development."[243] Global Pulse was specifically intended to reach "individuals who are not normally seated at the table with key decision makers," and to take advantage of technological advances that allow agency officials "to engage in dialogue with individuals and communities from around the globe."[244] The event featured "international leaders from government, private industry, and civil society organizations, along with influential individuals," who helped "guide the live conversations, encourage participation, provoke deeper thinking, and offer insight into the topics at hand."[245] The Jams technology used to conduct this event was able to support thousands of participants from around the world, and directed them to their preferred topics of conversation.[246]

F. Reverse Industry Days

An innovative way for federal agencies to engage with the public that has been used in the procurement process is known as "reverse industry days" ("RIDs"). *Industry days* have long been used in procurement to provide government contractors

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[242] Press Release, U.S. Agency for International Development, Global Pulse 2010: Innovative Ideas Wanted: U.S. Government to Host an Online Conversation: 'Global Pulse 2010' (Mar. 15, 2010) (on file with authors).

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *See id.* This technology can also be used to conduct textual analysis and data mining to identify emerging trends and otherwise analyze the dialogue. *See* IBM & USAID, GLOBAL PULSE 2010, MARCH 29-31, 2010 4 (2010).

with information from federal agencies about an impending acquisition.[247] The focus is generally on the details of a particular acquisition, and on providing industry with an improved understanding of the government's needs and potentially allowing the government to improve or refine the requirement and solicitation.[248] "Reverse industry days," in contrast, invite industry representatives "to tell the government" what they need "to be active, responsive, and effective participants in the government's acquisition process."[249] Specified industry members are carefully selected to organize and run a "training session" for agency employees that focuses on the state of the industry and its business practices, how the government's acquisition practices influence industry's participation and performance in federal acquisitions, and unintended or unappreciated barriers or obstacles that hinder or limit industry participation. In reverse industry days, "the government is there to listen and learn while industry presents its knowledge and perspective."[250] Thus, unlike listening sessions or focus groups, regulatory stakeholders set the agenda during RIDs.

Several federal agencies have recently held RIDs to inform their acquisitions practices. For example, the Department of Homeland Security's "Acquisition Innovations in Motion" project seeks to facilitate efforts for government and industry to learn from one another.[251] This project has featured several RIDS, which included large group presentations from industry representatives and contractors, smaller breakout sessions, and roundtable discussions. These RIDs have provided DHS acquisitions personnel with an opportunity to obtain a better understanding of the industry's perspective on a variety of issues relevant to the procurement process. DHS subsequently made the materials from these RIDs available on the agency's website for the benefit of other acquisitions professionals. RIDs also provide agency officials with industry contacts that could be tapped during future efforts to evaluate or improve the acquisitions process or other aspects of the agency's regulatory activities. Other agencies that have recently held RIDs in the procurement context include the IRS and the General Services Administration (GSA).[252] GSA's RIDs have focused in part on the bidding process and on how industry interprets relevant legal requirements. During these events, GSA officials told us they try "to look at issues from the perspective of industry," and identify information they "didn't realize was a concern." One interviewee told us that RIDs are capable of generating "aha moments" for agency officials. More than 400 people attended GSA's RIDs, and the feedback provided by attendees in subsequent surveys was reportedly "tremendous."

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[247] *See* VIRTUAL ACQUISITION OFFICE RESEARCH INSTITUTE, REVERSE INDUSTRY DAY: BETTER ACQUISITION OUTCOMES FROM A CHANGE IN PERSPECTIVE 1 (2017).

[248] *See id.*

[249] *Id.* at 1-2.

[250] *Id.* at 2.

[251] *See id.* at 3.

[252] *See id*. at 4.

While RIDs are perhaps best suited for the procurement context (where agencies and contractors are in a business relationship), this format could also potentially be used as a tool to facilitate public engagement in agency agenda setting (and, as discussed later, as a tool for conducting retrospective review). The primary benefits of RIDs are to give agency officials an opportunity to hear about the agency's practices from the perspective of the regulated community and to build stronger relationships with the participants in these events. RIDs can also bring unintended or unappreciated problems to an agency's attention, and suggest potential reforms that could improve the agency's processes and outcomes. These benefits suggest that RIDs may be a useful tool for facilitating public engagement about *how agencies could improve their public engagement efforts*. Moreover, these are the kinds of benefits that could potentially improve and usefully inform agency agenda setting in appropriate circumstances.

The best practices for hosting RIDs, particularly for purposes of improving an agency's public engagement efforts or informing its agenda setting, would include (1) securing a broad stakeholder perspective in organizing the event; (2) broadly publicizing RIDs to secure adequate and balanced participation; (3) prioritizing agenda items; (4) carefully considering the best methods for obtaining the targeted information; (5) coordinating and cooperating with relevant stakeholders in organizing and hosting the event; (6) devoting adequate resources to planning and hosting the event; and (7) establishing a "charter" or blueprint for planning and executing the event, which includes "personnel designations for leads, points of contact, reporting, various required approvals, responsibility for related documentation before and after the RID, and 'rules of the road' for interacting with participants," as well as any necessary legal advice.[253]

As these best practices suggest, the most significant challenge that would be posed by using RIDs to inform an agency's public engagement efforts or agenda-setting priorities is to ensure adequate and balanced participation from the entire range of the agency's relevant stakeholders. The "industry" targeted by RIDs in the procurement context is a relatively narrow group of government contractors and perhaps associated representatives from the regulated industry. The extension of RIDs to the public engagement or agenda setting contexts would significantly broaden the range of potentially interested parties in a way that would almost certainly pose challenges for the organization and execution of such events. In addition, to avoid regulatory capture, it is essential for agencies to include not only representatives of regulated industries in these events, but also representatives of regulatory beneficiaries, absent stakeholders, and unaffiliated experts or ordinary citizens in appropriate circumstances. Like in the contexts of focus groups and listening sessions, agencies should consider organizing and hosting RIDs that specifically target each of the foregoing groups, or hosting fewer events that are organized and attended by a sufficiently balanced group of participants.

[253] *Id.* at 7-9 (proposing a number of best practices for RIDs).

G. Hotlines or Suggestion Boxes

While the public could influence an agency's agenda directly by filing a petition for rulemaking, hotlines or suggestion boxes provide a less formal mechanism for agencies to solicit information, ideas, or experiences from the public relevant to their rulemaking agendas. Therefore, these tools may be more open and accessible to traditionally absent stakeholders than petitions for rulemaking. Hotlines or suggestion boxes include widely advertised telephone numbers or web-based forms of communication that are established to allow interested persons to ask questions or comment on an issue. They can be set up to allow the caller or user to communicate in "real time" with an agency employee, or to allow the caller or user to leave a message for a subsequent agency response. They can be used specifically to solicit suggestions for problems that should be added to an agency's agenda, or they can be established to obtain more general questions or comments regarding the agency's statutory mission or operations. The key to an effective hotline is providing callers or users with an appropriate response to their questions or comments.[254] This means that agencies must provide well-trained staff to answer calls or respond to messages in a reasonably prompt fashion, and that callers or users should feel that agency officials are interested in their concerns and that their replies are well-informed and responsive. Agency staff will, of course, sometimes need to conduct research to provide an adequate response.

Hotlines or suggestion boxes have the potential to bring previously unknown or underappreciated problems or concerns to an agency's attention. They can also provide agencies with some indication of whether a particular problem or concern is widespread or at least warrants greater scrutiny. Hotlines or suggestion boxes also have the advantage of providing agencies with a relatively simple mechanism for being (and appearing to be) accessible and responsive to the general public. Yet hotlines of this nature can backfire if they are not well run. If users do not receive a response from the agency or are unsatisfied with an agency's responses, they may undermine the agency's perceived legitimacy and discourage subsequent possibilities for engagement. Running a hotline well therefore requires adequate staffing and resources. Moreover, some questions or comments will necessarily be difficult to answer in an entirely satisfactory fashion. And, some callers may use hotlines or suggestion boxes in a problematic fashion or merely as an opportunity to vent. Accordingly, agencies should carefully consider whether the potential benefits of establishing and operating hotlines or suggestions boxes exceed the likely costs.

One example of a web-based hotline operated by a federal agency is the "Tell Your Story" feature managed by CFPB's Office of Consumer Education and Engagement. The CFPB's website invites consumers to tell the agency about their

[254] *See* CREIGHTON, *supra* note 220, at 119; EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 63-64; IAP2, PUBLIC PARTICIPATION TOOLBOX 2 (2006).

"experiences with money and financial services, good and bad."[255] In addition, the agency promises that "[t]he CFBP is listening."[256] The website provides basic information about the agency, explains how "telling your story works," gives examples of stories shared by other consumers, and notes that CFPB uses this information to identify "trends and work to head off problems," partly through its enforcement actions.[257] CFPB's website also includes a feature called "Ask CFPB," which provides consumers with the opportunity to obtain "answers to frequently-asked financial questions about student loans, credit cards, mortgages, credit scores and reporting, getting out of debt and more."[258]

A popular "suggestion box" operated by the federal government was the "We the People" petition process provided by the White House during the Obama Administration.[259] The White House established this website in 2012 to solicit online petitions from members of the public for recommended governmental action, and to allow visitors to sign those petitions indicating their support. While the White House initially promised to respond to any petition that received 5,000 signatures, the popularity of the website prompted the Administration to raise the signature threshold for a response to 100,000 signatures in a 30-day period. Beth Simone Noveck points out that petitions of this nature "can get a topic on the public agenda by opening a channel of communication other than lobbying or appealing to congressional officials."[260] For example, a petition that was designed to force telephone companies to unlock a consumer's cell phone for use on a competitor's network when their service contract expired generated 114,000 signatures and prompted substantial attention among media and political elites.[261] Noveck also points out, however, that most petitions fell short of the signature threshold that triggered a response, interest in the website precipitously declined in a relatively short period of time, and there is no

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[255] *Your Money. Your Story.*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/your-story/ (last visited Nov. 8, 2018).

[256] *Id.*

[257] *Id.* ACUS has, however, recommended that agencies that make consumer complaints publicly available through online databases or downloadable data sets inform the public of the source and limitations of the information and permit entities publicly identified to respond or request corrections or retractions. *See* Admin. Conf. of the U.S., Recommendation 2016-1, *Consumer Complaint Databases*, 81 Fed. Reg. 40,259, 40,259-60 (June 21, 2016).

[258] *You Have the Right to Have Your Financial Complaint Heard*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/you-have-the-right/submit-a-complaint/ (last visited Aug. 14, 2018).

[259] For discussions of "We the People," see BETH SIMONE NOVECK, SMART CITIZENS, SMARTER STATE: THE TECHNOLOGIES OF EXPERTISE AND THE FUTURE OF GOVERNING 75-76 (2015) [hereinafter NOVECK, SMART CITIZENS]; Jonathan Weinberg, *The Right to be Taken Seriously*, 67 U. MIAMI L. REV. 149, 212-14 (2012).

[260] NOVECK, SMART CITIZENS, *supra* note 259, at 76.

[261] *See id.* at 75-76.

evidence that "We the People" had any meaningful impact on policymaking.[262] Part of the problem was with petitions that could not be taken seriously (*e.g.*, deport Justin Bieber back to Canada, and build a "Death Star") or petitions that were beyond the scope of the President's authority. Part of the problem, however, may also have been the unsatisfying nature of some White House responses.[263] In this regard, one submission that received 37,167 signatures petitioned the Obama Administration to "[a]ctually take these petitions seriously instead of just using them as an excuse to pretend you are listening."[264]

The preceding examples illustrate both the advantages and limitations of hotlines or suggestion boxes and suggest some best practices related to their use. First, agencies should have realistic expectations about the utility of these methods of public engagement for agenda setting purposes. Hotlines and suggestion boxes can bring new ideas or problems to an agency's attention and perhaps highlight the significance of problems with which the agency is already familiar. These tools also give agencies a concrete opportunity to demonstrate their responsiveness to the interests and concerns of the public. Nonetheless, hotlines and suggestions boxes will not typically provide ready solutions to the problems users identify, and they should be viewed simply as a potentially useful supplement to the other modes of public engagement in agenda setting. Moreover, agencies that provide hotlines or suggestion boxes should widely advertise their availability to their targeted audiences, including missing stakeholders and unaffiliated experts, and devote sufficient resources toward their operation to ensure that the agency's responses are timely, accurate, and otherwise appropriate.

Agencies should also consider publicly recognizing the best ideas they receive through hotlines and suggestion boxes, allowing commentators to "endorse" suggestions that are submitted by other users, and providing more detailed substantive responses to serious or major proposals when possible. Agencies should report when they have acted on suggestions they have received via their hotlines or suggestion boxes. If hotlines or suggestion boxes are used for general purposes beyond agenda setting or other matters related to rulemaking, agencies should establish mechanisms to ensure that their rulemakers have access to the relevant database or reports that summarize the nature of the comments received. Agencies should also consider providing users of these tools with information about other agency activities that may be of interest to them, including upcoming opportunities to engage with the agency's rulemaking efforts.

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[262] *See id.* at 76. *See also* Paul Hiltin, *'We the People': Five Years of Online Petitions*, PEW RES. CTR. (Dec. 28, 2016), http://www.pewinternet.org/2016/12/28/we-the-people-five-years-of-online-petitions/ (calling the impact of the petitions on policy "modest and varied").

[263] *See* Weinberg, *supra* note 259, at 213 (criticizing the nature of the White House's responses, suggesting that this outcome is unsurprising, and claiming that "it makes the whole enterprise seem pointless").

[264] *Id.* at 213.

H. Public Complaints

Public complaints are another form of civic engagement that can be used to inform an agency's rulemaking agenda. Public complaints are in a sense a more specific version of hotlines and suggestion boxes. While the public can submit a range of proposals using suggestion boxes, including informal requests for rulemaking, complaints are typically focused on regulatory violations and agency enforcement. Complaints sometimes seek a specific enforcement action, but they can also provide a broader mechanism for the public to express concerns and for the agency to assess the frequency or magnitude of various problems, which could potentially inform the agency's agenda setting and provide an impetus for rule development. Much like hotlines or suggestion boxes, agencies can solicit or accept complaints via telephone or by establishing mechanisms for filing complaints via the Internet. Public complaints have many of the same advantages and limitations as hotlines as well—they can bring previously unknown or underappreciated problems to the agency's attention and provide a service that demonstrates the agency's responsiveness to public concerns. But it is essential that agencies provide the resources necessary to respond to complaints in a timely and reasoned fashion. Although agencies will rarely establish complaint processes primarily to inform their rulemaking agendas, the value of public complaints for agenda setting is a potentially significant byproduct of those efforts that agencies should use to their advantage.[265]

The CFPB's Office of Consumer Response is responsible for handling the Bureau's consumer complaints. This Office has received approximately 1.2 million consumer complaints to date. Eighty percent of the complaints are submitted via the Bureau's website; the Bureau also operates a call center to handle complaints.[266] The CFPB began collecting consumer complaints about credit card products in 2012 and gradually expanded the system over the next two years. The Bureau now has a universal complaint form that asks consumers specific questions about the nature of their complaints, which are then routed to the appropriate part of the agency for processing. The Bureau's data scientists periodically mine the complaints database using natural language processes. While this database has reportedly been used more heavily to date for purposes of rule development, it could also be used as a tool to inform the Bureau's rulemaking agenda. Other agencies that receive and respond to consumer complaints could likewise use their complaint databases as a resource to inform their rulemaking agendas.

The CFPB's experiences with public complaints offer some best practices for their use. Agencies that accept public complaints should develop a "complaints

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[265] As noted above, ACUS has previously recommended that if this information is made publicly available, agencies "should adopt and publish online written policies" that "[i]nform the public of the source(s) and limitations of the information, . . . permit entities publicly identified . . . to respond . . . or request corrections or retractions, . . . and give appropriate consideration to privacy interests." Admin. Conf. of the U.S., Recommendation 2016-1, *Consumer Complaint Databases*, 81 Fed. Reg. 40,259, 40,259-60 (June 21, 2016).

[266] Telephone Interview with Consumer Financial Protection Bureau (Dec. 5, 2017).

database" that could be used to identify recurring problems, begin to assess their magnitude and frequency, and develop processes for using this information to inform the agency's rulemaking agenda. For example, data scientists who study or examine the complaints database should provide periodic reports that summarize their findings to officials who are responsible for developing the agency's rulemaking agenda.

I. Public Notice and Comment

The most widely known and frequently used form of public engagement in rulemaking is almost certainly notice and the opportunity for public comment. Although this process is generally required for proposed rules, notice and comment can also enhance public engagement in agency agenda setting, although with some limits discussed below. For example, agencies can provide public notice and opportunities to comment on what should appear on their rulemaking agendas. As discussed above, the IRS and the PBGC already use RFIs to do this. Such requests for public comments could be open, in the nature of RFIs, or agencies could provide notice and opportunities to comment in connection with the *Regulatory Plans* they submit for the *Unified Regulatory Agenda* under E.O. 12,866. Agencies could publish their *Regulatory Plans* for public comment in advance of submitting them to the Office of Management and Budget (OMB) or merely provide a transparent means for the public to comment on the *Plans* after they are published in the *Unified Regulatory Agenda*. Finally, agencies can provide public notice and opportunities to comment on some or all of their rulemaking petitions. As indicated above, this last form of public notice and comment provides two layers of public engagement in agency agenda setting. Consistent with prior ACUS recommendations,[267] we believe that agencies should consider providing opportunities for public notice and comment *in each of these three contexts*.

To be sure, we are not suggesting that agencies comply with all the requirements of notice and comment under 4 U.S.C. § 553(c). Because section 553(c) notice and comment is not required for agenda setting, the agency need not have a fixed window for receiving comments, respond to all public comments on its agenda, nor respond with the level of detail and support typical in section 553 rulemaking.[268] Moreover, judicial review of agency agenda setting is extremely deferential.[269] Rather, agencies should merely commit to reviewing public comments on their agenda and, to the extent appropriate and realistic in light of agency resources, providing a concise and reasoned justification for their decisions based on the petitions and comments

[267] *See* Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,114, 75,117, 75,118 ("Agencies should consider inviting public comment on petitions for rulemaking by either: (a) Soliciting public comment on all petitions for rulemaking; or (b) Deciding, on a case-by-case basis, whether to solicit public comment on petitions for rulemaking."); *see also* SCHWARTZ & REVESZ, *supra* note 161, at 76-78.

[268] *See* SCHWARTZ & REVESZ, *supra* note 161, at 77.

[269] *Id.*

received. We recognize that agencies would generally not be able to respond to individual comments in this context unless they are unusually important or decisive.[270]

Following this advice could enhance public engagement in agenda setting, which is frequently the stage of rulemaking when agencies are most open minded and where the general public's values and priorities can and should most readily influence agency decision-making.

VII. EARLY RULE DEVELOPMENT

There are many ways for agencies to engage with the public when they set their rulemaking agendas. Of course, once an issue or problem is placed on the agency's agenda as a potential subject of rulemaking, the agency's opportunity to engage with interested members of the public on the best course of action are only beginning. While the scholarly literature on public engagement with rulemaking has focused primarily on ways to improve public notice and comment, the best prospect for more fully democratizing the rulemaking process may be to provide meaningful and consistent efforts for informed public engagement during rule development. Many of the modes of public engagement that are available at the agenda-setting stage can also be used—sometimes even more effectively—during early rule development, when agencies study the problem at issue, begin to gather relevant data, identify and evaluate potential approaches to the regulatory problem, and begin the process of drafting a proposed rule. This section identifies available modes of public engagement during early rule development, provides examples of their effective use by federal agencies, discusses the challenges and limitations of each of those methods, and recommends best practices for facilitating meaningful, balanced, and informed public engagement during this vital and formational stage of the rulemaking process.

A. Federal Advisory Committees

Federal advisory committees can be an effective tool for public engagement early in the process of developing most rules subject to notice and comment. As in the context of agenda setting, agencies would need to consider whether to charter a new advisory committee or to use existing advisory committees for this purpose. This would depend primarily on whether existing advisory committees are structured adequately to represent all of the relevant stakeholders with an interest in the matter and whether they have the necessary forms of expertise. If not, agencies should consider chartering new advisory committees to provide advice on particular rulemaking initiatives, especially if a potential rule would be especially significant or

[270] For a discussion of analogous ways in which voluntarily conducting public notice and comment on guidance documents is less burdensome than for legislative rules, see NICHOLAS R. PARRILLO, ADMIN. CONFERENCE OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 143-50 (2017).

controversial. Agencies should also consider whether seeking advice from a Citizens Advisory Committee would make sense under the circumstances. This is most likely to be the case, once again, for rulemaking initiatives that are especially important or controversial.

The primary goal of using federal advisory committees at this stage is to obtain advice from a balanced group of well-informed stakeholders and unaffiliated experts on potential approaches to a proposed rule. During the earliest stages of the process, advisory committees could help to identify the relevant issues that need to be considered, provide advice on how to obtain the requisite data, make suggestions or provide preliminary evaluations of potential approaches to the regulatory problem, and recommend potential approaches to begin drafting a proposed rule. As the agency's thinking progresses, advisory committees could be used to evaluate the agency's preliminary work, identify additional problems that still need to be resolved, and provide feedback on the agency's tentatively preferred solutions (including early drafts of proposed rules). In short, federal advisory committees can be used as a relatively simple and cost-effective way to "involve" representatives of the public in rule development, and even as a potential mechanism for "collaboration," whereby federal agencies "partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution."[271] Moreover, the briefing materials and other documents prepared for advisory committees, and the advice that is provided from advisory committees to federal agencies, can be shared with the public and provide a basis for relatively informed public comments from other interested parties early in a rule's development.

We have found several examples of agencies that use federal advisory committees for advice relatively early in rule development. The Department of Energy has a "process rule" that sets forth its procedures for promulgating rules.[272] The agency routinely consults with its advisory committees as part of this process before issuing an NPRM. The FCC also has advisory committees through which the public "is afforded an opportunity to provide input[]into a process that may form the basis for government decisions."[273] The FCC currently receives advice from eight committees subject to FACA and three committees not subject to FACA.[274] The NRC reportedly uses advisory committees to inform the development of its proposed rules, and the agency has found that the briefing materials that it prepares for those committees are also useful for gathering feedback from the general public. Similarly, the CFPB regularly uses Small Business Enforcement Fairness Act ("SBREFA") panels to review proposed rules before they are noticed. The panels help the agency identify unintended consequences and provide information about how industry does

[271] *See* LUKENSMEYER & TORRES, *supra* note 141, at 7 (describing IAP2's "spectrum of public participation").

[272] *See infra* Part XII.A (providing more detailed discussion of DOE's process rule).

[273] *Advisory Committees of the FCC*, FED. COMMS. COMMISSION, https://www.fcc.gov/about-fcc/advisory-committees-fcc (last visited May 2, 2018).

[274] *See id.*

business, compliance matters, appropriate regulatory thresholds, how best to communicate the Bureau's regulatory requirements, and trade-offs between potential costs and benefits. The CFPB also publishes SBREFA briefing materials on its website to solicit broader public input prior to the issuance of a notice of proposed rulemaking.

As discussed above, the primary challenges or limitations associated with advisory committees are that using them requires significant time and effort (as compared with *not* using them), their use is relatively heavily regulated by law, their composition may not be sufficiently balanced or representative, and they must be properly briefed on the relevant legal and technical issues and the agency's tentative thinking about the problem. Nonetheless, when federal advisory committees are properly composed and sufficiently informed, seeking their feedback and advice early in rule development will routinely be worth the time and effort. The best practices associated with using advisory committees at this stage therefore include (1) identifying all of the relevant stakeholders and making sure that their interests and perspectives are adequately represented; (2) carefully considering whether to use existing advisory committees or to charter a new advisory committee to obtain advice or recommendations on the development of a potential rule—or perhaps whether it would be best to seek advice on the matter from a combination of different advisory committees; (3) regularizing the solicitation of advice from advisory committees early in the process of developing potential rules, as opposed to using advisory committees for these purposes in an inconsistent or ad hoc manner; (4) preparing briefing materials for advisory committees that clearly explain the relevant issues and potential alternatives and the agency's tentative plans (if any); and (5) publishing those materials and any subsequent advice or recommendations from federal advisory committees on the agency's website and in other appropriate venues as a basis for seeking additional public comments.

B. Focus Groups

Focus groups can also be used as a form of public engagement during the early stages of rule development. Because they are a useful mechanism for identifying the primary concerns of participants regarding a problem or their initial reactions to a proposal, focus groups are generally likely to be more useful during the early stages of rulemaking than when a proposal is more fully developed. Similar to the agenda-setting context, focus groups could be a relatively easy and inexpensive way for agencies to obtain useful feedback on potential regulatory alternatives from missing stakeholders, unaffiliated experts, and ordinary citizens who tend not to participate in notice-and-comment proceedings or open public meetings.[275] Agencies should give careful consideration to whom to invite to participate in focus groups based on the

[275] *See* EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 74 (recognizing that focus groups can be used to obtain feedback from "people with common concerns who may not feel confident speaking up in a larger public gathering," and explaining that "findings from smaller meetings can be presented at larger public meetings or in summary reports, giving 'voice' to those in the community who are unable to speak up in a larger setting").

nature of the rule at issue and the type of feedback they are seeking. In any event, it is crucial that agencies provide skilled facilitation and conduct careful planning to maximize the likelihood of getting the most productive input possible. Agencies should also provide participants with briefing materials that clearly explain the relevant issues and the primary policy alternatives, and they should prepare a report after the session that summarizes the feedback and identifies potential concerns for further consideration.

C. Requests for Information ("RFIs")

RFIs are another tool of public engagement that can be used effectively during the early stages of developing many rules. As explained above, RFIs are published requests for data, comments, or other information from the public on designated problems or issues. The goal of using RFIs at this stage is to obtain data and feedback on potential approaches to a regulatory problem and primary areas of concern early in the rulemaking process before any firm decisions have been made. Responses to RFIs can help agencies to determine "an appropriate course of action—which may or may not involve rulemaking—to address the problem."[276] Some agencies, including CFPB and the Department of Energy, issue RFIs during the early stages of rule development on a regular basis.

The best practices for using RFIs during agenda setting would also apply to their use early in rule development. In particular, agencies should use RFIs as a matter of course when they are open to a variety of potential courses of action or need additional information or data before they can begin crafting a regulatory approach to an issue. When publishing an RFI, agencies should (1) remain neutral regarding potential regulatory alternatives; (2) pose specific questions or requests to obtain the information they need; (3) identify their intended audiences; (4) conduct focused outreach to bring RFIs to the attention of missing stakeholders, unaffiliated experts, and other interested parties, when appropriate, and consider whether there are additional ways to incentivize robust participation; and (5) acknowledge responses to RFIs, seriously consider the resulting feedback, and explain how the submitted information, data, or comments were useful to the agency.

D. Listening Sessions

Listening sessions are another potentially valuable tool that can be used to facilitate public engagement during the early stages of rule development. Listening sessions provide "live" opportunities for agencies to obtain information, comments, or data from the public on a designated problem or issue. They can be conducted in person or online (or both), and their primary goal is to provide information about the agency's tentative goals or plans and give the public an opportunity to ask questions and provide comments. Listening sessions provide a potentially useful way for agencies to obtain situated knowledge from absent stakeholders and concrete data or other information from unaffiliated experts. They also provide agencies with an

[276] *See Requests for Information (RFI), supra* note 235.

opportunity to hear about participants' primary concerns and to receive feedback on the perceived advantages or disadvantages of various policy alternatives. Similar to RFIs, this information and data can help an agency determine an appropriate course of action—which may or may not involve rulemaking—to address the problem.

As discussed above, the Forest Service made extensive use of listening sessions and other public meetings during the early stages of developing its 2012 Planning Rule.[277] The NRC is another agency that has made relatively extensive use of listening sessions. Indeed, the NRC has a group of employees who are trained as facilitators who can be called upon to help organize and run these meetings. The meetings normally occur early in the process of creating a rule, and they focus on a designated issue upon which the agency "wants to get input about what people think." An interviewee told us that "these meetings are fairly open, and the NRC will occasionally have panel discussions." The NRC's listening sessions usually last half a day or a full day. To identify specific topics to discuss at such meetings, the NRC staff will "brainstorm" or the agency will reach out to the public and interest groups to suggest topics. In addition, the NRC will include language in its notice of the meeting asking what issues and topics participants would like to discuss, and if enough people suggest a topic, the NRC will place it on the agenda for the meeting. The public can generally attend the meeting in person or they can watch it online. Even if they are participating online, the public is still invited to ask questions.

The NRC tries to "educate the public" about the relevant topic during these listening sessions. This may be an advantage of listening sessions over RFIs when the agency wants to get input from an informed public or engage in a more deliberative exchange. We were told that "the public is appreciative of these efforts." After an informative introduction, the agency will typically open up the meeting to a question and answer session. The meeting is generally led by someone from the relevant program office, and the facilitator is there primarily to "help out" and to serve as "an internal consultant." Before the meeting, the facilitator will also help with logistics. During the meeting, the facilitator is there to advise, ask questions, and make sure that everyone has a chance to participate. The facilitator also helps explain "technical issues and complex language" in a manner that the public can understand. This can prove challenging if the facilitator is not sufficiently familiar with the topic or with what the agency's experts are trying to say. The NRC's facilitators have also helped to conduct listening sessions online on several occasions. These meetings are similar to a "radio show" in that "there is a phone bridge set up and an operator controls the phone line." For online meetings, the facilitator will help with a presentation and then work with the operator regarding questions. One advantage of online listening sessions is that everyone is on relatively equal footing, unlike live meetings where people who are physically present often have an easier time participating than people who are attending remotely.

[277] *See supra* Part VI.E.

EPA is another agency that has used listening sessions effectively early in rule development. For example, the agency conducted five listening sessions in large cities around the country "as a first step in developing a new rule that would require states, territories, and authorized tribes to develop Total Maximum Daily Loads (TMDL) of pollutants that a body of water can receive while still meeting water quality standards."[278] These listening sessions were designed "to obtain stakeholder perspectives on key issues associated with the TMDL program and related issues in the National Pollutant Discharge Elimination System (DPDES) program."[279] EPA hosted the listening sessions, which included participation from other federal, state, and local agencies, and representatives of environmental, agriculture, forestry, and industry groups. The listening sessions were facilitated by a hired contractor, and included presentations from EPA management, as well as designated "listening panels" composed of EPA officials, officials from USDA and state agencies, "and industry and environmental stakeholders who listened to the attendees' perspectives and shared their own perspectives as well."[280] The listening sessions included a large group presentation and background discussion of the general topic, numerous facilitated small group discussions, and a plenary session with presentations from spokespersons for each of the smaller groups. At the end of the meetings, the listening panels "responded to what they had heard" and "both presented their viewpoints and listened and reacted to the discussions of the participants." [281] Comments from all of the participants were included in meeting summaries, which were posted on EPA's website and considered by the agency's rule-writing team as it determined how to proceed. While EPA ultimately withdrew its proposed rule on the grounds that significant changes were needed, the agency issued related guidance "based in part on information gathered from the listening sessions." [282] EPA subsequently reported that "[t]his case study illustrates that listening sessions can provide an effective forum for agencies to encourage proactive and constructive engagement early in the policy development process."[283] Moreover, "input obtained from listening sessions can be used to influence EPA guidance, even if the rulemaking that occasioned the information exchange is cancelled or the proposed rule withdrawn."[284]

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[278] DEBORAH DALTON & PHILLIP J. HARTER, CONFLICT PREVENTION & RESOLUTION CTR., BETTER DECISIONS THROUGH CONSULTATION AND COLLABORATION app. V at 115 [hereinafter BETTER DECISIONS MANUAL].

[279] *Id.*

[280] *Id.* at app. V at 116.

[281] *Id.*

[282] *Id.* at app. V at 115.

[283] *Id.*

[284] *Id.*

Listening sessions tend to be most useful if public education and input are both desired and possible.[285] The primary challenges associated with listening sessions include the potential difficulty of securing balanced attendance and participation. Moreover, the discussions could become "heated" if the issues are controversial, and listening sessions are not necessarily the best format for facilitating "interactive dialogue"—unless, as in the EPA example, moderated small group discussions are incorporated into the event. Accordingly, the effective use of listening sessions in early rule development will necessarily require careful planning and extensive outreach efforts. Agencies should generally use trained facilitators to plan and help conduct these events. They should also consider holding listening sessions in multiple locations and use available technology to facilitate remote participation. As discussed in the agenda-setting context, agencies should remain neutral about the best approach to a regulatory problem when they hold such meetings, and they should pose detailed questions that are designed to produce the targeted information or data. Agencies should also consider establishing "listening panels" composed of agency officials to respond to the views and perspectives that are conveyed at the meetings. And, they should provide summaries of the results of their listening sessions, and explain how this feedback subsequently influenced the agency's decision making.

E. Internet and Web-Based Outreach

The Internet is constantly evolving to allow greater possibilities for user-generated content, and thus, to provide increased opportunities for public participation and dialogue in agency rulemaking. Social media, which includes "any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public,"[286] can be carefully used in some situations to enhance public engagement in connection with notice-and-comment rulemaking.[287] As ACUS has previously recognized, however, the potential for using social media to facilitate public engagement in rulemaking is significantly greater during the early stages of rule development because "the APA and other legal restrictions do not apply, and agencies are often seeking dispersed knowledge or answers to more open-ended questions that lend themselves to productive discussion through social media."[288] The Conference has therefore recently issued recommendations to facilitate the use of social media for purposes of public outreach and education, and also as a potentially useful mechanism for soliciting situated knowledge and other helpful information during the early stages of rule development from missing stakeholders, unaffiliated experts, and other citizens who do not traditionally

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[285] For a more thorough discussion of the challenges associated with public meetings, and a detailed list of their potential advantages and the best practices for conducting them, see EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 74-75.

[286] Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269, 76269, 76,269 (Dec. 17, 2013).

[287] *See infra* Part IX.B.

[288] *Social Media in Rulemaking*, 78 Fed. Reg. at 76,270.

participate in notice-and-comment proceedings.[289] This section briefly highlights the most pertinent ACUS recommendations, provides a few examples of agencies using social media effectively to facilitate public engagement in early rule development, and identifies some of the primary challenges and best practices in this area.[290]

1. Prior ACUS Recommendations Concerning the Internet and Social Media

The primary goals of using the Internet and social media for outreach in early rule development are: (1) to inform the public of an agency's interest in a potential rule and opportunities to participate in the process of developing the rule and (2) to encourage public discussion and input concerning potential regulatory initiatives. Social media can be particularly effective for purposes of public outreach, "helping to increase public awareness of agency activities, including opportunities to contribute to policy setting, rule development, or the evaluation of existing regulatory regimes."[291] Accordingly, ACUS has recommended that "[a]gencies should use social media to inform and educate the public about agency activities, their rulemaking process in general, and specific rulemakings."[292] Social media can be a particularly effective (and likely essential) means of reaching absent stakeholders, and agencies should therefore "take an expansive approach to alerting potential participants to upcoming rulemakings by posting to the agency Web site and sending notifications through multiple social media channels."[293] ACUS's more specific advice concerning the use of social media for public outreach includes the following suggestions:

- Develop "communications plans specifically tailored to the rule and to all types of missing stakeholders or other potential new participants the agency is trying to engage."
- Clearly explain "the mechanisms through which members of the public can participate in the rulemaking, what the role of public comments is, and how the agency will take comments into account."
- Provide clear and specific information "about how the proposed rule would affect the targeted participants and what input will be most useful to the agency."
- Ask organized groups "to spread the participation message to members or followers," explaining that "individual participation can be beneficial,"

[289] *See id.* at 76,271-72.

[290] Of course, some of the same tools and practices could also be used in appropriate circumstances to enhance public engagement in agency agenda setting, advanced rule development, and retrospective review.

[291] *Id.* at 76,270.

[292] *Id.*

[293] *Id.* at 76,270-71.

and encouraging these groups "to solicit substantive, individualized comments from their members."[294]

ACUS has also recommended that agencies consider "ways to publicize, and allow members of the public to receive, regular, automated updates on developments" related to their significant rulemaking activities.[295] Finally, ACUS has recommended that agencies should consider using social media during rule development "where the goal is to understand the current state of affairs, collect dispersed knowledge, or identify problems."[296] When using social media for these purposes, agencies should clearly identify the kinds of information they are seeking and how the agency plans to use this feedback, and they should acknowledge receipt of submissions, pose follow-up questions, and provide substantive responses to reward participation and promote further dialogue with commentators.[297]

ACUS has also recommended other ways to use social media effectively in early rule development. For example, the Conference has suggested that "agencies should consider maintaining a blog or other appropriate social media site" for each rulemaking that can provide interested persons with "information, updates, and clarifications regarding the scope and progress of the rulemaking."[298] ACUS has also recommended that agencies consider "using such a site to generate a dialogue."[299] When agencies undertake such efforts, ACUS has recommended that agencies consider "retaining facilitator services to manage rulemaking discussions conducted through social media."[300] Moreover, agencies should provide information and otherwise communicate in a manner that would be understandable to the general public.[301] The Conference has emphasized that "[a]gencies have maximum flexibility under the APA to use social media before an NPRM is issued or after a final rule has been promulgated,"[302] and it has even recommended that they "consider experimenting with collaborative drafting platforms, both internally and, potentially, externally, for purposes of producing regulatory documents."[303] Such

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[294] *Id.* at 72,271.

[295] *Id.*

[296] *Id.*

[297] *See id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *See* Admin Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728, 61,730 (Dec. 29, 2017) ("The preambles to proposed rules should include a summary of the rule that non-specialists and the general public can understand.").

[302] *Social Media in Rulemaking*, 78 Fed. Reg. at 76,272.

[303] *Id.* at 76,271.

experimentation would generally make the most sense early in the rule development process.[304]

2. Successful Uses of the Internet and Social Media

The Department of Transportation has been a leader in using social media and the Internet to involve the public in some of the foregoing ways. In addition to its work with Regulation Room, which is discussed below,[305] DOT has used "National Online Dialogues" to solicit public input and encourage public discussion concerning various regulatory initiatives. These dialogues typically describe a general topic or problem and invite members of the public "to participate and lend [their] ideas."[306] In addition to providing background information, the online dialogues invite interested persons "to post an idea; review, comment, and vote on others' input; and provide specific feedback to [the agency's] questions."[307] The public is provided with a specific time frame in which to submit comments and told, "your voice can make a difference!"[308] A number of agencies have experimented with the use of the "Idea Scale" platform for similar purposes.[309]

DOT has also been a pioneer in the use of "status reports" and "effects reports," which allow interested persons to keep track of the status of rulemaking that could affect them. Members of the public can sign up to receive "status reports" on particular rules or on broader topics of interest. Status reports are issued by the agency each month, and they keep subscribers up to date on the progress of significant rulemakings. Status reports also allow recipients to sign up for "alerts" that notify them when proposed rules are open for public comment. Subscribers to this service do not need to monitor the *Federal Register*; they can just click on a link near the bottom of the notice that takes them directly to the NPRM.

"Effects reports" are issued as another way to keep the public informed of DOT's rulemaking activities.[310] The agency regularly produces 21 separate reports for each "effect" of its proposed or potential rules. Members of the public can sign up to receive a specific effects report when a proposed or potential rule has an "effect" that

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[304] For informative discussions of "wikis" and other collaborative drafting processes, see HERZ, USING SOCIAL MEDIA, *supra* note 28, at 59-62.

[305] *See infra* Part IX.C & F.

[306] *See, e.g.*, *FTA 5-Year Research Strategic Plan National Online Dialogue*, FED. TRANSIT ADMIN., https://www.transit.dot.gov/research-innovation/fta-5-year-research-strategic-plan-national-online-dialogue (last updated Aug. 24, 2016).

[307] *Id.*

[308] *Id.*

[309] For a discussion and evaluation of these efforts, see HERZ, USING SOCIAL MEDIA, *supra* note 28, at 42-46.

[310] *See Reports on the Effects of Rulemakings*, DEP'T TRANSP., https://www.transportation.gov/regulations/reports-on-effects-DOT-rulemakings (last updated Mar. 16, 2017).

is of interest to them. Examples of relevant effects include "Regulatory Flexibility Analysis," which may be of interest to small businesses; state, local, or tribal government effects, which may be of interest to representatives of those sovereign entities; and "major" or "other significant effects," which could potentially be of interest to anyone. Effects reports are provided so that interested members of the public can stay abreast of the progress of proposed or potential rules that would affect their particular interests. DOT creates and uses "listserves" to keep subscribers of these services notified by email of significant actions or events regarding specific rules or more general topics. The creation and use of listserves is a relatively easy way for agencies to conduct web-based outreach that has the potential to enhance public engagement in rulemaking significantly.

The FCC has also made relatively extensive use of web-based outreach and public engagement during early rule development. For example, in developing its National Broadband Plan, the FCC established a blog called "Blogband" for the public to discuss broadband policy, and conducted workshops and field hearings that were "lively, interactive and valuable for the staff tasked with collecting data and forming recommendations."[311] The public engagement effort related to the National Broadband Plan was unusually extensive, and included the issuance of a "notice of inquiry" (sometimes called a "request for information"), and 36 public workshops or "listening sessions" that were held at FCC headquarters and streamed online—which drew more than 10,000 in-person or online attendees and reportedly provided the framework for the ideas contained in the Plan. Significantly for present purposes, the FCC also used the Internet to engage the public in this effort. The agency posted more than 130 blog entries on a website created specifically for this project and received nearly 1,500 comments in return.[312] Based partly on efforts related to this project, the FCC's Twitter feed reportedly has more than 330,000 followers, "making it the third most popular governmental Twitter feed after the White House and the Centers for Disease Control."[313]

3. Challenges of Using the Internet and Social Media

While social media and other technological innovations have the greatest potential to facilitate public engagement during the early stages of rule development, such efforts undoubtedly pose substantial challenges. Michael Herz identifies and discusses those challenges at length in his ACUS report on the use of social media in

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[311] Jennifer A. Manner & Ronnie S. Cho, *Broadband in America: Introduction to a New Federal Priority*, 19 MEDIA L. & POL'Y 5, 9-10 (2010).

[312] In discussing this effort, however, Michael Herz concluded that "[d]espite some fanfare, comments were neither especially numerous nor especially substantive." HERZ, USING SOCIAL MEDIA, *supra* note 28, at 41.

[313] FED. COMMC'N COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN IX (2010).

rulemaking.[314] The bottom line is that the general public is unaware of most agency rulemaking activity and opportunities to participate in the process, they generally have other things they would rather do with their time, they do not know how to comment effectively, and, even if all of the foregoing barriers could be overcome, they may not have anything useful to add.[315] These challenges are potentially compounded by the fact that organized groups and trade associations are sometimes reluctant to encourage their members to participate as individuals with independent interests or perspectives.[316]

Though these are undoubtedly daunting challenges, we are confident that social media and other web-based outreach can be thoughtfully designed "to increase participation by certain small, targeted groups or to improve the quality of the participation that is already occurring,"[317] especially during early rule development.

4. Best Practices for Using the Internet and Social Media to Engage Absent Stakeholders

Social media and other technological innovations can be used for several distinct purposes, which can and should be disaggregated. The first purpose is simply to *inform* targeted stakeholders about an agency's activities and to notify them of related opportunities to participate. The related participatory opportunities could involve any of the "modes" of public engagement discussed in this report. Social media and listserves (or other subscription services) can be used relatively easily and effectively for these informational purposes. But agencies must identify their targeted audiences and engage in special recruitment efforts to ensure that they are "signed up" to receive the relevant information.

The second purpose that can be served by social media and other technological innovations is to help *educate* the public regarding how to participate effectively. This means providing the agency's targeted audiences with the procedural and substantive information they need to participate effectively. Specifically, agencies need to provide relevant members of the public with information about (1) how a particular mode of public engagement works, (2) their potential regulatory plans, and (3) precisely what information or data they seek. And, of course, all of this educational material needs to be presented in a manner that the targeted audience can clearly understand. While likely more challenging, social media and other technological innovations could also be used effectively for these educational purposes. As discussed further below, agencies could produce (either individually or

[314] *See* HERZ, USING SOCIAL MEDIA, *supra* note 28, at 21-28. *See also* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 11-12 (identifying the primary barriers to meaningful public engagement in rulemaking).

[315] *See* HERZ, USING SOCIAL MEDIA, *supra* note 28, at 8 (summarizing the challenges).

[316] *See supra* Part III.D.

[317] HERZ, USING SOCIAL MEDIA, *supra* note 28, at 29 (recognizing these may be realistic goals even for those who are "dubious about the value added by public participation").

collectively—or through some intermediary such as ACUS) materials that clearly describe how each mode of participation works and how citizens can contribute most effectively to those public engagement efforts. Agencies could also provide citizens with a set of best practices for making contributions through each of the respective modes of public engagement, and samples of particularly useful or effective contributions. Finally, agencies could use social media and other technological innovations to provide their targeted audiences with information that clearly describes each of their specific rulemaking initiatives and clearly identifies the information or data they are seeking from relevant members of the public. Armed with this procedural and substantive knowledge, the agency's targeted audiences would be in the best possible position to participate effectively in early rule development.

Social media and other technological innovations can also be used as a means to *gather information* from the public or to *facilitate a dialogue* about the agency's potential regulatory plans. These are by far the most challenging uses of social media for purposes of public engagement, and they require careful planning and facilitation. The e-rulemaking literature frequently and correctly recognizes that the use of social media in rulemaking is not like a field of dreams—if you build it, they will not necessarily come.[318] One could add that even if they come, they will not necessarily give you the information that you want or need. Nonetheless, if social media is used effectively for the information and educational purposes described above, agencies should also be able to use social media as a productive means for gathering useful information or comments from their targeted audiences.

Agencies should carefully consider *what type of information* they seek to obtain through public engagement. For example, are they seeking situated knowledge about a designated issue or problem, technical information or data about a potential subject of regulation, public preferences regarding potential forms of consumer disclosure, or general information about the public's values or priorities? Answering these questions will help agencies identify *who* they need to reach to generate the desired information. Once they know who they need to reach, agencies can consider *how* this information is most likely to be obtained, *when* those efforts should occur, and *what* the agency will do with the input.

Accordingly, agencies must (1) build the appropriate opportunities for public engagement, (2) inform targeted stakeholders about those opportunities, (3) persuade them to participate, *and* (4) provide the targeted audience with the education and guidance they need to participate effectively. The first of these requirements essentially involves identifying the best available modes of public participation for the task at hand. While this entire report is focused on helping with this task, social media and the Internet can be used to supplement most of the conventional modes of public engagement—and they can also be used as independent tools for engaging with the public when carefully done in appropriate circumstances.

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[318] *See, e.g.*, FARINA & NEWHART, IBM CENTER, *supra* note 22, at 21.

The second of these requirements involves conducting the necessary public outreach. As ACUS has previously recognized, social media can be especially helpful for this purpose. In addition to following ACUS's prior recommendations on this score, the best practices for effective outreach include (1) providing targeted information to targeted stakeholders, (2) constructing and using listserves to identify targeted stakeholders and communicate with them regarding relevant rulemaking initiatives and related opportunities to participate, and (3) creating websites and operating blogs that are specifically designed for each significant rulemaking initiative and engaging in appropriate efforts to bring these resources to the attention of agencies' targeted audiences.

The final prerequisite to the effective use of social media in public engagement efforts involves providing citizens with the information they need to participate effectively. We will further develop the best practices in this area in our discussion of potential ways to improve notice-and-comment rulemaking, but it is especially important for agencies to make special efforts to reach out to missing stakeholders during the early stages of rule development, and to provide them with clear information about the available ways to participate in each rulemaking initiative, basic instructions and examples regarding how to participate effectively, and simple overviews of the relevant issues with detailed descriptions of the information the agency is seeking and the questions it is trying to answer.

F. Using Public Input and Providing Feedback to Participants

While the issues that are briefly discussed in this section apply to public engagement efforts during every stage of rulemaking, and we discuss the importance of evaluating public engagements efforts as part of a broader discussion of planning,[319] it is worthwhile to emphasize here that agencies should use the information they receive from the public in early rule development and they should also provide participants with appropriate feedback regarding how their input was used. The EPA's Public Involvement Policy, for example, identifies reviewing and using public input and providing feedback as one of seven steps for effective public participation.[320] This step is considered essential for building public trust and establishing the credibility of the agency's public engagement efforts.[321] The agency's more detailed guidance for implementing this step of its Policy emphasizes that EPA "should demonstrate, in its decisions and actions, that it has understood and fully considered public concerns," and "the Agency should communicate the decision to the public and discuss how the public's input influenced the decision."[322]

Agencies can provide feedback to the public through formal channels, such as preambles or "responsiveness summaries," or through relatively informal

[319] *See infra* Part XII.

[320] *See* BETTER DECISIONS MANUAL, *supra* note 278, at 3 (discussing this Policy).

[321] *See* EPA PUBLIC INVOLVEMENT POLICY, *supra* note 35, at 19.

[322] *Id.* at 19.

mechanisms such as public meetings, press briefings or news releases, or even "thank you letters."[323] While preambles and responsiveness summaries often accompany an agency's final decisions, agencies should consider preparing a responsiveness summary for each significant public engagement effort. EPA, for example, is required by its own regulations to prepare a responsiveness summary for certain rulemaking activities by its advisory committees.[324] These documents express respect for the participants and effectively reward "stakeholders who participated by discussing how their contributions affected the decision."[325] According to EPA's regulations, responsiveness summaries "shall identify the public participation activity conducted; describe the matters on which the public was consulted; summarize the public's views, significant comments, criticisms and suggestions; and set forth the agency's specific responses in terms of modifications of the proposed action or an explanation for rejection of proposals made by the public."[326] Agencies should also consider telling "participants in stakeholder involvement events what will happen to the summaries or discussions—who will get them, what other information the [a]gency will produce and consider, and where and when the responsiveness summary will be posted."[327] Finally, in planning how to use the input they receive from public engagement efforts and how to notify the public about the impact of its feedback, agencies should consider the following specific questions: (1) How will the agency incorporate the results of its public engagement efforts into its decisions? (2) What specific measures will the agency undertake to ensure this happens? and (3) How will agencies inform stakeholders of the impact of their comments on the agency's decision making?[328] Agencies should also consider how often and through what methods their officials will "debrief" the public engagement process, and how they will evaluate the success of their efforts.[329]

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[323] *See* BETTER DECISIONS MANUAL, *supra* note 278, at 78.

[324] *See* 40 C.F.R. § 25.8 (2001).

[325] EPA, BETTER DECISIONS MANUAL, *supra* note 278, at 79.

[326] 40 C.F.R. § 25.8.

[327] EPA, BETTER DECISIONS MANUAL, *supra* note 278, at 79.

[328] *See id.* at 83. With respect to the second question, EPA's Conflict and Resolution Center provides a series of potential examples, including (a) maintaining two-way communication with workgroup and management; (b) keeping an updated web-site or list-serve; (c) encouraging workgroup members to attend public involvement events; (d) providing opportunities for upper management to be on the agenda at meetings or to listen to stakeholder concerns; (e) conducting regular meetings or conference calls to update the agency's management and workgroup; (f) inviting the facilitator to make presentations to the workgroup or management; (h) inviting the chair or executive committee to brief management; and (i) prepare fact sheets or discussion papers. *Id.*

[329] *See id.* at 83-84.

VIII. ADVANCED RULE DEVELOPMENT

At some point during rule development the shape of an agency's likely course of action comes into focus. There is no hard and fast line between early and advanced rule development. Nevertheless, it is useful to distinguish between the stage in the regulatory process when an agency remains open to a variety of different actions, including no action, and the stage in the process when the agency has committed to developing a regulation along certain lines, even if the agency is still considering one or more alternatives or needs to flesh out the details of a proposed rule. First, agencies seek different types of information at each stage. During early rule development, the agency needs information about the nature of a problem and what types of regulatory solutions may or may not be appropriate or feasible. During advanced rule development, however, the agency has a good idea of the direction it is headed. Nevertheless, the agency may need more specific information to choose among competing alternatives, flesh out a proposed rule in more detail, and prepare for a productive notice-and-comment process, including drafting a proposed rule that is clear, effective, and avoids unanticipated problems. Second, our interviewees reported that the public often engages with the agency in different ways depending on whether the agency is open-minded about how to address a regulatory issue, if at all, or the agency has made clear the direction in which it is headed. To wit, stakeholders may be more open and forthcoming with situated knowledge during early rule development, while focusing on promoting their positions during advanced rule development.[330]

It is critical for agencies to engage the public as they refine their regulatory proposals and prepare for notice and comment. Executive Order 12,866 directs that, "before issuing a notice of proposed rulemaking, each [executive] agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials)."[331] Moreover, it may be essential to the success of the notice-and-comment process for the agency to receive feedback from a broad array of stakeholders as it develops its proposed rule. Otherwise, the agency may discover relevant information or unintended consequences only after publishing an NPRM. This may require the agency to conduct a second round of notice and comment, thus delaying the publication of a final rule and wasting agency resources.[332]

Many of the tools of public engagement described above in connection with early rule development will naturally also be relevant to advanced rule development.

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[330] To be sure, there may be cases in which the process of early rule development is inapplicable or less involved because the agency knows the policy direction it will take based on a congressional mandate, the agency's prior knowledge, or the existing regulatory regime.

[331] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sep. 30, 1993).

[332] To protect the rule from being vacated on judicial review, the agency may need to undertake an additional round of notice and comment when it makes significant changes between the NPRM and Final Rule. *See* Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1104-05 (4th Cir. 1985) (describing the logical outgrowth test).

Rather than repeat what we have said about these modes of public engagement, in this Part we highlight additional or different considerations relevant to their use with advanced rule development. In addition, we discuss several tools that may be unique to advanced rule development.

A. Advance Notices of Proposed Rulemaking

Advance Notices of Proposed Rulemaking (ANPRMs) are important tools for public engagement during advanced rule development. ANPRMs are similar to RFIs and there is no formal legal distinction between them.[333] In both cases, the agency is seeking comments, data, and other information from the public in the course of developing a regulatory proposal. We merely use different terminology to signal the stage in the regulatory process when the agency is seeking public comment prior to an NPRM. The agency may issue an RFI to request comments when it is genuinely open regarding whether to address a matter with new rulemaking and, if so, how. By contrast, the agency may use an ANPRM to request comments on a tentative proposal or different potential alternatives and obtain the information it needs to develop and refine a rule in preparation for issuing an NPRM. Indeed, based on these distinctions, the Department of Energy's process rule includes both RFIs and ANPRMs as part of rule development before publishing an NPRM.[334]

Agencies should routinely consider using ANPRMs in connection with their rulemakings unless they have good cause to do otherwise. Good cause might include situations in which the agency has full information and full authority to implement the statutory mandate, the proposed rule is non-controversial, the agency has solicited meaningful feedback from the relevant stakeholders using other means, or the public has no information or views relevant to the proposed rule.[335] In many cases,

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[333] Neither is defined in the APA and many agencies use both. For a useful discussion of the purposes of ANPRMs and an argument that they should be used more regularly, see Andrew Emery & Fred Emery, *Maybe the Experts Were Wrong about the ANPRM*, 34 ADMIN. & REG. L. NEWS 10, 25 (2009).

[334] *See infra* Part XII.A.

[335] *Cf.* SUSAN L. MOFFITT, MAKING POLICY PUBLIC: PARTICIPATORY BUREAUCRACY IN AMERICAN DEMOCRACY 32 (2014) ("From a bureaucratic perspective, public participation for independent tasks in which bureaucrats enjoy sufficient information comes fraught with risk and little potential value in terms of advancing an agency's image of unique expertise."). On the other hand, Moffitt contends that public participation can have substantial value for administrators when they lack full information about a regulatory problem and when the successful implementation of a regulatory regime depends in part on the independent actions of third parties. *See id.* at 48 ("Tasks with emergent knowledge and interdependent implementations create opportunities for public participation to offer value to bureaucratic administration in terms of the information it brings into agencies *and* in terms of the information it disseminates from agencies.") (emphasis in original). Moffitt's model suggests that public participation will routinely provide added value for bureaucrats when agencies promulgate rules on complex subjects in the modern regulatory state. However, public engagement with rulemaking may be unnecessary or counterproductive when agencies already have full information and complete jurisdictional control over a regulatory problem.

however, ANPRMs can help agencies craft better NPRMs and avoid surprises during notice and comment.

ANPRMs are most useful when the agency has some doubts or reservations about a proposed regulatory action, lacks full information about the costs and benefits of its proposal, or is trying to choose from more than one alternative. In these cases, ANPRMs can provide critical information about the likelihood of compliance, the costs of achieving the agency's goals, the range of potential benefits, and any unintended consequences. The public response, along with questions raised during public meetings held in connection with an ANPRM, may also help agencies understand how best to communicate their proposals and specific legal requirements to the affected communities in the NPRM. The information garnered from an ANPRM may cause the agency to alter or revise its proposal before publishing an NPRM, thus saving the agency time down the road.

Of course, merely publishing an ANPRM in the *Federal Register* and Regulations.gov is not enough. The agency must also engage in outreach to obtain participation from a broad range of stakeholders, including regulated parties, potential beneficiaries, citizens with situated knowledge, and unaffiliated experts who may have useful information to share. In addition, ANPRMs are likely to be most productive when they ask specific questions.[336] Thus, ANPRMs seeking comments from traditionally absent stakeholders should address them directly and ask them to share their relevant experiences. For example, if an agency is considering extending a regulatory requirement to new groups or new contexts, it might ask the stakeholders currently subject to the requirement about their experiences or ask the new group what it would cost to comply with the new rule. Or if the agency is proposing a regulation to address a problem causing harm to consumers, it might ask consumers already harmed whether the proposed change would have helped them. Agencies should also ask stakeholders to identify ambiguities or unanticipated problems that could result from the agency's tentative proposal, and to suggest potential ways to improve a proposed rule on the subject.

Finally, whenever an agency publishes an NPRM after using an ANPRM, the preamble to the NPRM should acknowledge the public input received during the ANPRM and describe how it influenced the agency. This could include describing changes the agency made to its proposal based on the public comments or explaining how the public comments confirmed the appropriateness of the agency's preferred course of action. Although the APA does not impose legal constraints on ANPRMs, we recommend that agencies strive to treat comments received in response to ANPRMs in the same way they treat comments received in response to NPRMs. At a minimum, of course, they should review the comments. In addition, agencies should

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In these latter situations, using the kinds of public engagement tools that we believe would routinely be useful, including RFIs, listening sessions, advisory committees, and ANPRMs, would generally be unnecessary.

[336] *Cf.* Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 149, 156 (1996).

endeavor to respond in a reasoned fashion to the significant comments in the preamble to a subsequent NPRM. Moreover, if the agency decides to abandon the regulatory initiative, the agency should inform the public of its plan and explain its decision, although it need not provide the same level of detail as a preamble to an NPRM or final rule.

B. Federal Advisory Committees

Federal advisory committees can also be used for engaging the public during advanced rule development. At this stage, the agency may be less interested in hearing whether it should regulate or about alternative approaches to a rule than in the committee's views regarding the costs and benefits of a particular rule under development and any unintended consequences the committee foresees with the agency's proposal. As discussed above in Part VI.B, a well-designed advisory committee can provide agencies with input from a broad group of informed stakeholders and unaffiliated experts.

We recommend that agencies consider using their advisory committees in conjunction with RFIs and ANPRMs during rule development. When an agency publishes an ANPRM, it should also ask its relevant advisory committees for feedback or advice regarding the proposal. For example, the Department of Energy routinely consults an advisory committee concerning the information gathered from its RFI/ANPRM before deciding whether to proceed with rulemaking.[337] At whatever stage of rule development an agency consults with its advisory committees, the agency should post the FACA materials online, preferably in the kind of e-rulemaking docket described below in Part IX.C. This includes any materials the agency provided to the committee and the committee's recommendations or report.

C. Focus Groups

Agencies may also want to use focus groups during advanced rule development to gauge the reaction of a particular group to an agency's proposal or potential alternatives. Nevertheless, as discussed in Part VII.B, we believe focus groups are generally more useful during the early stages of rule development. However, focus groups of unaffiliated experts, in particular, could also provide useful feedback during the advanced rule development stage.

D. Public Meetings

Agencies hold public meetings at various stages of rule development. As discussed above in Part VII.D., public meetings can be conducted in-person, telephonically, online, or using some combination of formats to allow for both "live" in-person exchanges and remote access and participation. Agencies typically hold public hearings when the rulemaking is expected to have a significant impact on the

[337] Telephone Interview with Department of Energy (Jan. 19, 2018).

public or may prove politically controversial.[338] At the advanced stage of rule development, public meetings provide an informal setting for the agency to explain what it is proposing and continue to grapple with the views and concerns of stakeholders. If properly designed and facilitated, public meetings provide a more involved form of public participation than an RFI or ANPRM because the agency and stakeholders with different interests or perspectives can engage in a deliberative exchange. Agencies should always remind participants, however, that they need to submit their comments in the rulemaking process to ensure they are part of the administrative record.

Public meetings also provide agencies with an opportunity to describe how they responded to public input during rule development, publicize a current or upcoming ANPRM or NPRM, and encourage public participation in the written comment process. As we emphasize in Part XII, agencies need to conduct robust outreach to ensure broad public participation in the notice-and-comment process. A public meeting during advanced rule development can play an important role in outreach related to an ANPRM or NPRM. The agency can educate the public on the logistics of the comment process and highlight the types of information the agency needs.

Finally, questions or comments during public meetings may uncover ambiguities in an agency's proposal or misunderstandings on the part of certain stakeholders. The agency can clarify ambiguities or confusion that emerges during the meeting, which will help the public submit better comments in response to an ANPRM or NPRM. The agency may also decide to revise its proposed rule or the preamble to an NPRM to prevent such misunderstandings from undermining the usefulness of the notice-and-comment process. The public meetings discussed in this section are primarily designed to inform the public of the agency's plans and to consult with interested parties. If the agency is interested in involving or collaborating with a diverse group of stakeholders, it should use one or more of the enhanced deliberative exercises discussed in Part XI.

E. "Shuttle Diplomacy" & Technical Workshops

Agencies also hold meetings with discrete groups of stakeholders during advanced rule development. For example, after preparing a draft NPRM, EPA often seeks feedback from stakeholders in one-on-one meetings and listening sessions.[339] Although meeting with a specific stakeholder does not foster deliberation among parties with diverse interests, it does allow agency officials to gain a deeper understanding of the group's perspective. In such a setting, some stakeholders may be more forthcoming with information they do not want to share publically and willing to engage in a more informal back-and-forth with the agency to identify possible solutions to problems or challenges identified in the regulatory process. In addition, agencies sometimes hold technical workshops with stakeholders or other

[338] *See* KERWIN & FURLONG, *supra* note 2, at 83.

[339] *See* CHERYL BLAKE & REEVE T. BULL, ADMIN. CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING 15 (2017).

experts to obtain feedback on the data and analysis used by the agency in developing a proposed rule.[340] These meetings will usually involve sophisticated stakeholders who routinely participate in rulemaking. Thus, when agencies need to hold one-on-one meetings with these groups during the development of their rules, they should consider whether they are also creating opportunities for participation in the process by regulatory beneficiaries and other stakeholders who might have useful information to contribute and a different perspective. They should also consider soliciting feedback from unaffiliated experts as part of this process.

F. Internet and Web-based Outreach

Internet and web-based outreach continue to be important tools as agencies move into advanced rule development, and the strategies, examples, and challenges discussed in Part VII.E are also relevant at this stage of the rulemaking process. Agencies can use their websites, social media, and status reports to *inform* the public regarding the progress of the rulemaking as the agency refines its proposal and prepares to publish an NPRM. This includes keeping the public apprised of the impact of public engagement to date on the agency's decision-making. Agencies can also use these tools to *educate* the public on the upcoming notice-and-comment process and how to participate effectively. Finally, agencies can use e-tools to *gather information* and *facilitate dialogue* concerning the agency's plans.

Some of the web-based enhanced deliberation efforts discussed below in Parts IX (Notice-and-Comment Process) and XI (Enhanced Forms of Deliberation) may be most fruitful during advanced rule development. One can easily re-imagine the Regulation Room projects as deliberative exercises conducted during advanced rule development, when the agency has a rough outline of what it plans to propose, but before it has published an NPRM. Indeed, Regulation Room conducted online deliberations regarding an ANPRM that was issued by the Department of Transportation.[341] Using these modes of public engagement during late rule development enables the agency to obtain situated knowledge from traditionally absent stakeholders before the notice-and-comment process begins. As we emphasize throughout this Report, such enhanced public engagement will not be necessary or productive in all rulemakings. But when agencies decide that they need to target rulemaking novices for participation in the rulemaking process, it would be better for them to play a role before the agency has committed itself to a proposal in an NPRM.[342]

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[340] *Id.* at 15-18.

[341] *See* Enhancing Airline Passenger Protections, 75 Fed. Reg. 32,318, 32,319 (Proposed June 8, 2010) (to be codified at 14 C.F.R. pt. 259.5); *see also* Farina et al., *Rulemaking 2.0*, *supra* note 65, at 428 n.116.

[342] "[S]ome proposals might be too 'hard-baked' to easily switch to other, quite different options after the formal comment period close[s]." Patricia A. McCoy, *Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach*, 7 BROOK. J. CORP. FIN. & COM. L. 1, 2 (2012).

The CFPB has been at the forefront of using the Internet and social media to engage the public during advanced rule development.[343] When the agency was developing new regulations governing disclosure requirements for home mortgages, it posted prototypes of the disclosure forms on its website and invited both consumers and industry to comment on the alternatives and which they preferred.[344] The agency asked consumers if the forms were missing important information and encouraged them to submit comments online. The agency asked industry participants about the "usability and ease of implementation."[345] The agency received more than 27,000 text box comments and emails in response to the forms.[346] In addition, the public could click on parts of the forms they "liked" or "disliked." The agency used this information to create heat maps showing where readers focused their attention. These heat maps were then posted online. The comments and heat maps helped the agency identify problems with the disclosure forms and develop solutions. In this way, the public's participation in advanced rule development helped the CFPB to further refine its proposed disclosure form prior to publishing an NPRM.

A few things about the success of this exercise are worth noting. First, merely posting material on an agency's website is not sufficient to ensure public participation. As the CFPB official who oversaw all mortgage policy initiatives for the Bureau described it:

> In the weeks leading up to roll out, the … rulemaking team posted announcements on the CFPB's website, on Facebook, and on Twitter explaining the purpose of mortgage disclosures, talking about the need to improve those disclosures, and announcing our plans to unveil the prototype forms in the upcoming weeks for people's reaction. For readers who wanted to get involved, the Bureau suggested that they sign up for e-mail updates and tell their friends and family about the project on Twitter and Facebook and through e-mail.[347]

These extensive outreach efforts were likely critical to obtaining robust public participation in the rule development process.

Second, these online exercises were part of an iterative, multi-modal approach to public engagement in the development of CFPB's mortgage disclosure rules. Early in the process, the agency:

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[343] The example described below may have been the first time "any federal banking regulator … elicited mass public input on prototype disclosure forms before a proposed rule was published." *Id.* at 7.

[344] *See id.* at 8*;* Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1213 (2016).

[345] McCoy, *supra* note 342, at 8.

[346] *See id.*

[347] *Id.* at 7. Patricia McCoy founded the Mortgage Markets section of the CFPB.

> [held] brainstorming sessions with affected stakeholders—such as consumer representatives, housing counselors, lenders, other agencies, settlement services providers, and vendors—to identify issues and possible solutions; review[ed] the existing research and comment letters on past disclosure proposals . . . ; hir[ed] experienced consultants to assist . . . with the design and testing; and [held] an academic research symposium to explore consumer decision-making processes and better ways to design disclosures.[348]

Then, once the agency had developed two prototype forms, it conducted five rounds of qualitative testing of each form using one-on-one interviews conducted in different parts the country.[349] Ninety-two consumers and twenty-two lenders participated.[350] After each round of testing, the agency evaluated the results, revised the forms, and tested the new forms during the next round.[351] The agency tested the prototypes in both English and Spanish.[352] At the same time as the agency conducted the qualitative testing using small groups, the agency used the web-based exercises involving the broader public.[353]

The CFPB conducted similarly robust outreach and public engagement before publishing an NPRM during its development of regulations and disclosures concerning college costs, overdraft fees, pre-paid cards, overdraft protection, payday lending, and private educational loans.[354] These types of Internet and web-based exercises lend themselves well to disclosure and labeling requirements because consumer preferences and reactions are directly relevant to their effectiveness.

Finally, agencies should include the results of these exercises in some form, comparable to responsiveness summaries,[355] in the e-rulemaking dockets we discuss more fully below in Part IX.C. The information, comments, and views provided by the public should be part of the decision-making process if members of the public take the time and effort to participate.[356]

G. Negotiated Rulemaking

Agencies sometimes use negotiated rulemaking, or "Reg Neg," during advanced rule development. In negotiated rulemaking, the agency convenes an advisory committee comprising representatives of stakeholders affected by the rule to

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[348] *Id.* at 5.

[349] *See id.* at 5-6.

[350] *See id.* at 6.

[351] *See id.*

[352] *See id.* at 6-7.

[353] *See id.* at 7.

[354] *See id.* at 3.

[355] *See supra* notes 323-325 and accompanying text.

[356] *See* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 8.

collaborate on the formulation of a rule for notice and comment.[357] The negotiating committee is led by a convener or facilitator trained in ADR who "establishes mutually agreed upon ground rules for the negotiation, seeks to flesh out the stakeholders' positions, identifies and gathers information on relevant questions of fact, and guides participants towards producing a draft rule text based on group consensus."[358] If the committee reaches a consensus on a proposed rule, the agency then conducts the notice-and-comment process required by the APA. If the committee does not reach consensus, the agency must decide whether or not to proceed with a proposal.

Negotiated rulemaking arose in response to concerns first voiced in the 1960s that notice-and-comment rulemaking "had become increasingly adversarial and formalized."[359] Stakeholders with different interests did not meet or communicate with each other, which led them to take "conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules."[360]

In 1982, the Administrative Conference adopted a series of recommendations concerning regulatory negotiation with affected stakeholders based on a report written by Philip J. Harter.[361] Harter argued that

> Negotiations among directly affected groups conducted within both the existing policies of the statute authorizing the regulation and the existing policies of the agency, would enable the parties to participate directly in the establishment of the rule. The significant concerns of each could be considered frontally. Direct participation in rulemaking through negotiations is preferable to entrusting the decision to the wisdom and judgment of the agency, which is essential under the basic provisions of the APA, or to relying on the more formal, structured method of hybrid rulemaking in which it is difficult for anyone to make the careful trade offs necessary for an enlightened regulation. A regulation that is developed by and has the support of the respective

[357] 5 U.S.C. § 565(a)(1) (2012) (the committee is composed of representatives who "can adequately represent the interests that will be significantly affected by a proposed rule"); *see also* BLAKE & BULL, *supra* note 339, at 1. Negotiated rulemaking committees must comply with the Federal Advisory Committee Act (FACA) unless they have been exempted by statute. § 565(a)(1).

[358] BLAKE & BULL, *supra* note 339, at 1.

[359] Admin. Conf. of the U.S., Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52,893, 52,895, 52,895 (Dec. 27, 1985).

[360] Negotiated Rulemaking Act of 1990, Pub. L. No. 101–648, § 2, 104 Stat. 4969, 4969.

[361] *See generally* Admin. Conf. of the U.S., Recommendation 82-4, *Procedures for Negotiating Regulations*, 47 Fed. Reg. 30,701 30,708 (July 15, 1982); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

> interests would have a political legitimacy that regulations developed under any other process arguably lack.[362]

The Administrative Conference issued a second set of recommendations in 1985 based on the experience of four agencies that had used negotiated rulemaking since 1982.[363] The two sets of recommendations provided a framework and procedures for planning and conducting a rule negotiation.[364]

Based on the work of the Administrative Conference and advocates who had had success with regulatory negotiation, Congress formally endorsed the practice in the Negotiated Rulemaking Act of 1990.[365] The Act clarified the legal authority of federal agencies to conduct Reg Neg and established certain procedural requirements.[366] Among other things, the agency head must find that the use of negotiated rulemaking is "in the public interest" based on criteria set forth in the Act.[367] Then, if the agency decides to establish a negotiating committee, the agency must publish a notice in the *Federal Register* announcing the committee; describing the issues to be negotiated, the interests "likely to be significantly affected by the rule," and the "persons proposed to represent such interests"; soliciting comments on both the proposal and the proposed membership of the committee; and explaining "how a person may apply or nominate another person for membership on the committee."[368] In addition, the Act authorized the Administrative Conference to provide agencies with training on Reg Neg, maintain a roster of trained facilitators, cover agencies' Reg Neg expenses, and report to Congress on the process.[369]

Negotiated rulemaking generated a great deal of enthusiasm among some after the passage of the Act. The Clinton Administration repeatedly endorsed its use, and between 1991 and 1999 federal agencies convened 63 negotiated rulemaking committees.[370] But there was a significant decline in its use during the George W.

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[362] Harter, *supra* note 361, at 7.

[363] *See generally Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. at 52,985; *see also* Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1627 (1986).

[364] Perritt, *supra* note 363, at 1628.

[365] *See generally* Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended by Pub. L. No. 104-320, 110 Stat. 3870 (1996), at 5 U.S.C. §§ 561-70).

[366] *See* BLAKE & BULL, *supra* note 339, at 6-7.

[367] 5 U.S.C. § 563(a) (2012).

[368] *Id.* § 564(a).

[369] *See* BLAKE & BULL, *supra* note 339, at 7.

[370] Exec. Order No. 12,866 § 6(a)(1), 58 Fed. Reg. 51,735 (Sept. 30, 1993) (directing agencies to consider using negotiated rulemaking); Memorandum from William J. Clinton, President of the U.S. to Executive Departments & Selected Agencies Administrator of the Office of Information and Regulatory Affairs (Sept. 30, 1993),

Bush Administration.[371] Agencies convened only 22 negotiated rulemaking committees between 2000 and 2007.[372] The trend continued during the Obama Administration, with only 13 negotiated rulemaking committees noticed between 2007 and 2013.[373] Eighty-five percent of these committees were statutorily required.[374] Even during the Clinton Administration, however, negotiated rulemaking was used in only a tiny percentage of the rulemakings conducted each year.

The Administrative Conference published its most recent recommendations on negotiated rulemaking in June 2017, in the wake of this decline.[375] The Administrative Conference's 2017 Recommendations place negotiated rulemaking in the context of a variety of ways, including many discussed in this Report, that agencies can obtain public input on their regulatory work.[376] The Administrative Conference recommended that federal agencies deciding whether to use negotiated rulemaking consider whether:

- "there are a limited number of identifiable interests that will be significantly affected by the rule;"
- "there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (a) can adequately represent the [identifiable and significantly affected] interests and (b) are willing to negotiate in good faith to reach a consensus on the proposed rule;"
- there is adequate time to complete negotiated rulemaking and the agency possesses the necessary resources to support the process; and
- "the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with

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http://govinfo.library.unt.edu/npr/library/direct/memos/2682.html (directing federal agencies "to (i) identify to OIRA at least one rulemaking which the agency will, within the upcoming year, develop through the use of negotiated rulemaking or (ii) explain to OIRA why the use of negotiated rulemaking will not be feasible in the upcoming year"); Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1001 (2008) (counting negotiated rulemaking committees noticed in the *Federal Register*).

[371] *See* Lubbers, *supra* note 370, at 996.

[372] *See id.*

[373] *See* Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of A Procedural Reform*, 15 THEORETICAL INQUIRIES L. 417, 439 (2014).

[374] *See id.*

[375] *See generally* Admin. Conference of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,039, 31,040 (July 5, 2017); BLAKE & BULL, *supra* note 339.

[376] *See Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. at 31,042.

> respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment."[377]

The first two considerations are most salient for purposes of this Report. Even in negotiated rulemaking's heyday, Professor William Funk raised concerns that parts of the public were left out of the process:

> The rulemaking has "parties" who make the agreement. They make the agreement among and for themselves. They bargain and deal to achieve their own interests. There is no mention of the "public." The wisdom and fairness of the rule is equated with the satisfaction of the parties. Public law has been subtly transformed into private law relationships.[378]

Under such circumstances, it is essential that the parties to the negotiation adequately represent all affected interests. Moreover, "[g]iven the inherent challenges of group dynamics," [379] achieving consensus becomes increasingly difficult as the number of affected interests multiply. Therefore, the Negotiated Rulemaking Act "limit[s] membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership." [380] This number includes at least one person who represents the agency.[381] Given the limited size of negotiating committees and the requirement that committees represent all the affected interests, Professor Susan Rose-Ackerman argues that regulatory negotiation is "ill-advised" in areas such as environmental policymaking "because the notion of interest representation on which the method is based does not apply to most environmental issues."[382] There are simply too many diverse interests at stake to be "represented effectively by standard environmental groups." [383] Indeed, even the most ardent advocates of negotiated rulemaking recognize that it is not appropriate for "a regulation that would affect many interests in such diverse ways that representation by a few individuals or teams of individuals would be impossible."[384]

Thus, negotiated rulemaking is likely inappropriate when agencies identify absent stakeholders who are not adequately represented by other parties for the

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[377] *Id.* (alteration in original) (quoting Negotiated Rulemaking Act, 5 U.S.C. §§ 563(a)(2)-(7) (2012)).

[378] William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1386 (1997).

[379] BLAKE & BULL, *supra* note 339, at 35.

[380] 5 U.S.C. § 565(b) (2012).

[381] *Id.*

[382] Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1210 (1994).

[383] *Id.*

[384] Harter, *supra* note 361, at 46.

reasons discussed above in Part III.D: "All the interest groups participating must be well organized and similar in knowledge and bargaining skill."[385] Nor is negotiated rulemaking appropriate where there is a large group of diverse interests affected in different ways or who hold a variety of different preferences. In these circumstances, the enhanced deliberative exercises discussed in Part XI may be substantially more fruitful.

Nevertheless, negotiated rulemaking remains an important tool for agencies seeking a more deliberative, consensus-driven process for developing a subset of rules that lend themselves to the criteria set forth in the 1990 Act[386] and the Administrative Conference's 2017 Report and Recommendations.[387] When those criteria are not satisfied—because there are interested stakeholders who are not adequately represented by organized groups—that should be a strong signal that the agency should consider using the other tools of public engagement discussed in this report.

IX. THE NOTICE-AND-COMMENT PROCESS

The notice-and-comment process set forth in section 553 of the APA is the most prominent and well-studied aspect of rulemaking. Far more has been written about notice-and-comment rulemaking than agenda setting, rule development, or retrospective review.[388] Indeed, "notice-and-comment rulemaking" is often used as short-hand for the administrative process of creating legislative rules, even though, as this Report emphasizes, the process of rulemaking begins much earlier.

Notice-and-comment rulemaking is generally considered to be the most open part of the regulatory process, and more open to participation by members of the general public than the legislative process.[389] The agency must afford any interested person the opportunity to submit comments on proposed rules, there is no particular form that comments must take, the agency is obligated to consider the public comments, and the agency must generally respond in a reasoned fashion to significant issues raised in the comments, regardless of their source. Although all members of the public can write letters to their political representatives, politicians have no obligation

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[385] Rose-Ackerman, *supra* note 382, at 1210.

[386] 5 U.S.C. § 563(a) (2012).

[387] *See generally* BLAKE & BULL, *supra* note 339.

[388] *See, e.g.*, Coglianese & Walters, *supra* note 155, at 866 (noting how little is known about agenda-setting by agencies).

[389] *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 74 (2008) ("[T]he legal-procedural ways in which agencies regulate attenuate the advantages that more powerful interest groups enjoy over less powerful interest groups in the legislative arena."); KERWIN & FURLONG, *supra* note 2, at 31 ("Rulemaking adds opportunities for and dimensions to public participation that are rarely present in the deliberations of Congress or other legislatures."); Kochan, *supra* note 2, at 601 ("The commenting power given to ordinary individuals is rather extraordinary.").

to respond in a reasoned fashion to constituent mail, and those letters do not become part of the record that Congress must consider when taking legislative action. The procedural requirements of notice-and-comment rulemaking, by contrast, allow members of the general public to share their views directly with the responsible decision-maker and compel the decision-maker to address their concerns, lest the agency face reversal on judicial review.

Nevertheless, as discussed above in Part III.A, there is a widespread perception that certain "sophisticated stakeholders,"[390] including representatives of industry, large trade groups, professional associations, and national advocacy organizations, typically dominate notice-and-comment rulemaking. By contrast, regulatory beneficiaries; small regulated businesses; state, local, and tribal governments; ordinary citizens with situated knowledge; and members of the general public rarely participate. In addition, even in high-profile rulemakings that do attract mass comments, members of the public merely register their general preferences and rarely participate effectively.[391]

This raises at least two concerns: First, there may be stakeholders who possess information that will help the agency to write a more effective rule but do not participate, or participate effectively, in the rulemaking. Although this depends on the specific rulemaking, there are very likely some rulemakings in which rulemaking novices possess valuable information.

Second, the minimal procedural requirements of notice and comment as currently practiced may not meet the democratic obligation of agencies to render an account of what they are doing and why in a way that can be understood and accepted by the public, *in all of its various forms*, and to provide the public, *in all of its various forms*, with a meaningful opportunity to participate in the decision-making process by sharing their experiences and views.[392]

Agencies have used a variety of tools to address these concerns in the notice-and-comment process. First, agencies have begun to rethink how they draft their NPRMs to make them more understandable to the general public and highlight key issues in the rulemaking and the types of helpful information that absent stakeholders might be able to provide.[393] Second, some agencies have recently made creative use of social and other visual media to raise awareness about their rulemakings, to encourage public participation, and to direct interested persons to submit comments through Regulations.gov. Third, some agencies have created more user-friendly e-rulemaking

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[390] *See* Farina et al., *Knowledge in the People*, *supra* note 5, at 1191 (defining "sophisticated stakeholders").

[391] *See supra* Part III.C (discussing the challenges of mass comments).

[392] *See supra* Part II.B.

[393] *See generally* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728, 61,728 (Dec. 29, 2017); *see also* BLAKE & EMERSON, *supra* note 19, at 12-13 (discussing the Department of Education's attempts to make regulatory documents more understandable).

dockets, which summarize different parts of the NPRM, divide it into more digestible sections, and allow persons to comment on specific issues and reply to the comments of others. Fourth, both government and non-governmental parties have developed tutorials for rulemaking novices that explain the process and describe how to submit effective comments that could have an impact on the agency's decision. Fifth, agencies have long used public meetings to supplement notice-and-comment rulemaking and provide for a more informal forum in which to clarify their regulatory proposals, obtain feedback from interested stakeholders, and engage in a more dialogic process than typically is possible through written notice and comment. Sixth, agencies sometimes use reply comment periods to flesh out issues raised during the initial comment period and allow for a more dialogic process. Finally, a few agencies have engaged in supplemental deliberative exercises in rulemakings where they suspect that missing stakeholders who face barriers to participating may have important information to contribute. We review each of these tools, their successes and their limits, in turn.

A. Plain Language NPRMs

Meaningful public participation in notice-and-comment rulemaking begins with the NPRM. To achieve its information-gathering function, the NPRM must be written so that it is understandable to the stakeholders who will be impacted by the regulation and are likely to have information the agency needs.[394] This includes sophisticated stakeholders who routinely participate in rulemaking as well as rulemaking novices who might nevertheless be valuable sources of information otherwise unavailable. To achieve the democratic function of notice and comment the NPRM should also be understandable to members of the general public. Achieving these twin goals may in some cases, particularly where complex technical issues are involved, require the NPRM to address different audiences in different places.

In December 2017, ACUS adopted a series of recommendations regarding "Plain Language in Regulatory Drafting."[395] The Recommendations identify "tools and techniques agencies have successfully used to facilitate plain language drafting in rulemaking[.]"[396] Rather than repeat the many sensible recommendations ACUS has already made regarding plain language regulations, we (1) highlight the recommendations particularly useful for engaging absent stakeholders and members

[394] The Plain Writing Act (PWA) exempts rulemaking from its list of covered documents, but does cover other documents related to regulations that are directed to the public. Pub. L. No. 111-274, § 3, 124 Stat. 2861, 2861 (2010). OMB interpreted the Act as applying to "rulemaking preambles." But it is not enforceable in court. Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Agencies (Apr. 13, 2011), https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf.

[395] Plain Language in Regulatory Drafting, 82 Fed. Reg. at 61,728.

[396] *Id.* at 61,730.

of the general public and (2) offer some additional recommendations to improve the accessibility of NPRMs.

First, agencies should pitch the language of their NPRMs, particularly the preambles, to the relevant audiences for the rulemaking. These audiences include not just sophisticated stakeholders, but also the potential beneficiaries, smaller regulated entities, and members of the broader public.[397] To apprise members of the general public and unsophisticated stakeholders of the agency's proposals, the preambles to NPRMs should plainly explain the goals of a proposal, the agency's means-ends analysis, and how to comment on the rule. In addition, the preambles should highlight issues the agency believes would particularly benefit from public ventilation based on outreach conducted during rule development. To the extent the NPRM must also address sophisticated commenters with specialized expertise likely unfamiliar to the general public, the preamble should address these issues after the discussions aimed at rulemaking novices. Stakeholders who routinely participate in rulemaking, such as industry and national advocacy organizations and public interest groups, do not face the same barriers to participation as rulemaking novices. Unlike members of the general public, sophisticated stakeholders are unlikely to throw up their hands and merely submit a thumbs-up or thumbs-down comment if the preamble does not speak to them until page 100. Most rulemaking novices will.

Several agencies have begun employing visual elements such as bullet points, Q&A formats, and more colloquial language to emphasize key issues for public comment. For example, the Department of Education used a bulleted list of "Specific Issues Open for Comment" to solicit information relevant to a 2015 proposal that all Department grantees awarded direct competitive grant funds be required to openly license intellectual property created with Department funds.[398] The Department explained that "[i]n addition to your general comments, we are particularly interested in your feedback on the" bulleted questions. Some of the questions also addressed specific members of the public directly and asked them to share their experiences. For example, one question asked, "What experiences do you have implementing requirements of open licensing policy with other Federal agencies? Please share your experiences with these different approaches, including lessons learned and recommendations that might be related to this document."[399] Thus, the Department highlighted a "known unknown" and sought information directly from the stakeholders the Department believed were most likely to have the relevant information.

Many agencies have adopted internal manuals, practices, and procedures to ensure their NPRMs are understandable to unsophisticated stakeholders and members of the general public. These may include express plain language directions in internal

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[397] *See id.*

[398] *See* Open Licensing Requirement for Direct Grant Programs, 80 Fed. Reg. 67,672, 67,672 (U.S. Dep't of Educ. Nov. 3, 2015) (to be codified at 2 C.F.R. pt. 3574).

[399] *Id.*

agency guidelines for rulemaking.[400] In addition, multiple offices within an agency usually play a role in drafting regulatory documents, including policy offices with different areas of subject-matter expertise, the Office of the General Counsel, economists, and others. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) also reviews certain draft NPRMs under E.O. 12,866. A collaborative process involving different offices can help to catch ambiguities and confusion in the NPRM. A designated office may also be given specific responsibility for reviewing the NPRM for clarity and accessibility.[401] The Office of General Counsel (OGC) may be well suited to play this role because it works outside of a specific subject-matter area.

Nevertheless, OGCs are staffed with lawyers, who have a high level of education and draft language using the conventions of their own legal and regulatory communities of practice. Thus, OGCs may face their own obstacles in determining whether an NPRM is clear and understandable to a non-expert, non-lawyer audience. Therefore, agencies may also want to consider sharing draft NPRMs with reviewers without expertise in the subject area of the rulemaking or who do not draft and read regulatory documents on a regular basis.

For example, the Department of Transportation (DOT) shared draft NPRMs with the Regulation Room researchers at Cornell University in connection with several rulemakings discussed more fully below.[402] Although the Regulation Room team included at least one expert in and many students familiar with administrative law, they were not experts in commercial trucking, accessible air travel, or the other regulatory topics of the rulemakings. In addition, although many members of the team were trained as lawyers, they did not routinely draft regulatory documents. An interviewee reported that having someone familiar with the rulemaking process but not the substantive area of the rulemaking read the draft NPRM can help make the NPRM more comprehensible to rulemaking novices and those unfamiliar with the technical aspects of the regulations.[403] The Forest Service likewise reported benefitting from having unaffiliated experts review and comment on the drafting of proposed rules.

Accordingly, this Report reiterates ACUS Recommendation 2017-3, No. 2, that agencies "consider directing one or more offices involved in drafting rules and guidance to review them for plain language." In addition, the Report recommends

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[400] *See, e.g.*, BLAKE & EMERSON, *supra* note 19, at 13-14 (discussing the Federal Highway Administration and the Federal Aviation Administration).

[401] *See, e.g.*, *id.* at 26-27.

[402] *See infra* Part IX.C & F.

[403] Telephone Interview with Neil Eisner (Jan. 12, 2018). There may be obstacles to sharing some NPRMs with parties outside the agency prior to publication, however. For example, the Office of Federal Procurement Policy is an obstacle to early engagement with the public by GSA regarding rule development because its guidelines make rules confidential until they reach a certain stage.

that agencies consider including non-subject-area experts and non-lawyers in reviewing draft NPRMs to make sure that designated parts of the NPRM speak in plain language to rulemaking novices and members of the general public. Agencies might consider tasking their public communications office, for example, with this responsibility. Moreover, NPRM reviewers should consider the specific stakeholders the agency seeks to reach and whether they are likely to be able to find and understand the specific questions that the agency wants them to answer. When these stakeholders may include rulemaking novices, reviewers should ask whether such stakeholders would know that they are being solicited and understand the agency's questions.

B. Using Social and Visual On-line Media to Publicize Rulemakings

Agencies have long promoted their regulatory activities to the general public in various ways. But these efforts have not usually focused on rulemakings.[404] Agencies are required to publish their NPRMs in the *Federal Register* and post them using Regulations.gov. Some agencies also post a description of their NPRMs on their website, with a link to the *Federal Register* or Regulations.gov. But some proposed rules are buried deep within an agency's portal. Moreover, even prominent placement on an agency's website does little to ensure broad public awareness of the rulemaking. Beyond the sophisticated stakeholders who routinely participate in rulemaking and monitor agency activities, most persons with something at stake in rulemakings do not monitor either the agency's website or Regulations.gov. The media covers some particularly salient or politically controversial rulemakings. But it too rarely discusses the public comment process, and even more rarely, if ever, tells the public how to participate in notice and comment.

Professors Elizabeth Porter and Kathryn Watts have called for greater use of visual media by agencies to leverage information "inflows"—*i.e.*, encouraging public participation in rulemakings.[405] Although agencies have long used visual media to communicate with the public, it has not historically played an important role in rulemaking.[406] Porter and Watts suggest that various regulatory stakeholders, including agencies themselves, the President, members of Congress, interest groups, and members of the general public, have begun making greater use of visual media—including still images, videos, infographics, and GIFs—to promote their regulatory goals.[407] To date, however, agencies that have made the most use of visual media in rulemaking have focused on information "outflows"—*i.e.*, efforts to "sell[]their rulemaking stories to the American people."[408] Agencies have made less use of visuals to encourage public engagement with rulemaking.[409]

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[404] *See* Porter & Watts, *supra* note 344, at 1193-94.

[405] See *id.* at 1278.

[406] *See id.* at 1186, 1200.

[407] See *id.* at 1185-86, 1198.

[408] *Id.* at 1200.

[409] *See id.* at 1210.

The Department of Labor (DOL) and the Environmental Protection Agency (EPA) have been "at the forefront" of using visuals to publicize their rulemakings.[410] For example, after DOL published an NPRM to expand overtime pay under the Fair Labor Standards Act (FLSA), the agency posted a 4-minute whiteboard video to its YouTube channel explaining in a simple and visually engaging manner the nature of overtime pay and the benefits of updating overtime protections.[411] In addition, DOL posted a GIF on its overtime webpage that used humor to communicate the advantages of its regulatory initiative to members of the general public.[412] Similarly, after publishing an NPRM to require financial advisers to avoid conflicts of interest when providing investment advice, DOL posted a white-board video on its YouTube channel to explain the proposal. In addition, DOL posted an emotional video on its website in which a woman recounts how she was taken advantage of by an investment adviser with conflicts when her husband was diagnosed with Alzheimer's disease.[413]

EPA has also used social and visual media to publicize its rulemakings. For example, EPA marketed the benefits of its Clean Power and Clean Water Plans to the public using whiteboard videos, infographics, photographs, and other social media that portrayed a variety of negative consequences of pollution for everyday Americans in simple, and often emotional, terms.[414]

These uses of the Internet and social media helped the agencies communicate clearly, simply, and in a manner likely to be understood by the general public, the problems that the agencies' NPRMs sought to address and the benefits they hoped to achieve. But none of these social media campaigns included links to the rulemaking docket or advice on how to participate in the rulemaking. For example, although the end of an EPA whiteboard video on the Clean Water Rule told viewers that, "We are starting a national conversation on this, and we encourage you to tell us what you think of our proposal and make your voices heard," the video said nothing more about how, where, when, or why to comment on the NPRM.[415]

The CFPB is one of the few agencies that has made innovative use of social media to encourage public engagement with, not just publicize, its regulatory work. For example, when proposing requirements for pre-paid cards,[416] the agency tweeted a picture of two fee-disclosure forms for pre-paid cards, and asked the public to "Let

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[410] *See id.* at 1200.

[411] *See id.* at 1201.

[412] *See id.* at 1204.

[413] *See id.* at 1204-05.

[414] *See id.* at 1206-10.

[415] *Id.* at 1211 (quoting U.S. Envtl. Prot. Agency, *EPA White Board: Clean Water Act Rule Proposal Explained*, YOUTUBE (Mar. 25, 2014), https://www.youtube.com/watch?v=fOUESH_JmA0, at 02:28–02:35).

[416] Pre-paid cards are financial instruments that consumers can load money onto.

us know what you think."[417] The tweet included a link to a blog post elaborating on how to comment at Regulations.gov, provided access to key regulatory documents, and posed specific questions the agency wanted the public to answer.[418]

Social media offers a powerful tool to reach unsophisticated stakeholders and the broader public concerning the goals and rationales of regulatory initiatives and in some cases has generated significant public engagement in rulemaking. Well-designed visual media can break down a rulemaking into understandable terms and highlight what is at stake for regulatory beneficiaries and smaller regulated parties who do not regularly participate in the rulemaking process.

But generating awareness of and interest in rulemaking is only a first step towards meaningful public engagement. Agencies that engage in public outreach regarding a rulemaking should, at a minimum, also invite the public to participate in the rulemaking by submitting comments. This requires providing the audiences for the agency's media with links to basic information about how and when to submit public comments, the public's role in the rulemaking process, and the kinds of information that would be most valuable for the agency to receive. This should be relatively simple for agencies that have made the decision to invest in social and other visual online media. Such steps are not enough to ensure meaningful public engagement—prospective commenters also need accessible information about the substance of the proposed rule and sufficient incentives to read it.[419] But they are still a good first step to overcoming the "awareness" barrier to broader public participation in rulemaking.

The downside to such efforts is that they may generate *more* public comments but not necessarily *better* public comments. In other words, web-based outreach may result in "torrents of email"[420] merely endorsing or opposing a proposed regulatory action.[421] The agency must review all these comments even when they provide little useful information.[422] To be sure, this danger already exists without social media outreach by agencies encouraging public participation in rulemaking. Advocacy

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[417] *See* Porter & Watts, *supra* note 344, at 1212 (citing Consumerfinance.gov (@CFPB), TWITTER (Nov. 19, 2014, 9:33 AM), https://twitter.com/CFPB/status/535123637582708736 [https://perma.cc/LC65-QP7G].).

[418] *Id.* at 1212-13. *See also* Eric Goldberg, *Prepaid Products: New Disclosures to Help You Compare Options*, CONSUMER FIN. PROTECTION BUREAU (Nov. 13, 2014), https://www.consumerfinance.gov/about-us/blog/prepaid-products-new-disclosures-to-help-you-compare-options/.

[419] *See* HERZ, USING SOCIAL MEDIA, *supra* note 28, at 32-33.

[420] *See* Mendelson, *Torrents of E-Mail*, *supra* note 13, at 1361.

[421] *See* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 12 n.2 ("Mass e-mail comment campaigns mounted by advocacy groups illustrate low participation literacy. These comments are typically short, generalized statements urging the agency to do (or not do) something about the primary topic the rule addresses.").

[422] *See supra* Part III.C (discussing the challenges of mass comments).

groups are quite capable of undertaking mass comment campaigns using their own social media and the current form of Regulations.gov, or even just an old-fashioned mailing address.[423] Mass comments can also be generated by the efforts of a single television host.[424] Still, agencies may be reluctant to contribute to the inflow of unhelpful information.

In most cases, however, merely advertising a rulemaking and creating links to the rulemaking page of the agency's website or Regulations.gov will not be enough to generate substantial comments.[425] Such social media outreach may increase public awareness of rulemaking beyond sophisticated stakeholders but it will not do much to overcome the "incentive" and "capacity" barriers that prevent most people from submitting public comments, let alone meaningful public comments. Therefore, such efforts must be paired with other tools to overcome the disincentives to commenting before they are likely to produce a substantial improvement in public engagement. Moreover, if agencies pair social media outreach with tools to enhance the capacity of the public to submit meaningful comments, it may have the collateral benefit of reducing the number of unhelpful comments received through mass commenting campaigns. In addition, as discussed in the next section, agencies may be able to use natural language processing technologies to help organize and analyze a large number of public comments.

Finally, agencies that publicize their rulemaking using the Internet and social media must be careful to avoid running afoul of federal anti-lobbying laws. In 2015, the Government Accountability Office (GAO) concluded that EPA violated prohibitions on the use of appropriated funds for "covert propaganda" and "grass-roots lobbying."[426] First, the GAO cited EPA's use of Thunderclap, "a 'crowdspeaking' platform that allows a single message to be shared across multiple Facebook, Twitter and Tumbler accounts at the same time." GAO found that EPA violated a statutory prohibition on "covert propaganda"[427] because EPA's role in creating messages such as "clean water is important to me" and "I support EPA's

[423] *See* HERZ, USING SOCIAL MEDIA, *supra* note 28, at 7 ("Printing out and mailing a document is not that hard either."); ARGIVE, IMPROVING REGULATIONS.GOV: A PERSPECTIVE FROM SILICON VALLEY 2 (2017) (noting the high volume of fake, duplicative, or unproductive comments submitted in certain rulemakings through Regulations.gov).

[424] *See* Harper Neidig, *John Oliver Urges Net Neutrality Supporters to Tone Down FCC Comments*, HILL (May 15, 2017), https://thehill.com/policy/technology/333440-john-oliver-urges-net-neutrality-supporters-to-tone-down-fcc-comments ("When the [FCC] was first deliberating over [net neutrality rules] in 2014, it was flooded with a record of nearly 4 million comments—in part thanks to Oliver's high-profile activism on the subject.").

[425] *See, e.g.*, HERZ, USING SOCIAL MEDIA, *supra* note 28, at 34-35.

[426] *See generally* letter from U.S. Government Accountability Office to Hon. James M. Inhofe, Chairman, Comm. On Env't & Pub. Works, U.S. Senate (Dec. 14, 2015) [hereinafter Letter from GAO]; Eric Lipton & Michael D. Shear, *EPA Broke Law with Social Media Push for Water Rule, Auditor Finds*, N.Y. TIMES, Dec. 15, 2015, at A1.

[427] Letter from GAO, *supra* note 426, at 3, 11.

efforts" was not clear to the networks of friends and followers who ultimately viewed the messages in their newsfeeds and dashboards.[428] Second, GAO concluded that EPA's creation of hyperlinks to external webpages that contained links to contact Members of Congress concerning proposed legislation violated the prohibition on "grass roots lobbying."[429] A full analysis of the anti-lobbying questions surrounding use of the Internet and social media is beyond the scope of this study. But agencies should be cognizant of these concerns as they use the Internet and social media to publicize rulemakings, educate the public on how to participate, and solicit information from absent stakeholders.

C. User-Friendly Rulemaking Dockets

Upon the launch of Regulations.gov in 2003, OMB Director Mitchell E. Daniels, Jr. predicted the website would "democratize an often closed process and enable every interested citizen to participate in shaping the rules which affect us all."[430] Regulations.gov replaced scores of dispersed electronic and paper-based rulemaking docket systems maintained by each agency with a single, centralized web-based source for all federal rulemaking dockets. Before the advent of e-rulemaking dockets, most members of the public interested in learning about an agency's regulatory proposal had to go to a library that carried a hard copy of the *Federal Register*.[431] But the library might not receive the *Federal Register* in a timely manner given the relatively brief window for public comments, and typically other public comments could only by accessed in the docket rooms maintained by the agency in Washington, D.C.[432]

The arrival of e-rulemaking dockets, albeit not Regulations.gov per se, has made it substantially easier for interested members of the public to see what an agency is doing and to comment on regulatory proposals. But it does not appear to have led to any meaningful role by citizens in "shaping the rules which affect us all."[433] As one scholar has put it, the website "continues to reflect an 'insider' perspective—*i.e.*, the viewpoint of someone familiar with rulemaking and the agencies that conduct it."[434] If you know what you are looking for and have experience commenting in rulemakings, the website has most of what you need. Otherwise, it does little to overcome the barriers to participating in rulemaking for novices who manage to

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[428] See *id.* at 12-13.

[429] *See id.* at 17-18.

[430] Press Release, Office of Mgmt. & Budget, Regulations.gov to Transform U.S. Rulemaking Process and Save Nearly $100 Million—New E-Democracy Web Site First Step in Improving the Quality of Rulemaking Decisions (Jan. 23, 2003) (on file with authors).

[431] *See* Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 362 (2004).

[432] *See* Coglianese, *Citizen Participation*, *supra* note 8, at 949.

[433] *See* HERZ, USING SOCIAL MEDIA, *supra* note 28, at 8-11.

[434] CYNTHIA R. FARINA, COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING: A REPORT TO CONGRESS AND THE PRESIDENT 4 (2008).

become aware of the rulemaking and are sufficiently interested to make it this far. This is due in part to the challenges of the underlying rulemaking process and in part to the technical shortcomings of the website.

When citizens arrive at Regulations.gov, they confront an antiquated user interface that for the most part has merely moved documents formatted for paper to an online website.[435] The first thing a visitor sees when selecting a proposed rule on Regulations.gov is the NPRM. The text of the beginning of the NPRM occupies the bulk of the web browser page and visitors can scroll down to read the rest. The top of the web page also includes a link to "Open [the] Docket Folder" and a button to "Comment Now!," while the right-hand side of the page includes identifying information for the regulatory document and docket along with snippets of a few public comments if such comments have been received and docketed. But the most prominent part of the page is the text of the NPRM. Therefore, the NPRM can have a significant impact on whether the user continues to participate in the rulemaking or directs his or her attention elsewhere.

Unfortunately, NPRMs tend to be long, complex, and quite boring for general readers.[436] They are usually written at a college or graduate-level of education[437] and include an abundance of both "legalese," such as references to statutory authorities, executive orders, and steps in the administrative process, and detailed descriptions and analyses of substantive regulatory issues that may be quite technical and complex. Thus, the text of most NPRMs is littered with terms of art unknown to individuals inexperienced with either the legal or technical aspects of rulemaking. NPRMs are often challenging even for those with some experience in rulemaking.

Moreover, in many cases the most relevant information for members of the general public is buried deep inside the NPRM. For example, the Agricultural Marketing Service recently sought public comments on its proposal for mandatory disclosures concerning bioengineered foods. The most valuable information that consumers can provide the agency likely concerns their reaction to the text and symbols the agency proposes be required to disclose a bioengineered food, including their design, color, size, and placement on the packaging. Yet the reader must scroll through more than 10,000 words of text, roughly 26 pages, before the NPRM describes the specific appearance and placement of the proposed disclosures. Moreover, the reader has no idea of the length of the NRPM until she has scrolled down to the end of it.[438] Finally, while the actual symbols proposed by the agency

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[435] *See id.* at 3; (the federal government's eRulemaking initiative "has been largely limited to putting existing notice-and-comment processes online"); Farina et al., *Rulemaking 2.0*, *supra* note 65, at 418.

[436] FARINA & NEWHART, IBM CENTER, *supra* note 22, at 12; Farina et al. *Rulemaking 2.0*, *supra* note 65, at 402, 434.

[437] FARINA & NEWHART, IBM CENTER, *supra* note 22, at 12.

[438] We had to copy and paste the NPRM into a Word document to determine its length.

include color graphics, the NPRM on Regulations.gov is in black and white.[439] Thus, merely posting NPRMs on-line does little to overcome the barriers to public engagement for most rulemaking novices.

If the agency has received and docketed public comments on the proposed rule, they are accessible on Regulations.gov. This is a huge improvement over the previous system, which required interested members of the public to visit the agency to obtain the comments. It is hard to overstate how much this has improved the accessibility of these documents for those who wish to read them. Nevertheless, viewing the comments is still a tedious process for most users due to the antiquated architecture of the website.

As noted above, a few "teaser" comments, or at least the first few lines of them, are portrayed on the right-hand side of the homepage for the NPRM. When comments are submitted as attachments, however, there may be nothing to see on the rulemaking home page other than "See attached file(s)." If the visitor wants to see any of the comments on the homepage in full, the user must click "View Comment" below the "teaser" lines to open up a new page with the full comment. If the comment was submitted as an attachment, however, the visitor must click again to open the attachment, which may also involve choosing whether to open the file or save it to a hard drive. Then, if the visitor wants to look at another comment, the visitor must hit the back button on their browser, return to the rulemaking homepage, and begin the process again. There is no way to move easily from comment to comment or search the comments for particular information. Moreover, the only way to see all the public comments is to select "Open Docket Folder," which brings the visitor to a page with links to the primary and supporting documents for the rulemaking and the public comments. Once again, however, not all the comments are visible and the visitor must select "View All" to see all the comments, or at least the first few lines of them. And once again there is no way for a visitor to scroll through or search the comments. Rather, the visitor must click on the name of the commenter and download any attachments to read the comment in full. Then to view the next comment, the visitor must use the back key on the browser, return to the full list of comments, and begin the process again.

Given the difficulty of using the website, a visitor is likely to become discouraged, disengaged, or just throw up their hands and select "Comment Now!" without sufficiently understanding the issues involved or the kinds of information they possess that would be helpful to the agency. Moreover, once visitors open the commenting window, they must remember what they have already read on the

[439] Color versions of the symbols can be found on the agency's website at https://www.ams.usda.gov/sites/default/files/media/ProposedBioengineeredLabels.pdf and the agency did ask the public for suggestions and advice regarding the appearance and placement of required disclosures during the rule development process. *See Proposed Rule Questions Under Consideration*, U.S. DEP'T AGRIC., https://www.ams.usda.gov/rules-regulations/gmo-questions#Q2 (last visited Oct. 12, 2018).

different pages of the website.[440] It is a wonder that anyone not paid to comment on a proposed rule or with a strong professional or personal stake in the outcome would wade through the typical NPRM and decide to participate in the rulemaking. This is not a website designed for usability by the public. Moreover, it should not be surprising that many of the comments that are submitted by the general public through Regulations.gov are not particularly helpful and merely voice the commenter's approval or disapproval of the agency's general proposal or performance, address themselves to issues outside the agency's jurisdiction or beyond the scope of the NPRM, or otherwise do not provide the agency with any actionable information. Indeed, it would be surprising if the public provided any other types of comments when confronted with lengthy and complex NPRMs without any focused questions.

Agencies could improve the experience of using Regulations.gov by revising the preambles to the NPRMs in the ways proposed above in Part IX.A. Highlighting specific questions or information the agency seeks at the top of the NPRM and directing the requests to specific audiences would likely facilitate better comments from rulemaking novices and members of the general public. But if an agency wants to enhance participation by certain absent stakeholders, more ambitious efforts are needed.

A number of agencies and non-governmental organizations have created a more user-friendly on-line experience for rulemakings in which they sought enhanced public participation by absent stakeholders.[441] For example, the CFPB created a blog in connection with its proposed disclosures for prepaid cards that explained the reasoning behind the NPRM, summarized the proposal, included visual images of the proposed disclosures, and invited the public to answer specific questions:

> Tell us what you think
>
> > Now, we want to hear from you! Take a look, and tell us if you think this model form does a better job of disclosing fee information compared to other forms you've seen on prepaid card packaging. We're eager to get feedback from consumers, industry, advocacy organizations, and anyone else who is interested in making prepaid

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[440] *See* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 28.

[441] For example, Syracuse University established a Website early in 2018 entitled "Climate Comments," which was designed to provide the public with accessible information about proposed environmental regulations and to encourage them to submit comments to EPA. The Website provided plain language summaries of pertinent information about policies related to climate change that were under consideration, examples of comments both favoring and opposing relevant proposals, and the opportunity to submit comments via the website to Regulations.gov for inclusion in the administrative record. *See* Martin Walls, *'Climate Comments' Website Translates Complex Climate Change Policy into Plain Language*, SYRACUSE U. NEWS, MEDIA, L. & POL'Y (Jan. 17, 2018), https://news.syr.edu/blog/2018/01/17/climate-comments-website-translates-complex-climate-change-policy-into-plain-language/. The Website, which was accessible at www.climatecomments.org, was no longer in operation when this report was completed.

account disclosures better.
While you're looking at the form, some questions to consider might be:

- Does the short form disclosure above make it clear how much the account would cost you to use?
- What would you like to see added or changed? Is there some way to make the information clearer?
- Is there anything you find confusing?

We want to get your feedback so that we can consider it as we develop a final rule.

If you want to influence the design of a new prepaid card fee disclosure, let us know what you think. Submit a comment at Regulations.gov.

To learn more, check out the preamble, the proposed rule, and the official interpretations.[442]

The summary and bullet points direct the reader to the specific issues that would be useful for members of the public who purchase prepaid cards to address in their comments. Someone who has bought prepaid cards is more likely to feel like they have something to add to the rulemaking than if the agency simply summarized the proposal and invited the public to comment generally. Nevertheless, the consumer who would like to submit a comment must still brave the Regulations.com website.

The Regulation Room project went a few steps further. The Regulation Room was an experimental e-rulemaking platform created by the Cornell eRulemaking Initiative (CeRI) in collaboration with DOT and the CFPB during the Obama Administration.[443] A cross-disciplinary group of faculty and students summarized in plain language the significant issues raised in several NPRMs, highlighted the questions the agency wanted commenters to address, and created a more user-friendly interface for commenting on the Regulation Room website.[444] Rather than commenting on the proposal as a whole, the website allowed participants to comment on the specific issues summarized, and their comments remained attached to those issues.[445] When a visitor clicked on a particular issue, the website displayed a column of explanatory text on the left and a column for public comments on the right.[446] Once the user clicked on a section of the explanatory text, the comments connected with that section would open in the column on the right. Thus, users could

[442] Goldberg, *supra* note 418.

[443] Farina et al., *Rulemaking 2.0*, *supra* note 65, at 397. Professor Cynthia R. Farina of Cornell Law School served as the Principle Investigator for CeRI, and Mary J. Newhart, also of Cornell Law School, served as its Executive Director. The CeRI team included professors of Computing and Information Science and Information Science and Communication, as well as experts in design, communications, conflict resolution, technology, and e-Government.

[444] Farina et al., *Rulemaking 2.0*, *supra* note 65, at 412; Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 390-91.

[445] *See* Farina et al., *Rulemaking 2.0*, *supra* note 65, at 412.

[446] *See* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 30.

learn about both the NPRM and the comments already filed at the same time. Finally, in addition to submitting their own comments, participants could "Endorse" or "Reply" to other comments submitted on the same section of the rule.

FedThread, a now defunct project of the Center for Information Technology Policy at Princeton University, used a somewhat similar system for commenting. The FedThread website allowed users to comment on and create a conversation connected with any paragraph of an NPRM in the *Federal Register*.[447]

In general, it would be useful for agencies to draft summaries of regulatory proposals and the types of information the agency is most eager to receive from the public. Agencies have more flexibility with their websites than they do with Regulations.gov and can use them to create webpages for their rulemakings that are more accessible to rulemaking novices. Although it is useful for agencies to highlight the information they want from all stakeholders, it is particularly important when they seek information from rulemaking novices. Agencies should use their websites to summarize their proposals and highlight key information they want from different stakeholders.

At least one agency experimented with similar interfaces before the centralization of e-rulemaking on Regulations.gov. An IT entrepreneur created a web-based commenting forum for the National Marine Fisheries Service that broke up the NPRM into issue areas and allowed the public to submit comments in boxes that accompanied each issue. The agency also asked questions of commenters. There was an analytical algorithm that kept track of key words in the comments and allowed the agency to analyze and categorize the comments.[448]

Such agency innovations beyond plain-language summaries appear to be disfavored in the wake of the centralization and uniformity of Regulations.gov.[449] This is unfortunate. It would be useful for federal agencies to experiment with different forms of commenting technology to see which ones produce the most valuable information and meaningful public participation. We suspect, for example, that commenting on plain language summaries of NPRMs organized by issue would be more fruitful than the paragraph-by-paragraph comment structure utilized by FedThread. The latter is unlikely to overcome the challenges of reading NPRMs. Moreover, issues are likely to span more than one paragraph and some paragraphs might contain multiple issues.

When agencies suspect that rulemaking novices may be important sources of information, they should consider experimenting with user-friendly interfaces for commenting on their NRPMs. As discussed more fully below in Part IX.F, however,

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[447] *See id.* at 28-29.

[448] Telephone Interview with Department of Energy (Jan. 19, 2018). The interviewee formerly worked for the Department of Commerce and had personal experience with the NMFS's efforts.

[449] *See* Farina et al., *Rulemaking 2.0*, *supra* note 65, at 397-98, 397 n.10.

the Regulation Room supplemented its user-friendly web architecture with robust outreach and active moderation by students trained in law and group facilitation techniques.[450] In addition, the researchers summarized the on-line discussion during the final weeks of the comment period and invited participants to suggest revisions before submitting the summary as a formal comment using Regulations.gov.[451]

Nevertheless, even without active moderation, encouraging the public to comment on highlighted issues should focus attention on the most useful information the public can provide and things within the power of the agency to do in the rulemaking. In addition, if other public comments on the same section of the NPRM are grouped together, subsequent visitors may be more likely to engage in a dialogic exchange. Breaking up NPRMs in this way and encouraging issue-by-issue comments may produce more comments, but it should also produce *more useful* comments and be easier for the agency to review if grouped by topic.

Of course, agencies may be hesitant to encourage robust public participation in notice and comment and to make it easier to submit public comments for fear that they will receive more comments than they have the resources to review and adequately consider. Moreover, reviewing a large number of low-value comments may cause the agency to miss a few high-value comments.[452] Therefore, agencies that engage in these efforts to obtain information from a broad group of stakeholders should think carefully about how they will handle a large number of comments from public. Michael Livermore and his colleagues explain how natural language processing technologies can be used to help separate the wheat from the chafe.[453] In addition, similar technologies could be used to address what they call the forest problem,[454] whereby officials who review a large quantity of individual comments have a tendency to miss broader themes or lessons that could potentially be drawn from the rulemaking record as a whole.[455]

In addition to undertaking efforts to facilitate more useful and valuable public input, which would generally be better informed, more deliberative, and focused on producing the kinds of information and arguments that improve the quality and

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[450] *Id.* at 413.

[451] *Id.* at 414-15.

[452] *See* Livermore et al., *supra* note 99, at 981 ("The haystack problem occurs when comments of high substantive value are hidden within a very large set of documents of lower substantive value, creating the risk that agencies will fail to locate and appropriately consider high-value comments.").

[453] *See id.* at 1017-23 (describing potential uses of sentiment analysis and other techniques for assessing the "gravitas" of individual comments).

[454] *See id.* at 981 ("The forest problem occurs when agencies are unable to identify aggregate patterns within a large collection of comments because they treat each comment in isolation rather than drawing connections between them.").

[455] *See id.* at 1017-18, 1023-30 (describing potential uses of sentiment analysis and other techniques for "identifying emergent meaning" from large sets of comments).

legitimacy of agency decision making, agencies should also strive to make the most of the comments they receive.[456] This means that agencies should consider using the best available natural language processing technologies to help them identify comments that contain useful data, situated knowledge, or analytical arguments, so that they can respond to those comments in an adequate fashion. In addition, agencies should consider using this technology to identify broader themes or lessons from the rulemaking record as a whole, which might inform their decision-making in appropriate circumstances.

A few simple upgrades to Regulations.gov would make it easier for the public to comment and may have the added benefit of improving the quality of comments. Nevertheless, they are unlikely to be enough to obtain robust participation and valuable information from unsophisticated stakeholders. Rather, in those cases in which agencies identify rulemaking novices as potentially unique sources of relevant information, agencies should consider creating rulemaking portals designed for these groups.

D. Effective Commenting Tutorials

In addition to organizing NPRMs by issue, summarizing the issues in plain language, highlighting key questions, and creating a better user-interface for commenting, effective commenting tutorials can help rulemaking novices understand the goals of the rulemaking process more generally and the nature of effective comments. Regulations.gov has made some effort in this direction, but more could be done.

Visitors to Regulations.gov who select "Comment Now!" to open the commenting page may then select a "View Commenter's Checklist (PDF)" link to a three-page "Tips for Submitting Effective Comments."[457] Unfortunately, the "Tips" begin unhelpfully by suggesting, "[a] comment can express simple support or dissent for a regulatory action."[458] Although the next sentence explains that an "information-rich comment that clearly communicates and supports its claims is more likely to have an impact" and Recommendation No. 8 explains that "[t]he comment process is not a vote," the first sentence suggests that comments merely supporting or opposing a proposal have some value.[459] In fact, such comments likely have little to no value for the agency.[460] The document does contain some helpful advice, such as "Base

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[456] *See id.* at 992-93 (suggesting that agencies can deal with the challenges posed by mass comments both by undertaking efforts "to improve their sophistication" and by attempting "to extract more meaning from comments in their current form").

[457] *Tips for Submitting Effective Comments*, REGULATIONS.GOV, https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf (last visited Nov. 17, 2018).

[458] *Id.* at 1.

[459] *Id.* at 1-2.

[460] *See supra* Part III.C (discussing debate over the value of mass comments).

your justification on sound reasoning, scientific evidence, and/or how you will be impacted"; "Identify credentials and experience that may distinguish your comments from others"; and "support your comment with substantive data, facts, and/or expert opinions.[461] You may also provide personal experience … as may be appropriate."[462] But these are mixed in with tips that may be beyond the capacity of many unsophisticated stakeholders (e.g., "[a]ttempt to fully understand each issue" in the NPRM); or are misleading (e.g., "agencies … appreciate all comments").[463]

The Regulation Room YouTube video, "What is Effective Commenting?," is more helpful. First, visual media are likely more engaging for rulemaking novices than a three-page, text-based pdf. Second, the video immediately directs viewers to consider the information that the agency needs to make its decision—*i.e.*, "facts, logical argument, good reasons, things that Congress tells [the agency] it must pay attention to"—and then explains how an effective comment states a position and provides evidence through statistics, personal experience, or a story about why a regulation is or is not useful. The video repeatedly points viewers to the importance of relevant experience and provides examples of the types of experiences that might be relevant to certain rulemakings. In addition, the video repeatedly emphasizes that the commenting process is not a vote.

Similarly, the text version of "What is effective commenting?" begins by highlighting that agencies are not "allowed to decide based on majority vote. Instead, they are supposed to study the problem, collect information, and use expertise, experience, and good judgment to come up with the overall best answer." Accordingly, Regulation Room advises: "the best comments explain not only *what* the agency should do, but *why*."

Agencies should consider developing their own effective commenting tutorials using visual media connected to their e-rulemaking portals. Although the basic principles of effective commenting are generalizable across diverse subject areas, agencies that develop their own tutorials could highlight examples of effective comments from their own experiences. Such examples would likely illustrate the principles of effective commenting to the agency's stakeholders more successfully than examples drawn from distinct and unrelated regulatory areas. Agencies could also use the videos to highlight aspects of their NPRMs that they use to seek information from rulemaking novices or absent stakeholders. For example, if an agency highlights key questions for different groups at the top of their NPRMs, the effective commenting tutorial could tell the viewer to look for this section of the NPRM.

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[461] *Tips for Submitting Effective Comments, supra* note 457, at 1-2.

[462] *Id.* at 2.

[463] *Id.* at 1-2.

E. Public Meetings

Agencies have long used in-person public meetings to enhance public engagement in notice-and-comment rulemaking. The APA does not require agencies to hold a public meeting in connection with informal rulemaking; rather the agency can fulfill its obligation to "give interested persons an opportunity to participate in the rule making . . . with or without opportunity for oral presentation."[464] But many agencies held public meetings in connection with some of their rulemaking prior to the enactment of the APA, and they continue to do so today. In addition, an agency's organic statute may require the agency to hold a public hearing in connection with certain rulemakings.[465]

Although a public meeting can take a variety of forms, this section addresses meetings that, using the IAP2 Levels of Public Engagement, are held to "inform," "consult," and "involve" (in a limited way) the public in rulemaking. Thus, they allow for more *involved* public participation than the paper notice-and-comment process itself. Nevertheless, we address public meetings seeking even more robust public *involvement* and *collaboration* in Part IX.F (Supplemental Deliberative Exercises) and XI (Enhanced Forms of Deliberation).

Agencies generally supplement the paper rulemaking process with public meetings when the rulemaking is expected to have a significant impact on the public or may prove politically controversial.[466] A public meeting provides a more informal setting for the agency to explain what it is doing, field questions about the NPRM, and grapple with the views and concerns of stakeholders. Clarifying ambiguities in the NPRM also helps the public to submit better comments and may lead the agency to revise and clarify the final rule. When the issues are "big and complicated," public meetings also allow the agency to hear about potential unintended consequences and other stakeholder concerns. In-person meetings offer a dynamic environment in which the agency can probe and clarify public comments and ask participants for examples and evidence to support their assertions or concerns.[467]

Today, agencies often use conference calls and/or "virtual" online meetings. These enable the agency to reach people beyond Washington, D.C., without going into the field, especially if the agency does not have a network of field offices. For example, GSA held a "town hall" after publishing an NPRM concerning the disposal of electronic materials. A private company, Broadnet, helped the agency with the logistical setup for the town hall. The GSA alerted stakeholders about the town hall using e-mail blasts and attempted to reach a broad spectrum of people. The town hall took place on the phone and was similar to calling into a radio talk show. Thousands

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[464] Administrative Procedure Act, 5 U.S.C. § 553(c) (2012).

[465] *See, e.g.*, 15 U.S.C. § 57a(b)(1) (2012) (requiring the Federal Trade Commission (FTC) to hold an informal hearing in connection with rulemaking).

[466] *See* KERWIN & FURLONG, *supra* note 2, at 83.

[467] Telephone Interview with Pension Benefit Guarantee Corporation (Nov. 21, 2017).

of people participated. GSA began the call by explaining what it was trying to accomplish. Screeners then answered calls from participants, recorded basic information about the participants, and placed them in an electronic queue. The GSA moderator selected which calls to answer based on their perceived value to the rest of the participants. The town hall lasted about an hour. Those who did not have an opportunity to ask questions at the town hall were encouraged to submit comments or to reach out to the GSA with their questions. GSA felt the town hall was helpful because it confirmed what the GSA knew from other discussions.

The Department of Energy conducts formal meetings in connection with notice-and-comment rulemaking pursuant to 42 U.S.C. § 6393(a)(3). The agency gives presentations on the NPRM and encourages participants to ask questions. The agency uses a facilitator and typically obtains robust public participation, both in person and via webinar. The transcripts of the meetings are included in the rulemaking record.

As discussed above, the Forest Service conducted National and Regional Forums as part of the 2012 Planning Rule process.[468] Participants were told to submit any formal comments in writing as part of the notice-and-comment rulemaking, but the agency received feedback on different aspects of the proposed rule that may have had some impact on the final rule. For example, several participants wanted more concrete standards and guidelines in the Forest Plans.

Agencies that hold a public meeting must decide whether to conduct the meeting in-person or remotely using the web and/or a call-in system. "Virtual" meetings have the advantage of being able to reach a broader audience than a few in-person meetings. Even if in-person meetings are held at different locations around the country, there will likely be many people who cannot attend. Moreover, if the agency can queue questions remotely it may be able to field more questions than would be possible in a public meeting of the same length held in person. The town hall format used by GSA is sufficient to understand stakeholders' questions and clarify what the agency is doing and why. It may also allow the agency to probe comments and concerns and ask for more information. It probably does not lend itself as well to deliberative exercises in which participants respond to each other.

Finally, public meetings are an additional opportunity for the agency to encourage the public to submit comments in the rulemaking itself and provide rulemaking novices with resources for submitting public comments. Agencies should always remind participants that they need to submit their comments in the notice-and-comment proceeding to make them part of the record.

F. Supplemental Deliberative Exercises

Agencies may also want to conduct deliberative exercises to supplement the notice-and-comment process. Some of the best examples of online deliberative

[468] *See* text accompanying *supra* note 243.

exercises conducted in connection with rulemaking come from Regulation Room, the pilot e-rulemaking platform created by the Cornell eRulemaking Initiative.

The basic online commenting interface of Regulation Room is discussed above in Part IX.C. The Regulation Room team summarized several key issues in connection with each rulemaking and participants were able to comment issue-by-issue and respond to the comments of others on the same topic. These summaries and the interface helped to overcome the barrier to participation for rulemaking novices when they are confronted with a long, dense, and complex NPRM and then must remember what they have read when submitting comments on Regulations.gov. The Regulation Room website also provided visitors with helpful and engaging tutorials on the comment process and the nature of effective comments. This web-based infrastructure was at the heart of the project. But there were several other components that helped it succeed at furthering the information and democratic functions of rulemaking.

First, Regulation Room engaged in substantial targeted outreach to attract rulemaking novices with relevant knowledge to the Regulation Room website. Unfortunately, even if agencies build the most user-friendly commenting interface imaginable, "[b]uilding it will not be enough to make new participants come."[469] Accordingly, once agencies have identified missing stakeholders, they must tailor their outreach efforts to reach the particular group. The best practices and challenges of designing outreach efforts are discussed below in Part XII.

Second, a Regulation Room team member trained in law and group facilitation moderated the public comments on the proposed rules. The moderators facilitated the conversation in a number of ways. They expressed appreciation for comments; asked for clarifications, more details, personal experiences, or other factual support for comments; provided additional information relevant to comments that the participant might not know; focused the discussion on the issues in the rulemaking; referred the participant to other rulemakings when the comments were off-topic; encouraged participants to respond to the comments of others; monitored the discussion for inappropriate content; and helped resolve technical difficulties with the website.[470]

Third, because the agencies did not want the comments on the Regulation Room website submitted wholesale into the rulemaking record, the Regulation Room team created a draft summary of the discussion during the final weeks of the comment period. They then emailed the draft summary to registered users and invited them to suggest revisions. The summary was then finalized and submitted as a formal comment using Regulations.gov.[471]

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[469] FARINA & NEWHART, IBM CENTER, *supra* note 22, at 21.

[470] *See id.* at 34; Farina et al., *Rulemaking 2.0*, *supra* note 65, at 413-14; Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 391.

[471] Farina et al., *Rulemaking 2.0*, *supra* note 65, at 414.

These aspects of Regulation Room went a long way towards overcoming the incentive and capacity barriers to commenting by rulemaking novices. But extensive outreach, active moderation, and synthesizing and summarizing diverse comments is also very resource intensive. It likely requires substantially more resources than merely breaking an NPRM into digestible units with plain language summaries. In addition, agencies themselves may not be comfortable conducting these exercises or summarizing the outcome of a deliberative online discussion with a diversity of views. Agencies may therefore want or need to hire an outside facilitator to provide these services.

Agencies should consider whether these additional resources are well spent in each rulemaking they undertake. In most cases such extensive efforts will likely not be worth the costs. In some cases, however, they will be. Regulation Room did enhance participation by missing stakeholders in the rulemaking process. More than ninety percent of the participants reported that they had never participated in rulemaking before.[472] In addition, the agencies received helpful information and perspectives from these stakeholders that they might not otherwise have heard. For example, during the DOT rulemaking concerning the accessibility of airport check-in kiosks and travel websites to individuals with physical and cognitive disabilities, organizations representing persons with disabilities uniformly sought the increased independence offered by accessible technologies. But some individuals with disabilities were concerned that requiring accessible technologies would result in fewer airline agents who could assist travelers and adapt to their particular needs.[473] In the DOT rulemaking proposing the installation of EOBR equipment, large trucking companies, most of whom already used the technology, generally supported the proposal, while small trucking companies and independent commercial motor vehicle drivers, most of whom did not use technology, generally opposed the proposal.[474] Among other things, the commercial drivers and small companies noted that it would be more difficult for them to absorb the costs of installing the equipment and suggested that the agency's cost-benefit analysis was "skewed toward a big business model." [475] In addition, independent commercial drivers and small trucking companies conveyed "rich and nuanced detail of individual experiences and operations[, illuminating] a variety of business practices around completing driving logs and … concerns about inflexibility."[476]

Other agencies have conducted more limited deliberative exercises online to supplement the notice-and-comment process. In 2001, EPA worked with Information Renaissance to conduct a two-week online consultation experiment using "computer

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[472] *See* Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 392.

[473] *See* Farina et al., *Knowledge in the People*, *supra* note 5, at 1204-05; FARINA & CERI, IBM REPORT, *supra* note 70, at 17.

[474] *See* Farina et al., *Knowledge in the People*, *supra* note 5, at 1200, 1214 n.106.

[475] *Id.* at 1200.

[476] FARINA & CERI, IBM CENTER, *supra* note 70, at 17.

bulletin boards to foster a deliberative dialogue among a limited public interested in participating in the rulemakings at issue."[477]

In 2010, FCC used OpenInternet.gov and the IdeaScale application to facilitate public engagement with open Internet rulemaking.[478] The FCC held workshops and meetings "in a way that facilitated broad and geographically dispersed access," using social media, and using its special websites on broadband policy and open Internet as a way to generate ideas.[479] OpenInternet.gov featured a "video portal for public workshops on key aspects of the open Internet rulemaking."[480] The workshops could be watched live and those watching could ask questions using email or twitter. The workshops were also available by calling a toll-free telephone number and accessible to persons with hearing or sight difficulties. In addition, IdeaScale allowed the public to provide ideas, comment on other people's ideas, and vote for ideas and other's thoughts. These comments were then included as part of the rulemaking record.[481]

The Nuclear Regulatory Commission's RuleNet Pilot project in 1996 was an early online consultation experiment using a "computer bulletin board[] to foster a deliberative dialogue among a limited public interested in participating in the rulemakings at issue."[482]

G. Reply Comment Periods

Agencies generally have discretion to provide a "reply comment period" to give interested parties an opportunity to address the information, arguments, and evidence submitted by others during the comment period required by section 553 of the APA.[483] Reply comment periods are useful because of the tendency for stakeholders to submit materials on the last day of the comment period. This may be strategic—to avoid having their arguments or evidence challenged by other participants in the rulemaking—or merely the predictable effect of action-forcing deadlines. Regardless of the causes, the inability of stakeholders to reply to the comments of others can impair the quality of information generated by the public comment period.

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[477] Noveck, *The Electronic Revolution*, *supra* note 48, at 470 n.181 (citing THOMAS C. BEIERLE, DEMOCRACY ON-LINE: AN EVALUATION OF THE NATIONAL DIALOGUE ON PUBLIC INVOLVEMENT IN EPA DECISIONS 12 (2002)).

[478] *See* Peter M. Shane, *Empowering the Collaborative Citizen in the Administrative State: A Case Study of the Federal Communications Commission*, 65 U. MIAMI L. REV. 483, 490, 495-96 (2011).

[479] *Id.* at 495.

[480] *Id.* at 496.

[481] The IdeaScale website for this project can be visited at http://openinternet.ideascale.com/. One proposal received 467 votes. Quite a few ideas received several comments.

[482] Noveck, *The Electronic Revolution*, *supra* note 48, at 470 n.181.

[483] The APA does not require or even mention reply comment periods, but they are occasionally required by any agency's organic statute. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7607(d)(5) (2012).

Reply comment periods should generally be offered as a matter of course for several reasons. First, agencies are likely to receive better information and evidence in the rulemaking process when submissions can be contested during a reply comment period. Without a reply comment period, parties in possession of information that supports or refutes comments submitted at the end of the comment period may not have a chance to add their insights to the rulemaking record. Moreover, commenters who know others cannot challenge them may make less persuasive or reliable claims than they would if they knew that other parties could present counter-evidence. Thus, a reply comment period not only adds relevant information to the record but also may improve the quality or veracity of the information that is otherwise received. At a minimum, a reply comment period should provide the agency with a better record from which to assess the strength of the different claims made and evidence submitted during the notice-and-comment process.

Second, reply comment periods can create a more dialogic process, refining stakeholder positions and creating opportunities to forge compromise or reach consensus. There is some evidence that commenters make maximalist claims when they know others will not have an opportunity to respond to them in the rulemaking.[484] If initial comments may be challenged during a reply period, stakeholders are more likely to focus on their core interests. This makes it easier for agencies to understand how regulations might impact stakeholders and how they will respond to various regulatory alternatives.

The Administrative Conference has addressed reply comment periods in several prior recommendations.[485] The most recent survey suggests that reply comment

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[484] *See* STEVEN J. BALLA, PUBLIC COMMENTING ON FEDERAL AGENCY REGULATIONS: RESEARCH ON CURRENT PRACTICES AND RECOMMENDATIONS TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 12 (2011).

[485] *See* Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 79 Fed. Reg. 48,789, 48,791, 48,791 (Aug. 9, 2011); 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. 29,653, 29,654, 29,655 (July 19, 1976) (explaining that agencies should consider "a second cycle of notice-and-comment or by notice providing an opportunity for additional comment . . . when comments filed in the proceeding, or the agency's response to such comments, present new and important issues or serious conflicts of data"); Admin. Conf. of the U.S., Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability*, 38 Fed. Reg. 19,782, 19,792 (July 23, 1972) (recommending that agencies should consider providing an "opportunity for parties to comment on each other's written or oral submissions"); *see also* Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs to Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies (Feb. 2, 2011), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-10.pdf ("[Executive Order 13,563] seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.").

periods are used in a "rather small fraction" of rulemakings.[486] The Federal Communications Commission (FCC) conducts a significant number of these.[487] Yet agencies that have used reply comment periods report significant benefits. Professor Balla's study found that parties use reply comments both to agree with and to challenge prior arguments and information. His interviewees at the FCC offered positive assessments of reply comment periods. Our own interviews confirmed their general value.

One downside to reply comment periods is that they prolong the rulemaking process and require additional resources for the agency to manage.[488] The first concern is unlikely to be a problem in most cases. Professor Balla found that most reply comment periods only extended the notice-and-comment process a few weeks, perhaps one month beyond the end of the initial comment period. None extended the comment period more than six weeks. Given that rulemaking proceedings take, on average, about two years from publication of the NPRM until publication of the Final Rule,[489] an extension of a few weeks seems negligible. More time may be necessary to give reply commenters a meaningful opportunity to review and respond to initial comments. But in most cases a month would likely suffice unless the reply commenters are doing original research.

The second concern is perhaps more acute. The agency will need to review the second set of comments and formulate its responses. This takes additional time on the part of agency staff. Theoretically, the agency would only have to review comments germane to the topics raised in the original comment period, rather than on new or unrelated topics. But such a policy may be unworkable, and the agency will need to review all the comments submitted during a reply period as a practical matter. Still, agencies may be able to utilize some of the same natural language processing technologies discussed above in Part IX.C. In addition, the additional time and resources required to manage reply comment periods would be offset by reply comments that help the agency draft its own responses to comments in the preamble to the Final Rule. Thus, prolonging the comment period by a few weeks on the front end may save the agency time on the backend.

Therefore, agencies should consider whether a reply comment period will help them assess the information they receive in the required APA comment period or otherwise prove beneficial. When the agency seeks to obtain information from absent stakeholders and members of the general public at this stage, the agency should highlight in plain language the issues raised during the APA comment period upon which it seeks additional comments and why.

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[486] *See* BALLA, *supra* note 484, at 10.

[487] *See id.*

[488] *See id.* at 12-13.

[489] Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959 (2008).

H. Status Reports and Notifications

Several agencies have begun to take advantage of new technology to keep stakeholders informed of developments in their rulemaking proceedings. For example, DOT allows members of the public to sign up for monthly status reports and notifications with links to relevant rulemaking documents. DOT's groundbreaking efforts are discussed above,[490] and we recommend that other agencies consider adopting similar practices.

I. Acknowledgment and Impact Reports

Agencies should acknowledge the comments they receive from rulemaking novices and members of the general public during the notice-and-comment process. Such acknowledgement reinforces the value of public participation and encourages newcomers to remain engaged with the agency. Therefore, if the agency solicits feedback from rulemaking novices during the notice-and-comment process, the agency should acknowledge their contributions in the preamble to the final rule. This includes addressing the substance of their comments and highlighting how the comments had an impact on the final rule, either by effecting changes to the final rule or confirming the appropriateness of the agency's proposed solution to the regulatory problem.

X. RETROSPECTIVE REVIEW

Retrospective review seeks to determine whether existing agency rules are achieving their intended goals or are obsolete, ineffective, or excessively burdensome due to faulty assumptions, changed circumstances, or unanticipated consequences. In addition, retrospective review may reveal that a rule is redundant or counterproductive because it overlaps or conflicts with another rule enforced by the same or a different agency.[491] Depending on what is learned from reviewing a particular rule, the agency may decide to modify, streamline, expand, or repeal the rule.

As early as 1946, the APA granted the public a "right to petition for the issuance, amendment, or repeal of a rule."[492] But interest in more systematic and regular review of existing regulations has grown since the 1970s. Beginning with Jimmy Carter, retrospective review or periodic "regulatory lookbacks" became a staple of

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[490] *See supra* Part VII.E.2.

[491] *See, e.g.*, Cary Coglianese, *Taking Regulation Seriously*, REG. REV. (Jan. 28, 2012), http://www.theregreview.org/2012/01/28/taking-regulation-seriously (describing EPA's repeal of a regulation of dairy farmers that overlapped with the regulations of the Department of Agriculture).

[492] Administrative Procedure Act, 5 U.S.C. § 553(e) (2012).

presidential campaigns to improve the function of the administrative state.[493] In addition, Congress has required retrospective review of certain types of regulations. For example, the Regulatory Flexibility Act of 1980 (RFA) requires agencies to review rules that have a "significant economic impact" upon small businesses within ten years of the publication of the final rule.[494] The Act directs agencies to consider:

> (1) the continued need for the rule;
>
> (2) the nature of complaints or comments received concerning the rule from the public;
>
> (3) the complexity of the rule;
>
> (4) the extent to which the rule overlaps, duplicates or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
>
> (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.[495]

Furthermore, several laws require specific agencies to conduct periodic reviews of specific types of rules.[496] More generally, the Government Performance and Review

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[493] *See* JOSEPH E. ALDY, LEARNING FROM EXPERIENCE: AN ASSESSMENT OF THE RETROSPECTIVE REVIEWS OF AGENCY RULES AND THE EVIDENCE FOR IMPROVING THE DESIGN AND IMPLEMENTATION OF REGULATORY POLICY 4 (2014) ("Every administration dating back to the Carter Administration in 1978 has implemented some form of regulatory look-back."); *see also* Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) (requiring agencies under the Trump Administration to identify two existing regulations to be repealed for every new regulation proposed); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011) (requiring agencies to develop a plan to "periodically review its existing significant regulations"); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (directing agencies to periodically review their existing significant regulations); Memorandum from George H.W. Bush, President of the U.S., to Certain Department and Agency Heads (Jan. 28, 1992), https://www.gpo.gov/fdsys/pkg/PPP-1992-book1/pdf/PPP-1992-book1-doc-pg166-2.pdf (requiring agencies to review existing regulations and eliminate those that impose any unnecessary regulatory burden); Exec. Order No. 12,498, 50 Fed. Reg. 1,036 (Jan. 4, 1985) (requiring agencies to identify existing regulations they plan to rescind or revise); Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 24, 1978) (requiring agencies to "periodically review their existing regulations").

[494] Regulatory Flexibility Act of 1980, 5 U.S.C. § 610(a) (2012) ("[E]ach agency shall publish in the *Federal Register* a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities.").

[495] *Id.* § 610(b).

[496] *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5512(d) (2012) (directing the CFPB to conduct a 5-year review of "each significant rule or order adopted by the Bureau under Federal consumer financial law"); Clean Air Act

Act of 1993 (GPRA) requires agencies to develop strategic and performance plans to establish and track progress towards their regulatory goals.[497]

Finally, many agencies have promulgated their own policies and procedures requiring regulatory lookbacks.[498] These reviews typically focus on "the age of a rule, its economic impact, the burden it poses on industry, whether it duplicates another federal requirement, and whether it is inconsistent with a change in a law or administration policy."[499]

The Administrative Conference sponsored studies of retrospective review and issued recommendations based on those studies in 1995[500] and 2014.[501] Although this work focused largely on analytical approaches to retrospective review, it included several recommendations concerning public involvement in regulatory lookbacks. In 2014, ACUS recommended:

- leveraging outside expertise in retrospective review;
- "using social media, as appropriate, to learn about actual experience under the relevant regulations(s)";
- disclosing relevant data analyzing existing regulations on "Regulations.gov, [agencies'] Open Government webpages, and/or other publicly available websites[,]" and doing so in a way that "allow[s] private parties to recreate the agency's work and to run additional analyses"; and
- encouraging private parties to submit their own information and analyses and integrating this information, where relevant, into the agency's review.[502]

Amendments, 42 U.S.C. § 7409(d)(1) (2012) (requiring review every five years of national ambient air quality standards).

[497] *See, e.g.*, 5 U.S.C. § 306; 31 U.S.C. § 1115(a) (2012).

[498] *See* SHAPIRO, *supra* note 67, at 416 (describing some examples); *see also* Regulatory Review of Existing DOT Regulations, 76 Fed. Reg. 8,940, 8,941 (Feb. 16, 2011) ("The Department follows a repeating 10-year plan for the review of our existing regulations . . . . [The reviews] comply with section 610 of the Regulatory Flexibility Act. . . . Generally, the agencies have divided their rules into 10 different groups and analyze one group each year, then start over again. We regularly invite public participation in those reviews and seek general suggestions on rules that should be revised or revoked."). The FAA, NHTSA, and other agencies within DOT conduct additional periodic reviews of existing regulations. *Id.*

[499] SHAPIRO, *supra* note 67, at 416.

[500] *See generally id.*; Admin. Conf. of the U.S., Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

[501] *See generally* ALDY, *supra* note 493; Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114, 71,114 (Dec. 17, 2014).

[502] *Retrospective Review of Agency Rules*, 79 Fed. Reg. at 75,117.

In 1995, ACUS recommended:

- soliciting public input using requests for comment, agency ombudsmen, federal advisory committees, press releases and public notices, roundtable discussions, and "requesting comments through electronic bulletin boards or other means of electronic communication."

- ensuring adequate and timely responses to petitions for review under APA section 553(e).[503]

The ABA has also made recommendations regarding retrospective review. Most relevant for purposes of this Report, in 2016 the ABA House of Delegates recommended that Congress amend the APA to promote retrospective review by requiring agencies:

> a. When promulgating a major rule, to publish a plan (which would not be subject to judicial review) for assessing experience under the rule that describes (i) information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives, potentially in conjunction with other rules or other program activities, and (ii) how the agency intends to compile such information over time; [and]
>
> b. On a continuing basis, to invite interested persons to submit, by electronic means, suggestions for rules that warrant review and possible modification or repeal.[504]

Ensuring that regulations remain necessary and continue to provide cost-effective benefits is undeniably important. Nevertheless, retrospective review inevitably pulls resources from other agency activities. Even if the agency identifies a rule in need of amendment or repeal, in the process it may delay or lose the opportunity to proceed with a more important regulatory initiative. Thus, agencies must carefully weigh the potential benefits of retrospective review compared with other agency activities, at least when it is within their discretion to choose how to use their limited resources.

We endorse the recommendations of ACUS and the ABA described above and offer additional recommendations focused on enhancing participation in retrospective review by traditionally absent stakeholders and members of the general public. These groups are a potentially rich source of information for retrospective review. Those who live with a regulation, whether as beneficiaries or regulated stakeholders, are likely to have the best information about whether the rule is understandable, the ease or difficulty of complying with the rule, whether the rule is achieving its intended goals, and any unintended consequences that may have emerged over time.

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[503] *Review of Existing Agency Regulations*, 60 Fed. Reg. at 41,110.

[504] ABA Res. 106b (2016).

Before turning to the tools of public engagement, it is important to note a difference between retrospective review and prior stages in the rulemaking process. Unlike a proposed rule, a "well-run agency is constantly, '*informally*' reviewing its regulations" as part of its daily operations.[505]

> Informal reviews are a routine, daily occurrence in which, during the general operations of the agency, problems with existing rules are identified that may warrant further action. Investigators and others who work with the regulated parties may note a continuing problem in implementing rules; attorneys may note problems in enforcing, interpreting, or litigating over rules; and accidents, congressional interest, media interest, and other events may result in discussions within an agency that may, in turn, result in a decision to change rules.[506]

Thus, even without a formal process for retrospective review, most agencies continually receive feedback on how their regulations function. Indeed, some agencies report they learn more about how a rule is working from their day-to-day operations than from formal requests for comments on the effectiveness of their rules.[507]

Accordingly, we focus on ways that agencies can foster public review of existing regulations outside of agencies' day-to-day work with regulated entities and other members of the public. Some of these modes of engagement supplement informal review by providing on-going opportunities for public input. Others are focused on enhancing public participation in formal reviews or lookbacks that an agency conducts in connection with a legal mandate or on its own initiative.

A. "Open" or "Living" Rulemaking Dockets

If agencies want to institutionalize a culture of retrospective review, they should consider utilizing "open" or "living" rulemaking dockets.[508] This is consistent with the ABA recommendation that agencies provide an ongoing electronic means for the public to submit "suggestions for rules that warrant review and possible modification or repeal."[509] Open rulemaking dockets can be designed in a number of ways and mounted either on an agency's website or a re-designed Regulations.gov. The goals are to provide an ongoing way for the public to comment on existing regulations and to connect those comments to the rulemaking docket established during the notice-and-comment process.

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[505] Eisner & Kaleta, *supra* note 336, at 146 (emphasis added); *see also* Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017) (reporting that most rules promulgated by agencies revise or update existing regulations).

[506] Eisner & Kaleta, *supra* note 336, at 147.

[507] *See id.* at 148-49.

[508] *See* ARGIVE, *supra* note 423, at 8.

[509] ABA Res. 106b (2016).

The close of comment periods before the promulgation of final rules precludes comments on rules as implemented. Moreover, the limited time frame during which agencies accept public comments on retrospective review using RFIs, NPRMs, and similar devices can discourage meaningful assessments of the effectiveness of existing regulations. As noted in other contexts, the announcement of a deadline for comments prior to an agency decision whether to amend or repeal a regulation may encourage commenters to take maximalist positions for or against the regulation rather than focusing on how the regulation is working, providing examples of problems or unanticipated consequences, acknowledging what works, or articulating precise recommendations on how the rule might be improved.

In addition, seeking comments on existing regulations during discrete time periods may discourage stakeholders affected by a rule from commenting when they have relevant experiences. In the case of stakeholders who do not routinely participate in the regulatory process, the likely result of having to wait to comment until a subsequent regulatory lookback is that they will never comment at all. Thus, the public should have an open and accessible means to comment on regulations when they have experiences or other information that would be relevant.

Moreover, general requests for suggestions on which regulations should or should not be amended or repealed can result in blanket statements complaining about the burdens of regulations rather than specific actions that an agency might take to improve existing regulations.[510] Maintaining an open rulemaking docket on existing regulations encourages the public to comment on the specific regulations in need of attention and why.

Furthermore, connecting retrospective review with the notice-and-comment rulemaking docket already created provides the public with a wealth of existing information and focuses attention on whether the assumptions or evidence upon which the rule was based remain accurate. This should encourage a more dialogic commenting process. For example, if a rule was based on certain predicted costs and benefits, commenters could submit evidence directed at whether or not those predictions have proved correct.

For such engagement to be realistic for most rulemaking novices, the e-rulemaking dockets maintained by Regulations.gov or on the agency's website must be made more user friendly in the ways recommended in Part IX.C. But this is just a start. A few additional steps are required to convert the e-rulemaking dockets recommended in Part IX.C into open rulemaking dockets that facilitate retrospective comments.

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[510] *See, e.g.*, ARGIVE, *supra* note 423, at 8 (describing how the Department of Commerce's RFI seeking information on the impact of federal permitting requirements on the construction and expansion of domestic manufacturing facilities and on regulations that adversely impact domestic manufacturers encouraged commenters to respond categorically and repeat "goals of the current administration by referencing international competitiveness and job rates, or criticizing a rule formed during the Obama administration.").

First, the e-rulemaking docket for a regulation should highlight the specific types of information the agency believes would be helpful to assess the success of the rule. Agencies already highlight the basis and purpose for their rules in the preambles to their final rules. Just as we recommend that agencies summarize their regulatory proposals and identify the information they seek in plain language accessible to the different segments of the public they seek to reach, we recommend that agencies summarize the basis and purpose of their final rules in plain language form that can be understood by those who may have relevant information for retrospective review. In particular, agencies should highlight the goals and assumptions upon which the rule is based and the information the agency believes will enable it to assess the effectiveness of the rule going forward.[511] The agency might then encourage the public to address their retrospective comments to whether these goals and assumptions remain valid, whether the rule has had unintended consequences, and any other experiences relevant to the success or shortcomings of the rule. This is consistent with the ABA recommendation that agencies publish with their final rules "information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives."[512]

Second, agencies should commit to periodically reviewing these comments and, to the extent appropriate and realistic in light of the agency's resources, responding to comments they receive after the final rule becomes effective. At a minimum, if the agency encourages comments about existing rules it should commit to reading them. We recognize, however, that agencies will not always have the resources to respond to every comment. Nevertheless, they may be able to respond to some. As with the notice-and-comment process, the number of comments an agency receives concerning a given regulation is likely to vary dramatically from rule to rule. Whether an agency has the resources to respond to large numbers of comments likely depends on the agency. The CFPB has done a remarkable job responding to thousands of consumer complaints it has received through its website.

Open rulemaking dockets could be implemented using Regulations.gov or the agency's own website. We suspect that the agency's website may be preferable, however, as it is likely the first place that members of the public will go if they want to comment on the agency's regulations. In addition, this would allow for greater experimentation than is currently possible with Regulations.gov. Thus, agencies could utilize the same webpage interfaces we recommend adopting for the notice-and-comment process. The focus would merely change after the promulgation of the final rule. Instead of highlighting questions and information the agency seeks regarding a proposed rule, the agency would summarize the final rule and highlight questions and information relevant to retrospective review of the regulation going forward.

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[511] *See* ABA Res. 106b.

[512] *Id.*

We recommend that agencies experiment with living rulemaking dockets prospectively as they promulgate new rules. For older rules, and to the extent agencies cannot fully implement open e-rulemaking dockets, we recommend agencies utilize "hotlines" or on-line "suggestion boxes" that allow stakeholders to comment on what is working or not working with existing rules.[513] Consistent with our other recommendations, such hotlines or on-line portals should ask the public to identify the specific rule they are addressing rather than encourage general comments about the agency's work. In addition, the agency should explain how it evaluates existing regulations, identify the types of information or experiences that are most helpful for the agency to know, and ask commenters to be as detailed as possible in describing their experiences. On-line portals might also provide the public with examples of helpful comments on existing regulations.

B. Petitions for Rulemaking

Agencies review specific regulations in connection with petitions for rulemaking pursuant to APA § 553(e). The number of petitions for rulemaking to amend or repeal a rule varies quite a bit by agency.[514] Nevertheless, rulemaking petitions provide an important way for members of the public, although in most cases sophisticated stakeholders, to ask the agency to consider changes to existing regulations.[515]

Our recommendations concerning petitions for rulemaking set forth above in connection with agenda setting are equally applicable to petitions for rulemaking concerning existing regulations. Of course, the multiple uses of petitions for rulemaking will shape an agency's efforts to educate the public on their availability and uses. For example, if an agency provides examples of "model" rulemaking petitions that can be used by the public for guidance, the agency should include examples of petitions to create a rule, to amend a rule, and to repeal a rule, and explain the types of information that is most useful in each context.

In addition, agencies should be particularly mindful of soliciting comments from absent stakeholders who benefit from the existing regulation when they receive petitions to amend or repeal a rule. Petitions to amend or repeal a rule are likely to be filed by sophisticated stakeholders and to focus on compliance costs, which drive much of the interest in retrospective review. Agencies should not lose sight of the benefits the rule may continue to generate. Thus, we recommend that agencies invite public comment on petitions to amend or repeal a rule as a matter of course, unless the agency for good cause finds that public comment is unnecessary. In addition, agencies should conduct education and outreach efforts to solicit comments from potential beneficiaries of the rule under review.

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[513] *See* Eisner & Kaleta, *supra* note 336, at 164 (proposing the use of "electronic bulletin boards to ease the process for submitting suggestions").

[514] *Id.* at 150 (describing examples).

[515] *See* Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,114, 75,117, 75,117-18 (Dec. 17, 2014).

As explained below, some of the other modes of public engagement with retrospective review may also be used in conjunction with petitions to amend or repeal a rule.

C. Requests for Information[516]

Requests for Information (RFIs) are important tools for engaging the public in retrospective review. As discussed above in Part VI.D, RFIs are typically published in the *Federal Register* and on Regulations.gov. They describe a matter under consideration by the agency and request opinions, data, and other information from the public that will assist the agency in deciding how to proceed.[517] RFIs are particularly useful when (1) the agency is open-minded about whether and how to address a regulatory matter and (2) the public is likely to have useful information about the matter, including situated knowledge, data, preferences, and concerns, which will help the agency decide on an appropriate course of action. Thus, RFIs lend themselves to retrospective review in which agencies seek to determine whether a rule is achieving its intended goals or should be amended, expanded, or repealed.

Agencies routinely use RFIs when developing retrospective review plans and identifying candidates for review.[518] For example, during the Obama Administration, the Department of Transportation issued several requests for comments from the public on its "plan for periodically analyzing existing significant rules to determine whether they should be modified, streamlined, expanded, or repealed and identify specific rules that may be outmoded, ineffective, insufficient, or excessively burdensome."[519] During the Clinton Administration the FAA asked members of the

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[516] We use the term Request for Information (RFI) here but agencies may sometimes refer to this tool as an Advanced Notice of Proposed Rulemaking (ANPRM) or some other name to describe their requests for comments connected with retrospective review. As we explained above in Part VIII.A, we conceive of ANPRMs as being used at a more advanced stage of rule development or retrospective review. For example, an agency might issue an ANPRM when it has decided to amend a rule and is testing different alternatives or gathering the information it needs to craft its proposal. *See, e.g.*, Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (Dep't of the Treasury Mar. 21, 2012) (seeking comment on the agency's plans to amend its regulations to establish alternative ways to meet certain health coverage requirements by religious organizations that object to the coverage of contraceptive services for religious reasons and that is not exempt under the existing regulations).

[517] *See supra* Part VI.D.

[518] As noted above, agencies do not always denote such request as RFIs. Regardless of the nomenclature, however, these requests for comments serve the same purpose. They seek the public's views on conducting retrospective review generally or retrospective review of a specific regulation.

[519] Regulatory Review of Existing DOT Regulations, 76 Fed. Reg. 8,940, 8,940 (Feb. 16, 2011). *See also generally* Notice of Retrospective Review of DOT Existing Regulations, 76 Fed. Reg. 11,699 (Mar. 3, 2011); Next Phase of the Regulatory Review of Existing DOT Regulations, 79 Fed. Reg. 11,051 (Feb. 27, 2014).

public to identify "the top three rules that they believe[d] need[ed to be] review[ed] (rather than asking them to list everything without requesting priority)."[520]

Agencies also routinely use RFIs when conducting regulatory lookbacks concerning specific rules. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the CFPB to review "each significant rule or order adopted by the Bureau under Federal consumer financial law" five years after it becomes effective.[521] The CFPB routinely issues RFIs one-year in advance to outline its proposed approach to the review process, including the scope of the review and the data needed to assess the effectiveness of the rule. In addition, soon after the agency was established, the CFPB issued RFIs to solicit feedback on its inherited regulations. The retrospective review process initiated with RFIs has resulted in tangible changes to rules.[522]

There are many other examples. The Department of Energy uses RFIs in connection with the regulatory lookbacks it conducts six or seven years after issuing a rule. The agency uses RFIs to ask questions about the issues it thinks are "at play" based on its experience with the rule.[523] The Federal Trade Commission regularly uses RFIs to ask the public to comment on specific questions regarding the economic impact of existing rules.[524] And the PBGC routinely uses RFIs to solicit feedback on its deregulatory actions. These are just a few examples.

RFIs are useful for retrospective review when the agency is open-minded about how to proceed and the public is likely to have useful information or experiences concerning the effectiveness of the existing regulation(s) and any unintended or underappreciated consequences. As we have repeatedly emphasized, however, merely issuing a request for comments is not enough. The agency must also engage in planning and outreach to obtain participation by a broad range of stakeholders, including regulated parties, the beneficiaries of the existing regulations, individuals with situated knowledge, and unaffiliated experts who may have useful information to share.

Finally, RFIs tend to be most valuable for retrospective review when they ask specific questions.[525] Thus, RFIs seeking comments from traditionally absent stakeholders should speak directly to them and ask them to share their experiences living with the regulations. For example, when the CFPB conducts a regulatory lookback of its mortgage disclosure rules it should address borrowers directly and ask

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[520] Eisner & Kaleta, *supra* note 336, at 164.

[521] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5512(d) (2012).

[522] Telephone Interview with Consumer Financial Protection Bureau (Dec. 5, 2017).

[523] Telephone Interview with Department of Energy (Jan. 18, 2018). The Department of Energy also sometimes uses negotiated rulemaking as part of the lookback process.

[524] *See* Eisner & Kaleta, *supra* note 336, at 165.

[525] *See, e.g.*, *id.* at 149, 156.

them if the disclosures they received pursuant to the rule were clear and transparent or whether they were surprised or confused by any closing costs. The RFI should also ask borrowers to describe their relevant experiences in as much detail as possible. The CFPB can then compare this information with the baseline established by the comments it received from borrowers before the mortgage disclosure rules were adopted.

D. Public Meetings

Agencies hold public meetings at all stages of rulemaking, including retrospective review. As discussed above in Part VI.E, public meetings can be conducted in person, telephonically, on-line and live-streamed, or using some combination of formats. They may also be recorded so that the public can view them after the event. Both in person and remotely accessible meetings have advantages, and we recommend that agencies consider using elements of both depending on their specific goals.

Agencies can use meetings to encourage public participation in retrospective review in several different ways. First, several agencies periodically hold open meetings in which the public can raise questions or concerns about a particular topic. These may include questions or concerns about existing regulations. Indeed, it is common for agencies to hold public meetings when they are implementing new regulations to field compliance questions on the part of regulated parties. Any meeting that permits members of the public to raise their own agenda items with the agency, even if within a defined subject area, will provide an opportunity for the agency to learn how the public understands existing regulations, whether they are achieving their goals, and any unintended consequences.

Second, agencies can design public meetings to focus on soliciting information relevant to retrospective review. The reverse industry days (RIDs) discussed above in Part VI.F offer a useful model for providing agencies with information about the success or shortcomings of existing regulations. To briefly recap, RIDs are organized and run by stakeholders to educate the agency on their interests and how they experience the regulatory environment. Our research suggests that RIDs have provided GSA and DHS with helpful information for improving their acquisitions processes. We believe similar types of public meetings could provide agencies with useful information regarding the effectiveness of their regulations in particular areas and reveal ambiguities and unintended or underappreciated problems that could be addressed through subsequent rulemaking.

Third, agencies can hold public meetings after receiving a petition to amend or repeal an existing regulation, perhaps in conjunction with issuing an RFI.

Fourth, agencies can use public meetings when they conduct a regulatory lookback concerning a specific rule or rules pursuant to a legal mandate or on their own initiative. For example, the PBGC held an open hearing in connection with retrospective review of its Reportable Events Rule. An in-person meeting offered a more dynamic environment in which the agency could probe public comments in

ways that would be difficult using only a paper hearing such as notice and comment. The agency was able to ask participants for examples and evidence to support their comments and concerns. In addition to publishing a notice in the *Federal Register*, the PBGC worked hard to get a balanced group of stakeholders to participate in the meeting. It also allowed participants to submit material after the meeting and extended the comment period to allow people to respond to each other's comments.[526] This offers a good model for fostering a more deliberative process using public meetings.

Finally, agencies can hold public meetings in connection with designing retrospective review plans, undertaken on their own initiative or in response to a legislative or executive mandate. For example, EPA held twenty public meetings and nineteen town halls and listening sessions on specific topics in connection with the plan it developed in response to President Obama's call for agencies to establish retrospective review plans and policies.[527]

Regardless of precisely how a public meeting is used, it is critical that the agency undertake thoughtful outreach and planning to obtain balanced participation from a broad range of stakeholders, including the beneficiaries of the existing regulations. Agencies should also consider whether unaffiliated experts could provide additional useful information on the regulation(s) under review, and engage in targeted outreach efforts to secure their participation in appropriate circumstances.

E. Federal Advisory Committees

Federal advisory committees provide an important means of public engagement in retrospective review or regulatory lookbacks. They can provide agencies with advice from a balanced group of well-informed stakeholders and unaffiliated experts willing to give the agency their focused attention and able to engage in a deliberative discussion concerning existing regulations and how to assess them.

Regulatory lookbacks sometimes originate in an agency's federal advisory committees.[528] Problems or unanticipated consequences of existing regulations can come to light during the committee's work on related topics. But agencies also can

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[526] Telephone Interview with Pension Benefit Guaranty Corporation (Nov. 21, 2017).

[527] Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1389 n.170 (2011). *See also* Regulatory Review of Existing DOT Regulations, 76 Fed. Reg. 8,940, 8,940 (Feb. 16, 2011) (announcing a public meeting held by DOT to discuss its "plan for periodically analyzing existing significant rules to determine whether they should be modified, streamlined, expanded, or repealed and identify specific rules that may be outmoded, ineffective, insufficient, or excessively burdensome").

[528] *See, e.g.*, Eisner & Kaleta, *supra* note 336, at 147, 149; HCV Lookback for Blood Products Proposed, Food Drug Cosm. L. Rep. ¶ 45,964 (2000), 2000 WL 36704962 (explaining that a lookback was conducted by DHHS in response to recommendation of Public Health Service Advisory Committee on Blood Safety and Availability).

and do make more purposeful use of advisory committees in retrospective review.[529] First, agencies can consult advisory committees when considering whether or how to undertake a retrospective review or a regulatory lookback. Second, agencies can consult advisory committees when they receive petitions to amend or repeal existing regulations or public comments in response to an RFI regarding retrospective review.[530] Thus, agencies may ask advisory committees to generate their own candidates for regulatory review, evaluate candidates for review proposed by other members of the public in a petition or in response to an RFI, or help the agency design a process for conducting lookbacks.

Advisory committee can provide advice on:

- Which existing regulations are in need of review?
- How the agency should prioritize among candidates for regulatory lookbacks?
- How the agency should approach retrospective review generally or lookbacks of specific regulations?
- What should be the scope of a given retrospective review?
- What is the appropriate baseline for measuring the success of a regulation?
- What types of information or data does the agency need to conduct its regulatory review?
- Which stakeholders are likely to have critical information for retrospective review, and how can the agency ensure that it receives balanced and unbiased information?
- What procedural steps the agency should undertake as part of its retrospective review?

In addition, advisory committees might provide more specific advice on particular regulations, such as:

- Potential ambiguities or unintended consequences of the rule;
- Changes in the industry or other developments since the promulgation of the rule; and

[529] *See, e.g.*, Eisner & Kaleta, *supra* note 336, at 165.

[530] *See, e.g., id.* at 165 (describing FDA's use of an advisory committee to narrow a list of regulations that the public proposed for review in response to an RFI).

- Alternatives to the existing regulatory process.

When deciding whether to use an advisory committee for retrospective review, the agency must decide whether an existing committee has the appropriate composition and expertise to review the regulation(s). The advantage of advisory committees is that a well-informed group of stakeholders can provide focused attention on the regulatory matter. If the agency does not have a group with the relevant expertise, it will have to decide whether to charter a new advisory committee for these purposes. Theoretically, the agency could charter a new advisory committee to review a specific regulation or regulatory area. We suspect in most cases, however, this would prove too burdensome given the challenges of chartering new committees.[531] If the agency routinely engages in retrospective review it might charter an advisory group for this purpose. There may be advantages to having a distinct committee focused on retrospective review. But such a group may not have the relevant subject-matter expertise for all the regulations an agency must review. Thus, it will generally make more sense for agencies to use existing advisory committees in the context of retrospective review. Because advisory committees provide a useful mode of public engagement in a variety of contexts—including agenda setting and rule development—and because they are relatively difficult to charter in the first instance,[532] it is likely more efficient for agencies to maintain committees with relevant expertise that can be consulted for a variety of purposes.

Finally, agencies should routinely share the briefing materials prepared for their advisory committees and the advice of their committees with the broader public. An advisory committee's report and recommendations could be posted on the agency's website as part of the e-rulemaking portal described above in Part IX.C.

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[531] There are several procedural hurdles to establishing new advisory committees. *See, e.g.*, Federal Advisory Committee Act, 5 U.S.C. app. § 9(a)(2) (2012) (the head of an agency must find that the establishment of the advisory committee is "in the public interest in connection with the performance of duties imposed on that agency by law"); *id* § 9(c) (requiring advisory committee charter to be filed with, among others, the standing committees of the House and Senate with jurisdiction over the agency); *id.* § 14(a)(1) (setting a two-year limit for advisory committees unless created by statute); Exec. Order No. 12,838, 58 Fed. Reg. 8,207 (Feb. 10, 1993) ("[E]xecutive departments and agencies shall not create or sponsor a new advisory committee subject to FACA unless the committee is required by statute or the agency head (a) finds that compelling considerations necessitate creation of such a committee, and (b) receives the approval of the Director of the Office of Management and Budget. Such approval shall be granted only sparingly and only if compelled by considerations of national security, health or safety, or similar national interests. These requirements shall apply in addition to the notice and other approval requirements of FACA."). These requirements operate as a constraint on establishing new advisory committees. Eisner & Kaleta, *supra* note 336, at 152.

[532] *See supra* Part VI.B.

F. Focus Groups

Agencies may also want to use focus groups in retrospective review to gauge the reactions of certain stakeholders to various aspects of existing regulations or potential alternatives. We describe the basic process and challenges of conducting a focus group above in Part VI.C. In the context of retrospective review, the agency might use focus groups in a variety of ways. For example, the agency might use focus groups to test whether the regulated industry or the public shares concerns or supports proposals contained in a petition to amend or repeal a rule. Or the agency might use focus groups to determine how consumers experience a particular regulation, such as a disclosure requirement, under review. Similar to the use of focus groups in rule development, the agency might also use a focus group to test alternatives to an existing regulation. Federal agencies have frequently used focus groups to ask questions about different approaches to consumer disclosure and product labeling.[533]

As we discuss above in Part VII.B, agencies should give careful consideration to whom to invite to participate in focus groups based on the nature of the regulation under review and the type of feedback they seek. They should provide skilled facilitation and conduct careful planning to maximize the likelihood of getting the most productive input from the group. This includes providing participants with briefing materials that clearly explain the relevant issues and possible alternatives. Finally, agencies should prepare a report after the session that summarizes the feedback and identifies issues for further consideration. The agency should post these reports on their websites, if possible in the e-rulemaking dockets described in Part IX.C.

G. Public Notice and Comment

The APA requires agencies to utilize public notice and comment to amend or repeal a rule promulgated using notice and comment. Thus, if an agency decides to proceed with amendment or repeal of a rule based on retrospective review or a regulatory lookback, the agency will need to provide an opportunity for public notice and comment. Our recommendations concerning the notice-and-comment process discussed above in Part IX also apply to proposals to amend or repeal a rule.

XI. ENHANCED FORMS OF DELIBERATION

Most of the tools of public engagement that we have discussed so far provide opportunities for agency officials and interested members of the public to communicate with each other by sharing information and ideas about potential courses of action. These forms of public engagement generally involve efforts to "inform" or "consult" under IAP2's spectrum of public participation.[534] While these are meaningful and potentially valuable forms of public participation, they generally

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[533] *See supra* Part VI.C.

[534] *See supra* notes 141-142 and accompanying text.

do not involve much in the way of reasoned deliberation or interactive dialogue about what should be done. In other words, they generally do not rise to the level of "involving" or "collaborating" with the public under IAP2's spectrum,[535] and thus arguably fall short of the ideal requirements of deliberative democratic theory.[536]

Deliberative democracy fundamentally aims to facilitate legitimate collective decisions about what should be done that take into account all of the relevant interests and perspectives that emerge from a reasoned deliberative process. The deliberative process should reflect the perceived interests and views of ordinary people, and should ultimately consider and respond in a reasoned fashion to the interests and perspectives of everyone who will be affected by the decision.[537] Deliberative democratic theory maintains that the exercise of governmental authority is only legitimate if public officials adequately consider everyone's interests and perspectives and if they give reasoned explanations for their decisions that could reasonably be accepted by people with fundamentally competing views.[538]

An ideal deliberative process should therefore provide mechanisms for agencies to "[w]ork directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered," and could in appropriate circumstances involve partnering "with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution," even if the agency retains ultimate decision-making authority.[539] An ideal deliberative process would also provide opportunities for interested members of the public to engage in a dialogue with each other as well as with responsible agency officials. While deliberative processes ideally seek to achieve consensus on the best course of action under the circumstances, they can also incorporate voting or other closure devices when reasoned disagreement remains after discussions have concluded.[540] The enhanced deliberative techniques briefly discussed in this section would facilitate these more robust forms of participation, and

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[535] *See id.*

[536] For influential discussions of the theory of deliberative democracy, see generally GUTMANN & THOMPSON, WHY DELIBERATIVE DEMOCRACY?, *supra* note 62; AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996). For a comprehensive extension of deliberative democratic theory to the realm of administrative law, see generally RICHARDSON, *supra* note 14.

[537] *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163, 173-80 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (discussing the "electoral" and "contestatory" dimensions of republican democracy).

[538] *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17 (Alan Hamlin & Philip Pettit, eds., 1989).

[539] *See* LUKENSMEYER & TORRES, *supra* note 141, at 7 (providing IAP2's definitions of "involve" and "collaborate").

[540] *See* Staszewski, *Political Reasons*, *supra* note 15, at 893-96 (discussing the role of voting in deliberative democratic theory and the possible relevance of these ideas for agency decision making).

could therefore help agencies reach legitimate collective decisions on which courses of action would promote the public good. However, the use of these tools is time-consuming and expensive and will not always produce a substantial amount of useful new information. Accordingly, we will also provide some guidance on when the use of enhanced deliberative exercises is most likely to be worth the additional effort. These deliberative tools would, after all, supplement rather than replace the opportunities for public engagement described elsewhere in this report, including public notice and comment, which we view as a baseline legal and democratic requirement.

A. Deliberative Public Engagement in Government Decision-making

The best example of the use of enhanced deliberative tools in federal rulemaking is almost certainly the efforts associated with Regulation Room, which we have already discussed at length.[541] However, the nonprofit world and other governmental bodies have developed a number of other methods to produce enhanced deliberation on policy issues, which could be used to supplement the federal rulemaking process.

One of the most well-known of these methods is the "deliberative polls" pioneered by James Fishkin, the Director of the Center for Deliberative Democracy at Stanford University.[542] These polls are designed "to combine random sampling with deliberation" in an effort to ascertain what the general public would think about a problem if they were fully informed about the relevant issues and had a chance to engage in reasoned deliberation about what should be done.[543] Deliberative polls typically involve the participation of approximately 500 randomly selected citizens who agree to participate in an in depth discussion of a specified topic over the course of two days. According to Fishkin, the entire process "is designed to facilitate informed and balanced discussion," including the provision of carefully prepared briefing materials that provide an initial basis for discussion, random assignment to small groups where trained moderators seek to facilitate respectful and balanced discussion, and the opportunity for participants to pose questions that arise from the small group discussions to policy makers and other experts at larger plenary sessions.[544] Participants are asked to complete a confidential survey that expresses their views on a range of relevant questions both before and after these deliberations, and Fishkin reports that "it is routine to find large and statistically significant changes of opinion over the weekend."[545] The challenges associated with conducting deliberative polls include persuading a sufficient number of citizens to participate, and the extensive resources necessary to provide balanced briefing materials, valid surveys, expert commentators, and trained facilitators. Of course, because the views

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[541] *See supra* Part IX.A.6.

[542] *See generally* JAMES F. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY & PUBLIC CONSULTATION (2009).

[543] *See id.* at 25-26.

[544] *See id.* at 26.

[545] *See id.*

or recommendations produced by deliberative polls are likely to diverge from the views of the general public (precisely because most citizens are not well-informed about the relevant problems and they have not engaged in reasoned deliberation with their neighbors), regulations that are based on recommendations from deliberative polls may not receive enhanced support from the broader public.[546]

Citizen advisory committees provide another example of a tool that could be used to provide enhanced deliberation to supplement the traditional notice-and-comment rulemaking process. Building on the success of deliberative polling and similar models, Reeve Bull has recommended that agencies consider establishing federal advisory committees composed of demographically diverse and otherwise balanced groups of ordinary citizens to provide federal agencies with thoughtful advice on their potential rulemaking options in appropriate circumstances.[547] While the ideal size of these committees would depend on the situation, Bull recommends that they should generally include roughly a few dozen members to ensure a sufficient variety of perspectives without becoming unwieldy.[548] Once the citizen advisory committee was formed, the agency would provide its members with balanced briefing materials on the nature of the problem and the range of potential solutions, and would provide them with an opportunity to engage in reasoned deliberation on the best course of action over the following weeks or months. At the close of the deliberations, the committee would provide the agency with advice on the best course of action under the circumstances (either by reaching consensus or pursuant to a majority vote), and the agency could consider this advice in deciding how to proceed.[549] Bull points out that some of the financial and logistical challenges associated with these efforts could be mitigated by conducting at least some of the committee's proceedings online,[550] but he acknowledges that agencies will likely only devote the resources necessary to establish and use such committees for especially important decisions where informed public opinion is likely to be useful.[551]

Carolyn Lukensmeyer's and Lars Hasselblad Torres's report, *Public Deliberation: A Manager's Guide to Citizen Engagement*, provides a wealth of information about different methods of enhanced deliberation that could be used by federal agencies during the rulemaking process.[552] These include the Jefferson Center's "citizen juries," "citizen assemblies" of the kind used in British Columbia to

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[546] *See id.* at 28.

[547] *See* Bull, *Making the Administrative State "Safe"*, *supra* note 13, at 640-47; *see also* John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 926-31 (1998) (describing and endorsing the use of citizen advisory boards to provide advice on cleaning up the environment at particular sites).

[548] *See* Bull, *Making the Administrative State "Safe"*, *supra* note 13, at 641-42.

[549] *See id.* at 644.

[550] *See id.* at 644-45.

[551] *See id.* at 647.

[552] *See* LUKENSMEYER & TORRES, *supra* note 141, at 19, 24-32.

make recommendations on the best ways to reform the electoral process, the 21st Century Town Meetings hosted by AmericaSpeaks,[553] and the "participatory budgeting" process that was pioneered in Porto Alegre, Brazil, and is currently being used in a number of major cities.[554] Lukensmeyer and Torres explain that all of these methods of enhanced deliberation:

- "use 'balanced' or 'neutral' background materials;"
- "are structured around small group dialogue;"
- emphasize "learning through exploration of competing perspectives on an issue;"
- expect new knowledge "to inform individual and group recommendations on the issue or problem at hand;" and
- issue "findings" from the exercise in a final report "made available to community members and leaders."[555]

Lukensmeyer and Torres point out that while most of these methods for facilitating enhanced deliberation have an established track record, the federal government has rarely used methods of this nature to inform its rulemaking decisions. They contend that "[t]he critical next step in the evolution of deliberative democracy in administrative decision making will be to experiment with, adapt, and institutionalize these techniques" within federal agencies.[556] Such efforts would reflect an emerging new role for federal agencies as "*convener* of the public"[557]—or as "steward of an infrastructure of engagement."[558]

While this vision may seem like a substantial departure from existing practice, it is important to emphasize that the foregoing tools are merely supplemental techniques for potentially enhancing public engagement in a limited subset of rulemakings in which the benefits justify the costs. Moreover, some federal agencies already use relatively simple methods of public engagement that could involve "enhanced deliberation" in some situations. For example, federal advisory committees regularly provide advice to agencies on rulemaking-related issues. Moreover, agencies sometimes engage in negotiated rulemaking with a balanced group of interested stakeholders. Both of these methods of public engagement have the potential to involve the type of reasoned deliberation that is under consideration here. The

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[553] *See, e.g.*, *id.* at 24-25.

[554] *See generally* HOLLIE RUSSON GILMAN, DEMOCRACY REINVENTED: PARTICIPATORY BUDGETING AND CIVIC INNOVATION IN AMERICA (2016).

[555] LUKENSMEYER & TORRES, *supra* note 141, at 25.

[556] *Id.*

[557] *Id.* at 12.

[558] *Id.* at 35.

question, once again, is *when* to use these methods of public engagement and *how* to execute them in the appropriate circumstances.

B. In-person Versus Online Deliberative Exercises

A major question agencies must answer when considering the use of enhanced deliberative methods is whether to conduct the proceedings online, in person, or both.[559] Regulation Room, once again, is a prime example of an enhanced deliberative tool that was conducted entirely online. Most of the other methods of enhanced deliberation discussed above have traditionally been conducted in person. Fishkin has, however, recently conducted deliberative polling online,[560] and ACUS has recommended that agencies consider holding asynchronous virtual meetings of their federal advisory committees.[561] Nearly any deliberative method can be conducted at least partly online based on existing technology,[562] and the best practice may generally be to design some sort of "hybrid" deliberative process that includes both in person meetings and virtual discussion. Participatory budgeting in various major cities has been cited as an example of a process that has made particularly effective use of hybrid deliberation of this nature.[563]

The primary advantages of meeting in person include an enhanced ability to establish trust and build relationships, to facilitate more respectful and empathetic interactions, and to ensure participants have adequate knowledge about the relevant issues to participate effectively—all of which are essential for approximating the deliberative ideal. In particular, it is easier to overcome the capacity and information barriers to effective public participation in rulemaking identified in Part III.B in person than when the unlimited distractions of the Internet are just a click away. The primary disadvantage of in-person meetings mirrors the primary advantage of their virtual counterparts—virtual meetings can save substantial resources in the time and money that is required to attend meetings in person. Moreover, virtual deliberation can produce more thoughtful or well-considered responses *if* the meetings are "asynchronous," because participants can spend more time thinking about a matter and providing a more polished response. Finally, although the anonymity that is provided or enhanced by virtual communications can severely undermine the tenor of those discussions, anonymity does provide the advantage of minimizing potential

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[559] For a useful discussion of efforts to conduct deliberation online, see generally ONLINE DELIBERATION: DESIGN, RESEARCH, AND PRACTICE (Todd Davies & Seeta Peña Gangadharan eds., 2009).

[560] *See id.* at 39 (discussing this effort).

[561] *See* Admin. Conf. of the U.S., Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, 77 Fed. Reg. 2,257, 2,261, 2,263 (Jan. 17, 2012).

[562] For a useful overview of "online deliberation," see LUKENSMEYER & TORRES, *supra* note 141, at 33-43.

[563] *See generally* GILMAN, *supra* note 554.

distortions in evaluating the persuasiveness of a message based on the identity or personal characteristics of the speaker.

The primary perceived advantage of online deliberative exercises—their accessibility, however, may be overstated and create its own challenges. When online deliberative platforms are open to anyone and thus rely on "voluntary" participation, it is substantially more difficult to obtain balanced or representative feedback or advice.[564] First, merely placing exercises online does little to overcome the motivational barriers to greater public engagement in rulemaking identified above in Part III.B. As Farina and Newhart explain, Regulation Room had to engage in extensive targeted outreach directed toward missing stakeholders to obtain meaningful participation in the online platform.[565] Second, interest groups and advocacy organizations can orchestrate "mass comment" campaigns in this setting (or even prompt fraudulent comments), which raises further concerns about the representativeness of public comments (or even their authenticity), and tend not to provide information that is especially useful to agencies.[566] Agencies may therefore have valid concerns that the "quantity" of feedback produced by online deliberation will routinely exceed its "quality."[567]

Deliberative exercises conducted in person typically seek to overcome these difficulties by recruiting targeted stakeholders or a balanced group (or even a stratified random sample) of ordinary citizens, providing them with balanced and objective briefing materials, using trained facilitators to moderate the discussions, and providing access to government officials or other experts to answer any questions that arise during the proceedings. While it can still be challenging to achieve a deliberative ideal, enhanced deliberative exercises of this nature are certainly capable of generating useful advice for policy makers.

The problem is that producing this advice using in-person exercises is undeniably time-consuming and expensive, and requires careful planning by experts with experience in conducting such events. Accordingly, the use of such enhanced deliberative exercises by federal agencies should be limited to situations where the potential benefits are likely to exceed the costs. The next section suggests some factors that agencies should consider when making this decision, as well as recommendations on how to design these exercises.

C. Best Practices for Enhanced Deliberative Exercises

Agencies must give careful consideration to when enhanced deliberative exercises of this nature are most likely to be worth the effort. The scholars who designed and operated Regulation Room once again provide useful advice for thinking about this question. Their first major recommendation on this score is for

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[564] *See, e.g.*, Fung, *Varities of Participation*, *supra* note 143, at 67.

[565] *Cf.* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 21-26.

[566] *But cf.* Mendelson, *Torrents of E-mail*, *supra* note 13, at 1,375.

[567] *See* LUKENSMEYER & TORRES, *supra* note 141, at 35-36.

agencies to focus their efforts "on rulemakings in which (a) new participants are likely to have useful information and (b) it is feasible to provide the participation support necessary to elicit this information from them."[568] Farina and Newhart suggest that agencies should carefully consider whether specific groups of missing stakeholders or unaffiliated experts could provide added value to a particular rulemaking effort, and they suggest that agencies should only actively solicit participation by ordinary citizens if they are confident that those efforts will produce information that is useful to the agency.[569] Farina and Newhart also recommend giving careful consideration to the "information load" associated with efforts to generate useful input from novice participants, by which they mean the effort required to provide sufficient information to rulemaking newcomers to enable them to participate effectively.[570] The lower the information load, the more likely it is that efforts to facilitate enhanced deliberation will prove worthwhile, and vice versa. In a recommendation that we regard as crucial for these purposes, Farina and Newhart suggest that agencies consider the possibility of using enhanced deliberative methods "selectively—that is, of targeting only certain types of potential new participants or only certain issues in the rulemaking."[571] We strongly agree that enhanced deliberative efforts will generally be most worthwhile, regardless of the precise method used, if they are carefully targeted at designated groups of participants and focused on relatively specific questions, issues, or problems.

Indeed, Farina's and Newhart's proposed conceptual framework is generally transferable to thinking about when other types of enhanced deliberation would be worthwhile. Nonetheless, there are also a few caveats or other factors to keep in mind. First, as explained above, efforts to facilitate enhanced deliberation will generally be more efficient and productive when they are limited to a carefully selected and manageably sized group, as is the case with all of the traditional "in person" methods for producing reasoned deliberation. While such exercises could be conducted solely with missing stakeholders or unaffiliated experts, ordinary citizens could also make useful contributions to deliberative exercises of this nature in certain circumstances.

Second, agencies plainly need to consider which types of rulemaking proceedings are appropriate for enhanced deliberation. While Farina and Newhart correctly suggest that these exercises will be most useful when agencies are confronted with information gaps that could likely be filled by missing stakeholders, unaffiliated experts, or ordinary citizens, there are certainly other variables to consider. For example, enhanced deliberative exercises will generally be most useful when rulemaking proceedings are more rather than less important, more rather than less politically salient, and more rather than less likely to turn on the resolution of conflicting public values.

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[568] FARINA & NEWHART, IBM CENTER, *supra* note 22, at 38.

[569] *See id.*

[570] *See id.* at 39.

[571] *Id.*

Third, we think that it is vital for agencies to give careful consideration to whether efforts to facilitate enhanced deliberation makes sense *at each stage of the rulemaking process*, and then to choose the appropriate method or methods of producing enhanced deliberation at each respective stage. As we have suggested elsewhere in this report, efforts to facilitate public engagement in rulemaking will often make the most sense at the agenda setting stage or during rule development, and this is particularly true of enhanced deliberative methods because ordinary citizens (and, to a lesser extent, missing stakeholders) will typically be most adept at weighing in on the proper ordering of the agency's priorities and helping determine which general regulatory directions will best promote the public good, as opposed to providing useful input on the relatively detailed legal, technical, or empirical questions the agency will be required to resolve later in the rulemaking process.

Once an agency decides to conduct an enhanced deliberative exercise, it must also think carefully about its design. According to Lukensmeyer and Torres, enhanced deliberative exercises should:

- Provide accessible information to citizens about the issues and choices involved, so that they can articulate informed opinions.
- Offer an unbiased framing of the policy issue in a way that allows the public to struggle with the same difficult choices facing decision makers.
- Involve a demographically representative group of citizens reflective of the affected community.
- Facilitate high-quality discussion that ensures all voices are heard.
- Produce information that clearly highlights the public's shared priorities.
- Achieve commitment from decision makers to engage in the process and use the results in the policy process.
- Support ongoing involvement by the public on the issue, including feedback, monitoring, and evaluation.[572]

While enhanced deliberative exercises that adhere to these principles have traditionally been composed of a representative cross-section of the community, we believe that agencies might also find it useful in some situations to experiment with efforts to seek input from deliberative bodies constructed primarily or even exclusively of missing stakeholders or unaffiliated experts, particularly when agencies seek the type of situated knowledge or expertise that these groups possess.

Finally, agencies should also consider whether to conduct enhanced deliberative exercises themselves or hire a facilitator or contractor to manage such efforts. The practice of deliberative democracy has produced a cottage industry of consultants

[572] LUKENSMEYER & TORRES, *supra* note 141, at 44.

with expertise in planning and implementing the available techniques. Given the effort and potential challenges involved in running these exercises effectively, it will often make sense for agencies to hire an experienced consultant to carry out this work in cooperation with agency officials, and to produce a report that summarizes the findings and recommendations of the deliberative body when the process has concluded. This is how Regulation Room was conducted, and the cooperating agencies told us they would not have had the resources or expertise to replicate this process on their own. This approach also provides advantages associated with conducting deliberative exercises separately from the agency's traditional rulemaking process, while simultaneously allowing the agency to benefit from the views and perspectives of the deliberative body. The primary disadvantage of hiring a consultant to conduct enhanced deliberation is obviously the likelihood of additional costs—and that is, of course, a major factor that federal agencies with limited (and diminishing) resources routinely need to consider.

Notice-and-comment rulemaking is widely understood to have the potential to serve as an ideal deliberative process.[573] Yet it is widely recognized that regulated entities and other organized groups are disproportionately represented in this process.[574] Deliberative democratic theory does not require participation by every individual with a potential stake in the agency's decision. It does require, however, that agencies give adequate consideration to all of the relevant interests and perspectives, and provide reasoned explanations for their decisions that could reasonably be accepted by citizens with fundamentally competing views. A prerequisite to achieving this deliberative ideal, then, is for all of the relevant interests and perspectives to be forcefully articulated during the decision-making process and given careful consideration by agency officials. The rulemaking process falls short of this ideal if some relevant interests or perspectives are missing or ignored. This suggests the fundamental importance of enhanced efforts by agencies to involve missing stakeholders, unaffiliated experts, and even ordinary citizens at some stage of the rulemaking process in appropriate circumstances.

We have already suggested some potential ways to improve the notice-and-comment rulemaking process to further this goal. When those efforts are insufficient, however, agencies should consider undertaking additional efforts to facilitate enhanced deliberation to supplement the traditional legislative rulemaking process and thereby remedy those deficiencies. The briefing materials that are prepared for enhanced deliberative exercises, and the recommendations and other feedback that are provided by deliberative bodies, can also be provided to other interested members of the public as a basis for further deliberation and commentary. Thus, enhanced

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[573] *See* DAVIS, *supra* note 2, at 65-66 ("Rule-making procedure which allows all interested parties to participate is democratic procedure."); KERWIN & FURLONG, *supra* note 2, at 31 ("Rulemaking adds opportunities for and dimensions to public participation that are rarely present in the deliberations of Congress or other legislatures.").

[574] *See* Johnson, *supra* note 6, at 78; Walters, *supra* note 6, at 4.

deliberative exercises will typically produce additional material that can also be used to further improve the value and legitimacy of notice-and-comment rulemaking.

XII. THE IMPORTANCE OF PLANNING AND OUTREACH

It is widely recognized that early planning for public engagement efforts is essential.[575] Agencies should therefore develop general policies for public engagement in rulemaking and establish mechanisms to ensure that those policies are consistently followed. Agencies should also develop specific plans for public engagement for each rulemaking initiative they undertake or seriously consider. These plans should include internal and external situation assessments, and consider (1) *why* the agency wants to engage with the public, (2) *who* the agency is trying to reach, (3) *what type of information* the agency is seeking, (4) *how* this information is likely to be obtained, (5) *when* these efforts should occur, and (6) what the agency *will do* with the information. These public engagement plans should also address issues of outreach and communication.

A. General Public Engagement Policies

Agencies should adopt general public engagement policies that express their support for public engagement efforts and provide a framework for involving the public in particular rulemaking initiatives. EPA's Public Involvement Policy is one of the best examples of this practice.[576] EPA has explained that the Policy's "overall goal is for excellent public involvement to become an integral part of EPA's culture, thus supporting more effective Agency actions."[577] The Policy provides guidance to agency managers and staff on specific steps that should be followed to promote effective public engagement, and provides information about other resources that are available to facilitate those efforts. The Policy's seven steps for effective public engagement are as follows:

1. Plan and budget for public involvement activities;

2. Identify the interested and affected publics;

3. Consider providing technical/financial assistance to support public involvement;

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[575] *See, e.g.*, CREIGHTON, *supra* note 220, at 27 ("Public participation that isn't an integrated part of the decision-making process is a waste of time for both the organization and the public."); EPA, BETTER DECISIONS MANUAL, *supra* note 278, at 5 ("Good stakeholder involvement processes should be planned early enough to allow both [agency] staff and the stakeholders to obtain the necessary resources and data to interact effectively.").

[576] *See* EPA PUBLIC INVOLVEMENT POLICY, *supra* note 35.

[577] ENVTL. PROT. AGENCY, INTRODUCING EPA'S PUBLIC INVOLVEMENT POLICY 2 (2003) (describing EPA's public involvement policy).

4. Provide information and conduct outreach;

5. Conduct public consultation and involvement;

6. Review and use input and provide feedback; and

7. Evaluate public involvement activities.[578]

The Policy explains the underlying goal of each of these steps, and provides recommendations for how to achieve those goals.[579] The Policy seeks to "support and encourage public involvement excellence" by providing well-publicized training opportunities, fostering "public involvement networks" within the agency "for sharing information and experiences," and providing tools for evaluating the success of the agency's public engagement efforts.[580]

The National Park Service has also adopted a strong Civic Engagement Policy pursuant to a pair of Director's Orders.[581] The purpose of the orders is to set forth the agency's "commitment to civic engagement, and to have all National Park Service units and offices embrace civic engagement as the essential foundation and framework for creating plans and developing programs."[582] The latest version of the order articulates the Service's philosophical commitment to civic engagement, and states that "[t]he public has a right to know about the challenges that confront the NPS and to participate in the process by which we find solutions to those challenges."[583] The order wisely emphasizes that the relevant public includes external stakeholders as well as agency employees who must be given "an opportunity for meaningful involvement during the decision-making process" to utilize their special knowledge and expertise.[584] After discussing the document's scope and providing definitions, the order recognizes that "[t]he public will have a greater appreciation of, and support for, our management if they recognize that we seek, and are receptive to, their contributions to and involvement in the important decisions that are made."[585] It proceeds to set forth an extensive list of policies and standards to achieve those ends.[586] While those policies and standards are worthy of reading (and generally emulating) in their entirety, several of NPS's adopted policies focus directly on the importance of planning and therefore merit special attention here:

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[578] *Id.* at 3-5.

[579] *See id.* at 2-5.

[580] *Id.* at 5-6.

[581] *See generally* DIRECTOR'S ORDER #75A, *supra* note 35.

[582] *Id.* at 1.

[583] *Id.* at 3.

[584] *Id.* at 4.

[585] *Id.* at 6.

[586] *See id.* at 6-10.

- We will plan in advance and be clear at what stages, and how, we will invite the public to participate in our decision-making processes. It is important to make a clear and early decision about the extent of the public's involvement in each project or decision-making process. The extent of the public's role can vary from issue to issue, and at different stages in the process.

- We will plan early for appropriate opportunities for public involvement in our decision-making process when the decisions will lead to actions or policies that may significantly affect or interest them.

- Managers are encouraged to be resourceful and employ a wide variety of methods and techniques to obtain the opinions of individuals and groups.

- On potentially controversial issues, we will be particularly mindful to plan and design public involvement opportunities at the earliest opportunity, and to use specialized techniques . . . to minimize potential for conflict and achieve a solution smoothly. As issues arise, managers should already be familiar with a range of alternative dispute resolution techniques and resources, including the use of facilitators or mediators, to help resolve controversial issues. If a controversy pertains to a rule-making activity (*i.e.*, adopting a regulation), "negotiated rulemaking" should be considered.

- We will call upon individuals with expertise about how to create and manage opportunities for public involvement activities.

- We will develop capacity in public involvement strategies and will encourage Service employees to become knowledgeable about civic engagement and public involvement techniques and principles. Interdisciplinary training materials and opportunities will be developed to help park managers and others who are responsible for public involvement activities understand and apply "best practices."

- We will design public involvement processes that are as open and inclusive as possible so that diverse publics, including those who typically do not participate, have opportunities to share their views, values, and concerns.

- We will maximize the use of computer and Internet technologies to expand public access to information and opportunities to participate.[587]

The order describes the roles and responsibilities of various NPS officials for implementing the order, and significantly provides that the Director and Deputy Directors:

> [w]ill ensure that the Office of Policy coordinates and implements this DO, assists in developing further guidance and training to build

[587] *Id.* at 6-8.

> organizational capacity, and serves as a liaison to the other offices of the Director, the associate and regional directors, the Department [of the Interior], and other federal agencies on civic engagement and public involvement opportunities and issues.[588]

The order closes by stating that NPS will develop tools to evaluate the Service's public engagement efforts and "take the necessary steps to ensure that adequate public involvement processes are developed and implemented."[589] To build the requisite internal capacity, the order states that NPS will, among other things, "[t]rain, devise incentives, and recognize employees for practicing civic engagement and public involvement" and "[p]lan and budget early for public involvement activities."[590]

The most significant challenge or limitation associated with public involvement policies of this nature is the difficulty of ensuring that they are consistently followed or enforced, particularly in administrations that place a lower priority on civic engagement efforts or when agencies face substantial budget cuts. Agencies can, however, make "pre-commitments" to designated public engagement efforts by promulgating rules that at least presumptively require them to take certain action. For example, the Department of Energy has used stakeholder engagement to adopt a "process rule" that sets forth the agency's procedures for promulgating consumer appliance efficiency standards.[591] As the preamble explains, this process rule "provides for greatly enhanced opportunities for public input, improved analytical approaches, and encouragement of consensus-based standards."[592]

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[588] *Id.* at 10-11.

[589] *Id.* at 11.

[590] *Id.* at 12. For additional information about NPS's public engagement efforts, see generally MOLLY RUSSELL, PRINCIPLES OF SUCCESSFUL CIVIC ENGAGEMENT IN THE NATIONAL PARK SERVICE (2011), REBECCA STANFIELD MCCOWN ET AL., NAT'L PARK SERV. CONSERVATION STUDY INST., BEYOND OUTREACH HANDBOOK: A GUIDE TO DESIGNING EFFECTIVE PROGRAMS TO ENGAGE DIVERSE COMMUNITIES (2011), NAT'L PARK SERV. CONSERVATION STUDY INST., LEADING IN A COLLABORATIVE ENVIRONMENT: SIX CASE STUDIES INVOLVING COLLABORATION AND CIVIC ENGAGEMENT (Jacquelyn L. Tuxill & Nora J. Mitchell eds., 2010), and MICHAEL DUFFIN ET AL., NAT'L PARK SERV. CONSERVATION INST., ENGAGING YOUNG ADULTS IN A SUSTAINABLE FUTURE: STRATEGIES FOR NATIONAL PARKS AND OTHER SPECIAL PLACES (2009).

[591] *See generally* Energy Conservation Program for Consumer Products: Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 61 Fed. Reg. 36,974 (U.S. Dep't of Energy July 15, 1996) (to be codified at 10 C.F.R. pt. 430); Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 82 Fed. Reg. 59,992 (U.S. Dep't of Energy Dec. 18, 2017) (to be codified at 10 C.F.R. 430) (issuing an RFI seeking comments on ways to improve DoE's process rule and noticing a public meeting on this topic).

[592] Energy Conservation Program for Consumer Products: Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 61 Fed. Reg. at 36,974.

DOE's process rule includes some valuable features that go beyond the bare requirements of notice-and-comment rulemaking, particularly during the agenda setting and rule development stages. The process rule has four steps, beginning with "a screening analysis" that identifies "the product categories and technologically feasible design options and then narrow[s] the range of design options being considered for the development of candidate standard levels."[593] The process rule states that DOE "will seek expert input to conduct the necessary analyses," and consider, "wherever feasible, data, information and analyses received from stakeholders."[594] To this end, DOE regularly issues RFIs and holds public workshops to gather information and solicit feedback on the agency's preliminary analyses of potential design options. The agency claims that,

> [t]his emphasis on the early stages of the process is designed to enable interested parties and DOE to engage in a more productive, informative interaction on standards issues prior to the publication of the [ANPRM], so that the standards development process starts with the best possible foundation of common understanding.[595]

After completing this screening analysis, DOE will typically make a preliminary decision and issue an ANPRM to solicit public comments as the second step of the process. The process rule emphasizes, however, that DOE "will provide interested parties with opportunities to provide data, recommendations and other comments" throughout the process, and the agency "will share with the public both analyses and preliminary decisions to inform interested parties as to the progress of standards development" and "enable the public to provide informed input to DOE at each step of the process."[596] DOE established an Advisory Committee on Appliance Energy Efficiency Standards in conjunction with the process rule, and the agency regularly uses this committee to "provide an official, organized forum for interested parties to provide the Department with advice, information, and recommendations" throughout the rulemaking process.[597] Moreover, DOE recognized that "consumers have rarely participated directly in standards development," and therefore committed to "strengthen its efforts to inform and involve consumers and consumer representatives in the process of developing standards."[598] The process rule emphasizes that DOE "encourages efforts to develop consensus among interested parties on proposals for new or revised standards as an effective mechanism for balancing the economic, energy, and environmental interests affected by standards."[599] Accordingly, the rule provides that "notwithstanding any other policy on selection of proposed standards, a

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[593] *Id.* at 36,976.

[594] *Id.*

[595] *Id.*

[596] *Id.* at 36,977.

[597] *Id.* at 36,979-80.

[598] *Id.* at 36,978.

[599] *Id.* at 36,977.

consensus recommendation on an updated efficiency level submitted by a group that represents all interested parties will be proposed by the Department if it is determined to meet the statutory criteria."[600]

If DOE ultimately decides to promulgate a proposed rule, it issues a notice of proposed rulemaking (step 3), and provides the public with an opportunity to comment before issuing its final rule (step 4). DOE is required by statute to hold a public hearing during the NPRM stage,[601] and agency officials told us that DOE routinely holds public hearings at each stage of the rulemaking process. These meetings are "run formally" and feature a facilitator. Agency officials give presentations before being "examined" or "grilled" by interested members of the public. We were told that there is typically extensive public participation at these hearings, and everything that is said is included in the rulemaking record. The public hearings are accessible via webinar, so that interested persons can log on and participate in real time from a remote location.

We believe that other agencies should consider promulgating process rules of this nature, and that it would also be worthwhile for agencies to consider making binding pre-commitments to other more extensive public engagement efforts in appropriate circumstances. Agencies could, for example, promulgate rules that commit them to developing specific plans for public engagement for each rulemaking initiative they undertake or seriously consider. As explained in the following section, we think that agencies should regularly adopt specific plans for public engagement for each of their rulemaking initiatives regardless of whether they are compelled by process rules to do so.

B. Specific Plans for Public Engagement for Each Rulemaking Initiative

Early and thoughtful planning for public engagement in rulemaking is crucial to its success.[602] There are good resources that provide detailed guidance on the best ways to plan for public engagement.[603] These resources uniformly recognize that there is no single approach to public engagement that will work for every type of decision. There are, however, systematic ways to think about whether and how to conduct public engagement for any particular decision.[604] Thus, these resources

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[600] *Id.*

[601] *See* 42 U.S.C. § 6393(a)(3) (2012).

[602] *See* EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 17 ("The success of a public participation program is largely determined by how thoroughly and thoughtfully it is planned.").

[603] *See, e.g.*, CREIGHTON, *supra* note 220, at 27-87; EPA, BETTER DECISIONS MANUAL, *supra* note 278, at 19-63; EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 8-25; DOUGLAS MISKOWIAK, CTR. FOR LAND USE EDUC., CRAFTING AN EFFECTIVE PLAN FOR PUBLIC PARTICIPATION (2004).

[604] *See* CREIGHTON, *supra* note 220, at 27 ("There is no such thing as a one-size-fits-all public participation plan. But there is a systematic way of thinking through the issues that will help produce a successful plan that fits the unique requirements of a particular decision

typically divide the planning process into various stages, and identify the types of questions that one should address at each stage. They also provide sample worksheets that one could use to conduct the recommended analyses.

James Creighton, the founding president of IAP2, suggests that planning for public participation involves three distinct stages.[605] The first stage, *decision analysis*, involves clarifying the decision at issue, specifying the stages of the decision-making process and establishing a schedule, and deciding "whether public participation is needed and for what purpose."[606] The second stage, *process planning*, involves establishing the goals of public participation at each stage of the decision-making process, identifying the relevant internal and external stakeholders, selecting the modes of public engagement that will be used at each stage, and developing an integrated public engagement plan.[607] The third stage, *implementation planning*, involves working out the logistics necessary to conduct the selected forms of public participation effectively.[608] Creighton emphasizes that,

> [b]efore we ask anyone to spend their time participating in our decision-making processes, we owe it to them to ensure that we are offering them the opportunity to participate in a manner and at a time that gives them the greatest opportunity to have a useful influence on the decisions being made.[609]

He points out that during the decision analysis stage, it is important to develop a broad consensus within the organization on the nature of the decision and the extent to which public participation is necessary.[610] It is also important to identify any constraints that could undermine the feasibility or effectiveness of the agency's public engagement efforts.[611] Public engagement in rulemaking can only succeed if both the agency and interested members of the public are truly committed to the effort.

Similarly, a report prepared by the Center for Land Use Education in collaboration with USDA on "Crafting an Effective Plan for Public Participation," provides a useful outline of what a "model public participation plan" should entail.[612]

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or issue."); *see also* Nash & Walters, *supra* note 218, at 25-28 (suggesting five principles of effective public engagement, including (1) early and frequent efforts to engage the public, (2) fair and neutral treatment of participants, (3) efforts to facilitate a broad range of views and perspectives, (4) the selection of appropriate methods, and (5) a spirit of experimentalism and self-evaluation).

[605] *See* CREIGHTON, *supra* note 220, at 27-28 (summarizing the stages of planning).

[606] *Id.* at 28-44.

[607] *See id.* at 28, 45-77.

[608] *See id.* at 28, 78-83.

[609] *Id.* at 27.

[610] *See id.* at 29.

[611] *See id.* at 41.

[612] *See* MISKOWIAK, *supra* note 603, at 4.

This report recommends providing an introductory section that describes the relevant decision, identifies the intended audience and explains how they should use the public participation plan, and provides "an overarching vision for public participation" for the decision at issue.[613] The bulk of the public participation plan would center on the "categories of information" that are necessary "to craft an effective public participation plan," or what the report calls the "Four Cornerstones of the PPP."[614] These four cornerstones include (1) the purpose cornerstone – "[W]hat the public is involved to do and when", (2) the people cornerstone – who should be involved in those efforts, (3) the methods cornerstone – which modes of public engagement should be used, and (4) the evaluation cornerstone – how will the public engagement efforts be documented and evaluated.[615] After a public participation plan carefully addresses each of these cornerstones, the report recommends that the plan should provide an integrated public engagement strategy "for implementing and evaluating public participation activities" based on this information.[616] The report also explains that the people cornerstone requires a stakeholder analysis that identifies the people or groups that should be targeted for participation based on a careful assessment of who would likely be interested in or affected by the relevant issues,[617] and points out that "planning consultants" can be hired in appropriate circumstances "to provide a full range of technical planning and public participation products and services."[618]

EPA's *Public Participation Toolkit* also includes useful information on planning.[619] The relevant portion of this report begins with a discussion of "situation assessments," which are "conducted for the purpose of understanding the needs and conditions of your project and stakeholder community in order to design an effective public participation process."[620] A situation assessment involves "gathering information to determine the public participation program and techniques that are feasible and most appropriate for the circumstances."[621] The report distinguishes between organized and grassroots stakeholders, and recognizes that "sponsoring agencies often have to be highly proactive in reaching out to and engaging" traditionally absent stakeholders.[622] The report emphasizes that "[i]t is important to identify and seek out the full range of interests and perspectives that are potentially affected by a project and ensure that their voices are heard."[623] To this end, the report details the "key findings" that should result from a situation assessment, the rationale

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[613] *Id.* at 4-5.

[614] *Id.* at 4.

[615] *See id.* at 7.

[616] *Id.* at 4.

[617] *See id.* at 12.

[618] *Id.* at 13.

[619] *See* EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 8-25.

[620] *Id.* at 8.

[621] *Id.*

[622] *Id.*

[623] *Id.*

for engaging in this exercise, and the manner in which it should be conducted.[624] Situation assessments are generally conducted in two phases, including (1) *an internal assessment*, which is intended "to clarify the problem or opportunity, the decision to be made, available resources and commitment for public participation, and the sponsor agency's expectations about the appropriate level of public participation," and (2) *an external assessment*, which is intended "to identify the full range of external stakeholders that should be engaged and to learn from the public to understand how stakeholders perceive the situation and decision to be made."[625] After discussing how to conduct a situation assessment, the report explains how the agency should use the results of its analysis.[626] This includes an agency's selection of the appropriate level of public participation for the decision based on the spectrum provided by IAP2.[627]

The *Public Participation Toolkit* breaks the process of public participation planning into five steps.[628] The first step involves organizing for public participation.[629] This step includes ensuring that meaningful public participation is possible and that the agency is committed to the requisite efforts.[630] The report wisely recognizes that "[i]f there is little or no room for public influence over the decision, then public participation is not a reasonable option for your project."[631] This initial step also includes identifying and securing the necessary resources for creating and implementing the public engagement plan, and identifying "where public input is desired and possible."[632] The report emphasizes the importance of clearly specifying "the specific issues and questions where public input is desired and where the public can have influence," and notes that "[t]he more clearly you articulate the areas for input, the more meaningful the ultimate input will be."[633] The second step of public participation planning involves identifying and getting to know the relevant stakeholders.[634] As discussed above, the report emphasizes the importance of conducting a situation assessment "to understand who might be impacted, who should be involved, and what concerns they bring to the process," and claims that it is vital to "identify all of the viewpoints and interests that must be heard to create a fully

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[624] *See id.* at 8-11.

[625] *Id.* at 9.

[626] *See id.* at 11.

[627] *See* LUKENSMEYER & TORRES, *supra* note 141, at 7 (describing IAP2's spectrum of public participation).

[628] *See* EPA, PUBLIC PARTICIPATION TOOLKIT, *supra* note 221, at 17.

[629] *See id*. at 17-18.

[630] *See id.*

[631] *Id.* at 17.

[632] *Id.* at 18.

[633] *Id.*

[634] *See id.* at 19.

participatory process."[635] When this situation assessment is completed, the agency should have produced a comprehensive list of stakeholders that will provide the foundation for its outreach efforts and ensure that the agency is "reaching the full range of community interests throughout the project."[636] The report also recommends building relationships with stakeholders to develop an understanding of their views and perspectives on the project. It suggests that the best way to achieve this goal is to conduct interviews during the project planning stage with a broad range of stakeholders who are representative of the competing interests at stake.[637] The third step of the planning process involves selecting the appropriate levels of public participation for the relevant decisions.[638] The fourth step involves "integrat[ing] [p]ublic [p]articipation in the [d]ecision [p]rocess" by identifying, among other things, the key stages and relevant timeline of the decision-making process and precisely when public input will be sought and used.[639] The final step in the planning process is to select the appropriate modes of public participation to use at each of the respective stages.[640]

EPA's Conflict Prevention and Resolution Center has also produced a manual entitled "Better Decisions through Consultation and Collaboration" that provides detailed advice on designing and implementing public engagement processes.[641] The *Better Decisions* manual breaks the process of "preparing for involving stakeholders" into five stages.[642] The first stage involves conducting an internal situation assessment, which includes an analysis of the precise nature of the decision facing the agency, the agency's goals and concerns, and an assessment of how the decision fits within the agency's broader agenda. At this stage, the agency should make a preliminary determination of what level of stakeholder involvement seems most appropriate for the decision at issue. The manual points out that agency management and staff from other offices are important "internal stakeholders," and recommends integrating them into the decision-making process through early involvement, obtaining their buy-in along the way, and keeping them engaged throughout the rulemaking process.[643] The second stage involves conducting an external situation assessment, which is intended to secure input and advice from stakeholders outside

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[635] *Id.*

[636] *Id.* at 20.

[637] *See id.*

[638] *See id.*

[639] *See id.* at 24.

[640] *See id.* at 25.

[641] *See* EPA, BETTER DECISIONS MANUAL, *supra* note 278, at 1 ("This document is a resource guide on public involvement best practices and strategies for EPA staff who are tasked with designing and/or implementing public involvement processes for various EPA activities.").

[642] *See id.* at 17 (providing a concise summary of the five stages).

[643] *See id.* at 21-22.

the agency about the proposed public engagement process.[644] The primary components of the external situation assessment include "identifying stakeholders, interviewing representatives of affected interests, identifying issues to discuss in a stakeholder involvement process, assessing the willingness of stakeholders to participate, projecting likely outcomes, and recommending a detailed stakeholder involvement process."[645] The chapter on external situation assessments provides helpful information on when to begin this aspect of the planning process, when to use a neutral convener, and how to identify potentially interested stakeholders, along with detailed advice on how to conduct the external assessment process.[646] When agencies use a convener, this person should prepare a report with findings and recommendations for the design of the public engagement process, which the agency can use to finalize its public engagement plan.[647]

Once the internal and external situation assessments have been completed, the third stage of planning for public engagement involves designing the details of the process.[648] As indicated above, the agency and its facilitator must consider (1) *why* the agency wants to engage with the public, (2) *who* the agency is trying to reach, (3) *what type of information* the agency is seeking, (4) *how* this information is likely to be obtained, (5) *when* these efforts should occur, and (6) what the agency *will do* with the information.[649] The fourth stage of the process involves conducting the public engagement,[650] and the final stage of the process involves "benefitting from the results."[651] The *Better Decisions* manual emphasizes the importance of incorporating the results of public engagement efforts into the agency's decision and providing meaningful feedback to participants regarding how their input influenced the agency decision.[652] Agencies should also learn from their experiences with public engagement efforts, and "tell their stories" so that others can learn from their efforts and the best practices for public engagement in rulemaking will continue to emerge, improve, and evolve.[653]

Based on a review of the foregoing resources, it is striking how much time and effort is required to create and implement an effective public engagement plan. We are confident, however, that careful planning is essential to effective public engagement, and that making this investment in the rulemaking context will routinely

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[644] *See id.* at 29.

[645] *Id.* at 17.

[646] *See id.* at 30-37.

[647] *See id.* at 37-39.

[648] *See id.* at 43.

[649] *Cf. id.* at 17 (designing the process "includes the who, what, when, and how").

[650] *See id.* at 67.

[651] *Id.* at 75.

[652] *See id.* at 75-79. *See also supra* Part VII.F (discussing the importance of providing feedback and explaining how this can be done).

[653] *See* EPA, BETTER DECISIONS MANUAL, *supra* note 278, at 79-81.

be worth the effort. Accordingly, we recommend that agencies develop general policies for public engagement in rulemaking and establish mechanisms to ensure that those policies are consistently followed. In this regard, agencies should consider adopting "process rules" that require them to consider conducting certain public engagement efforts for each rulemaking initiative they undertake or seriously consider, and provide reasons or "good cause" when they decide to dispense with these procedures. Such process rules could include, for example, provisions requiring agencies to issue RFIs and conduct listening sessions early in the rule development process. Those process rules could also require agencies to consult with federal advisory committees at various stages of the rulemaking process, to hold public meetings in appropriate situations, and to issue ANPRMs on a regular basis. Perhaps most importantly, we recommend that agencies should develop specific plans for public engagement for each rulemaking initiative they undertake or seriously consider. Agencies should seriously consider hiring neutral conveners or facilitators to carry out these planning efforts. These public engagement plans should include internal and external situation assessments and address (1) *why* the agency wants to engage with the public, (2) *who* the agency is trying to reach, (3) *what type of information* the agency is seeking, (4) *how* this information is likely to be obtained, (5) *when* these efforts should occur, and (6) what the agency *will do* with the information.

There are also a few simple structural reforms that would likely improve these efforts to facilitate planning for public engagement in rulemaking. First, agencies could assign a public engagement specialist or advocate to each rulemaking team to ensure that these efforts are taken seriously. Second, agencies could provide advance notice of public engagement opportunities in their *Regulatory Plans* and the *Unified Agenda* whenever possible. They could also routinely provide more detailed information and as much advance notice as possible regarding those opportunities on agency websites and through other communications with stakeholders. Finally, agencies could establish units of public engagement experts (or at least employees who have been trained in these processes), which could be available as a resource to help rulemaking teams plan their public engagement efforts. Indeed, we think that it may be more efficient and effective for Congress to establish and fund a new federal agency or division of an existing agency that is specifically responsible for helping other agencies plan their public engagement efforts. As explained further below, this is conceivably a role that could be provided by ACUS, if it were provided with the funding and personnel necessary to perform this function effectively.

C. Outreach and Communication

Technological advances have not yet revolutionized public engagement with rulemaking and there are still many challenges to overcome. One of the most significant challenges is for agencies to identify missing stakeholders with situated knowledge of the subject of regulation, and to persuade them to participate in the rulemaking process in beneficial ways. This requires both careful advance planning and effective outreach strategies. As explained below, we think this is perhaps *the area* where technological advances could potentially have the greatest payoff.

EPA's *Better Decisions* manual provides a list of useful "suggestions for finding stakeholders."[654] For example, it recommends checking the dockets from prior versions of a proposed rule or related policies to identify interested parties, contacting officials from relevant offices throughout the agency for recommendations, consulting directories of public interest groups and trade associations, posting notices on the agency's website and in the *Federal Register*, providing press releases or placing advertisements in trade journals and other relevant publications, and "[s]earch[ing] the Internet."[655] While these are plainly good ideas that should routinely be followed, they are most likely to bring rulemaking proceedings and other opportunities to participate to the attention of relatively sophisticated parties who are already known by the agency or pay attention to traditional sources of information about agency activities. Agencies will likely need to pursue other more creative outreach efforts to recruit missing stakeholders, and those efforts are the primary focus of the remainder of this section. In any event, we agree with the manual's authors that agencies can "stop searching for stakeholders" when they are "confident" they "have discovered all the sides of the issue and all the major players."[656] Agencies "don't have to find everyone, just representatives of the different points of view."[657]

Cynthia Farina and her colleagues have also made useful suggestions for conducting effective outreach, focusing in particular on efforts to involve missing stakeholders based on their experiences with Regulation Room.[658] The goals of effective outreach are to bring the agency's rulemaking initiative and available opportunities to participate to the attention of members of the targeted audiences and "craft messages that motivate them to respond."[659] This requires, at a minimum, that agencies undertake proactive efforts to engage in communications that are likely to reach their targeted audiences, emphasize in those communications that the agency is seeking public input and clearly explain how to participate, and persuade members of the targeted audiences why they should care and why their participation is worth the effort.[660] These efforts can be achieved, first, by "[d]eveloping an outreach plan," and, second, by "[c]rafting message content that motivates engagement."[661]

The outreach plan should be designed "to put information about the rulemaking in places where members of the targeted participant groups are likely to come across

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[654] *See id.* at 32-33.

[655] *See id.*

[656] *Id.* at 33.

[657] *Id.*

[658] *See* FARINA & NEWHART, IBM CENTER, *supra* note 22, at 21-26. For a more detailed discussion of the outreach efforts associated with Regulation Room, see Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 8, at 393-416.

[659] Farina & Newhart, IBM CENTER, *supra* note 22, at 21.

[660] *See id.* at 21-22.

[661] *Id.* at 22.

it."[662] This means that the plan should be "tailored to the specific rule and to the targeted types of participants."[663] It should include direct communication with targeted stakeholders, where possible, as well as the proactive use of social and conventional media, and efforts to communicate with groups that are likely to pass messages along to members of the targeted audiences. An effective outreach plan requires "significant human effort," and "the barrier of unawareness" that afflicts most missing stakeholders cannot easily be overcome solely by social media or other technological innovations.[664] Thus, Farina and her colleagues explain:

> On Regulation Room, we try to identify places where targeted participants are likely to go for information, including membership associations; subject-matter, recreational, and trade publications; and influential individual opinion leaders such as bloggers and newsletter authors. We reach out to these sources through e-mail, phone, social networking, and other online communication, asking them to publicize information about the rulemaking and how individuals can participate . . . . We also develop a list of keywords and phrases related to the rule that are likely to have impact for the targeted groups. We use these both *proactively* in daily tweeting, Facebook posting, and Facebook, Google, and Twitter ads; and *reactively* by continuously monitoring Internet activity and responding with comments and tweets about the opportunity to participate whenever the rulemaking or its issues appears on blogs, news sites, or Twitter.[665]

While agencies routinely inform the public about their rulemaking activities, effective outreach also requires conscious efforts to develop messages that will persuade members of targeted audiences to participate.[666] In other words, agencies need to "recruit" as well as to "inform." Farina and her colleagues provide three primary suggestions for how this can be done. First, they emphasize the importance of making "the process part of the message" so that whenever and wherever the agency's rulemaking initiative is discussed, citizens are told of their opportunities to participate (and ideally provided with links that either provide more information or directly allow them to provide input).[667] Second, they emphasize the importance of personalizing the impact of the rulemaking initiative by clearly and concretely explaining how it could positively or negatively affect the targeted audiences' interests.[668] Third, they recommend seeking to "[m]otivate organizations to help spread the word" by enlisting organized groups to pass along messages to members or

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[662] *Id.*

[663] *Id.* at 22.

[664] *Id.* at 22-23.

[665] *Id.* at 22 (emphases in original).

[666] *See id.* at 24.

[667] *Id.*

[668] *Id.* at 24.

allies on behalf of the agency whenever possible, and they provide some helpful advice on how to overcome the reluctance that organized groups sometimes exhibit when asked to perform this function.[669]

It is difficult to go beyond these recommendations and provide a more detailed set of uniform best practices for effective outreach for several reasons. First, the best approach to outreach will naturally vary depending on the circumstances, including the identities of the targeted participants, and the most effective ways of reaching them and persuading them to participate. Second, figuring out how to carry out the requisite tasks successfully is itself a specialized form of expertise. Part of what it means to be an expert on civic engagement is being able to conduct effective outreach in any particular situation. Just as one generally needs to be a baseball player to use the right launch angle and hit a home run, one may need training and experience in public engagement efforts to understand how to conduct outreach effectively. Third, the technology that exists to assist with outreach efforts is not always well known or widely available, can be difficult or complicated to understand, may be controversial in some respects, and is constantly evolving. Accordingly, preparing and implementing an effective outreach strategy for any particular rulemaking proceeding will necessarily require access to a certain amount of technical expertise.

We therefore believe that structural or institutional reforms may be necessary to help agencies identify, reach, and involve missing stakeholders in their rulemaking proceedings on a regular basis. The simplest strategy would be for agencies to ensure that their rulemaking teams include an expert on public engagement with experience in conducting outreach that targets missing stakeholders and unaffiliated experts. Agencies could hire outside consultants to perform this task on an as needed basis or hire or provide training for a designated group of agency staff who could be available to perform this function regularly. Agencies would also need to ensure that their rulemaking teams have the technical support necessary to help them use the best available information technology to carry out their outreach activities. If Congress established and funded a new federal agency or division of an existing agency that was responsible for helping other agencies plan their public engagement efforts, this entity could also be responsible for facilitating effective outreach. Alternatively, Congress could establish a new federal agency or division of an existing agency that is charged, more narrowly, with helping other agencies conduct effective outreach regarding their rulemaking activities. For example, New York City established the Public Engagement Unit ("PEU") as a new division of its city government in 2015. PEU includes a team of outreach specialists who are responsible for meeting with otherwise hard-to-reach constituents to ensure they have access to vital city services and build long-term relationships between those constituents and city staff.[670] According to Hollie Russon Gilman and Sabeel Rahman,

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[669] *Id.* at 25-26.

[670] *See* HOLLIE RUSSON GILMAN & K. SABEEL RAHMAN, NEW AM., BUILDING CIVIC CAPACITY IN AN ERA OF DEMOCRATIC CRISIS 13 (2017).

> PEU serves as an interface through which residents engage with local government to better enable city agencies to identify and resolve individual cases, as well as large community issues. PEU works across agencies to build capacity among outreach teams and is implementing new outreach tools, technology, and best practices to integrate an accessible, door-to-door community engagement approach throughout the city. These tools support strong partnerships with city agencies to help maximize outreach for new services and engage New Yorkers.[671]

Regardless of precisely who designs the outreach, there is little doubt that information communication technologies will play an increasingly prominent role. Beth Simone Noveck, who served as the first United States Deputy Chief Technology Officer and director of the White House Open Government Initiative under President Obama, has written extensively about the emerging possibilities.[672] Noveck recognizes that open calls for participation have severe limitations, and that a common challenge for conducting effective outreach is "the lack of clear, cost-effective, and reliable ways to find those with the right expertise, insights, information, and innovative solutions."[673] She therefore emphasizes the importance of developing and tapping "the ability to match people and problems" and thereby "targeting expertise,"[674] and she defines expertise broadly to include what we have characterized throughout this report as "situated knowledge."[675] And this is where technology comes in: Noveck claims that "[a]lthough the tools and approaches are still evolving, it may soon become easy to identify with precision who knows what and match them to opportunities to serve."[676]

There are at least two related ways in which agencies could use the latest technology to target expertise in this fashion. The first involves using expert networking platforms to identify people with relevant knowledge, information, experiences, or interests,[677] and then engaging in the kinds of "micro-targeting" that

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[671] *Id.*

[672] *See generally* NOVECK, SMART CITIZENS, *supra* note 259.

[673] *Id.* at 22.

[674] *Id.* at 42-43.

[675] *See, e.g.*, *id.* at 102 ("Ground-level knowledge of cultural context and the sensitivities and priorities of relevant stakeholders, as well as of physical and natural conditions, is an important kind of expertise that emerges from practical experience and that bureaucrats often have a hard time replicating."); *see also id.* at 104-05 ("Professionals inside an organization lack adequate access to diverse and innovative sources of expertise, especially in situations where situational awareness, local know-how, craft ability, disciplinary diversity, and the gritty 'deep smarts' of lived experience are critical to good outcomes."); *id.* at 251 (discussing three relevant kinds of knowledge: "expertise within government; credentialed expertise outside of government; and nontraditional forms of distributed know-how").

[676] *Id.* at 101.

[677] *See id.* at 106-11.

are conducted by advertisers to invite them to participate in an agency's public engagement efforts.[678] Noveck recognizes that while profiling consumers based on their online behavior "has become part of everyday commerce, these applications of user segmentation and targeting make some people uncomfortable."[679] Nonetheless, she argues that "if we can develop the algorithms and platforms to target consumers, can we not also target citizens for the far worthier purpose of undertaking public service?"[680] The second involves using similar technology, and the enhanced ability that it creates to identify people with nontraditional, experiential forms of expertise that are enabled by social media and other Internet-related activities, to develop advanced databases of citizens with special expertise on a broad and diverse range of subjects.[681] Noveck claims that the development of a searchable "directory of directories" or "Brain Trust" of civic knowledge would allow agencies to match the supply of available expertise with their particular demands or needs in any particular case.[682] This information and related capacity would have the potential to facilitate and greatly improve the effectiveness of an agency's outreach efforts at each stage of the rulemaking process. Noveck thus concludes that "[w]hen we can see with precision who knows what, we can harness that know-how for the public good—that is, make our democracy, starting with the administrative state . . . more participatory."[683]

Noveck acknowledges there is still a long way to go before her vision could be fully realized,[684] but some of her ideas could already be used to begin to improve public engagement with rulemaking. For starters, agencies should consider using expert networking platforms and other information communication technologies to

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[678] *See id*. at 109-11 (describing how companies like Facebook and Google "are learning to micro-target ads with even more precision to exactly the desired demographic, using proprietary modeling and segmentation techniques," and suggesting that public agencies could use similar methods).

[679] *Id.* at 110.

[680] *Id.*

[681] *See id.* at 106-36 (providing an in depth discussion of how "technology is changing expertise"); *id*. at 111-12 (explaining that "[t]he Internet is changing our relationship to expertise" by (1) "making a broad range of expertise—including more forms of craft knowledge as well as skills, experience, interests, and credentials—more visible, independent of institutions;" (2) "permitting expertise to be identified by means of manual and automatic data collection, thus enabling an infinite diversity of expressions of expertise based on different traits and characteristics;" (3) expanding "the number and types of expertise markers, including the shift from certification to badging;" and (4) enabling the quantification of expertise in different and more diverse ways).

[682] *See id.* at 210-11, 218-22.

[683] *Id.* at 271.

[684] *See, e.g., id.* at 132-33 (discussing "technological obstacles" and acknowledging that "[s]earching for and targeting specific expertise, even within a single organization such as a government agency, is not yet something we know how to do well or comprehensively or consistently"); *id.* at 184-85 (describing potential legal obstacles).

identify people with relevant knowledge, information, experiences, or interests. Agencies should notify those individuals or groups of available opportunities to participate in the rulemaking process, and provide them with the information that is necessary for them to do so effectively. More work needs to be done to determine the best ways of communicating this information to missing stakeholders, and agencies should therefore consider experimenting with different approaches to determine what works best for their particular constituencies. We fully agree with Noveck, however, that the relevant constituencies will routinely include experts within government, unaffiliated experts outside of government, and citizens with situated knowledge or what she calls "distributed know-how."[685] We also agree that agencies should at least consider using the best available technology in a responsible manner to target citizens for the purpose of undertaking public service. "[J]ust as an advertiser wants to be able to target the right audience with ads matched to their interests, a policymaker should be able to invite those with something to contribute."[686]

Agencies should also consider using information communication technologies to begin to develop databases, directories, or "brain trusts" of public officials, unaffiliated experts, and ordinary citizens with relevant forms of expertise. Those directories could then be tapped by agencies when they conduct outreach for their public engagement efforts. Although Noveck seems to envision a master directory of virtually unlimited forms of expertise throughout the country, we think agencies could benefit simply from creating their own searchable, digital directories of public employees (which should include state, local, and tribal officials), unaffiliated experts, and ordinary citizens with various forms of expertise that are relevant to their delegated statutory authority. Such directories could specifically identify people who have proven especially helpful or active in prior rulemaking proceedings, and they should receive recognition from the agency and become candidates for "repeat business." This would create an incentive for interested members of the public to participate effectively in an agency's public engagement efforts. While agencies have likely been conducting similar forms of outreach throughout American history—albeit through rolodexes and more primitive forms of communication—modern information communication technologies open up the possibility for more creative and effective forms of outreach that can also be more open, egalitarian, and meritocratic, and could therefore further enhance democracy.[687] Accordingly, this is where technological innovations may potentially have the greatest payoff for improving public engagement with rulemaking.

At the end of the day, there may be interests or perspectives that are not adequately represented in the rulemaking process despite an agency's best efforts to conduct targeted outreach. Therefore, it is also worthwhile to consider appointing

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[685] *See id.* at 251.

[686] *Id.* at 111.

[687] *See id.* ("The Internet is democratizing expertise and opening up the possibility of connecting anyone to an opportunity to engage in the life of our democracy that speaks to his or her talents.").

ombudspersons (or similar individuals or entities) to represent the concerns of missing stakeholders, particularly when collective action problems are likely to prove most intractable. The National Taxpayer Advocate, who was established by Congress to represent the interests of low income taxpayers on various matters involving the IRS, is widely viewed as a successful example of this model.[688] Scholars have pointed out that public interest advocates of this nature can improve the quality of information that is available to agencies and help to prevent regulatory capture.[689] These representatives can be formally established or designated by Congress, the White House, or by the agencies themselves, and they can be part of a larger office that is charged with promoting good government in ways that may be less central to the agency's substantive statutory mission.[690] Of course, such offices must be designed with care to ensure that they have an appropriate degree of influence and stay true to their assigned functions.[691] However, designated representatives of missing stakeholders could provide agencies with a more complete and well-balanced array of views and perspectives and thereby further improve the democratic legitimacy, effectiveness, and accountability of the rulemaking process.

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[688] *See generally* Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517 (2012) (discussing the success of the National Taxpayer Advocate and proposing reforms that would enhance the Taxpayer Advocate Service's role in influencing IRS decision making).

[689] *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 62 (2010) (suggesting that agency capture resulting from asymmetrical political pressure can be counteracted in part by establishing "a formal position of public advocate who is charged with representing the public's interest before the agency"); Wagner, *Administrative Law*, *supra* note 39, at 1414 (claiming that one strategy for addressing imbalanced participation is to deploy agency-selected ombudspersons, advocates, or other government intermediaries "to stand in for significantly affected interests that might otherwise be underrepresented in rulemakings").

[690] *See generally* Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629 (2011) (describing existing variations on these offices and their potential for improving financial regulation); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014) (exploring subsidiary offices within agencies that are charged with promoting normative values that go beyond and potentially even cut against their primary statutory missions).

[691] *See* Schlanger, *supra* note 690, at 103 ("Offices of Goodness cannot increase the amount of Goodness in an agency without two capacities: influence and commitment.").

XIII. RECOMMENDATIONS

A. Public Engagement Planning and Infrastructure

1. Public Engagement Policies

Agencies should develop and make publicly available general policies for public engagement in rulemaking. The policies should require the agency to consider the following questions at the beginning of each rulemaking initiative it undertakes or seriously considers: (1) the agency's goals and purposes in engaging the public; (2) the types of individuals or organizations with whom the agency seeks to engage, including experts and any affected interests that may be absent from or insufficiently represented in the notice-and-comment rulemaking process; (3) how such types of individuals or organizations can be motivated to participate; (4) what types of information the agency seeks from its public engagement; (5) how this information is likely to be obtained; (6) what the agency will do with the information; (7) when public engagement should occur; and (8) the range of methods of public engagement available to the agency. Agencies should consider the full range of stakeholders that may have information, views, or data relevant to the rulemaking and how to engage them. In particular, the agency should seek to identify individuals and groups who traditionally are absent from the notice-and-comment process; any information, views, or experiences they might possess that is relevant to the rulemaking; how best to reach such stakeholders and involve them in the rulemaking process; and the resources available to do so. Planning for public engagement for specific rules would best take place at the earliest feasible part of the rulemaking process. Agencies should also consider adopting process rules that presumptively require certain types of public engagement efforts at certain stages of the regulatory process for each rulemaking initiative they undertake or seriously consider. At the same time, agencies should consider employing a wide variety of modes and techniques to obtain the views and insights of different individuals and groups. Agencies should plan for public involvement that is as open and inclusive as possible so that diverse publics, including those who typically do not participate, have opportunities to share their views, values, and concerns.

Agencies should establish mechanisms to ensure that their public engagement policies are consistently followed.

2. Public Engagement Plans

Based on the framework established by their public engagement policies, agencies should develop specific public engagement plans (PEPs) for each rulemaking initiative they undertake or seriously consider.

The PEP should identify how, and at what stages, the agency will invite the public to participate in its decision-making process. The extent of the public's role may vary from issue to issue, and at different stages of the rulemaking process. The agency should provide opportunities for public involvement early in the decision-making process when the rulemaking may significantly affect or interest the public.

The PEP should also identify whether the rulemaking is likely to involve controversial issues or require specialized techniques to handle potential conflicts. Such techniques may include the use of facilitators, mediators, or other persons trained in alternative dispute resolution to help resolve controversial issues. In such cases the agency should also consider using negotiated rulemaking.

The PEP should identify whether and if so how the agency will use the Internet and social media to expand public access to information and opportunities to participate.

Agencies should publish their PEPs in the *Federal Register* and on their websites. Whenever possible, agencies should also provide advance notice of specific public engagement opportunities in their *Regulatory Plans* and the *Unified Agenda*. Agencies should routinely provide more detailed information and as much advance notice as possible regarding those opportunities on their websites and through other communications with stakeholders.

3. Enhancing Agency Capacity for Public Engagement

Agencies should develop or maintain their capacity for public engagement in rulemaking by encouraging employees to become knowledgeable about civic engagement and public involvement techniques and principles. Agencies should maintain interdisciplinary training materials and support opportunities to train employees responsible for public involvement activities to understand and apply recognized "best practices" in the field.

Agencies should designate certain employees or establish new positions with responsibility for supporting and fostering efforts to engage a broad and diverse public in their rulemakings. These employees should be trained in procedures and practices aimed at involving rulemaking novices and unaffiliated experts in the regulatory process, and serve as resources for rulemaking teams planning and executing their public engagement efforts. Agencies should also consider assigning a public engagement specialist or advocate to each rulemaking team to ensure that the commitment to public engagement is taken seriously. In addition, agencies should consider using personnel with public engagement training and experience to participate in both the development of their general public engagement policies and planning for specific rules.

Finally, Congress should consider establishing and funding a new federal agency or division of an existing agency that is specifically responsible for helping other agencies plan their public engagement efforts. Congress should also consider establishing ombudspersons (or similar individuals or entities) to represent the concerns of missing stakeholders in rulemaking proceedings, particularly when collective action problems are likely to prove most intractable. Agencies should consider establishing or designating public interest advocates of this nature when appropriate in the absence of legislation.

4. Targeted Outreach.

When agencies believe that their public engagement may not reach all affected interests, they should consider conducting outreach that targets experts not already likely to be involved, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, and members of the public with relevant views that may not otherwise be represented. These targeted outreach efforts should include:

a. proactively bringing the rulemaking to the attention of affected interests that do not normally monitor the agency's activities;

b. overcoming or minimizing possible geographical, language, resource, or other barriers to participation;

c. motivating participation by explaining the nature of the rulemaking process and how the agency will use public input; and

d. providing information about the issues and questions raised by the rulemaking in an accessible and comprehensible form and manner, so that potential participants are able to provide focused, relevant, and useful input.

B. Agenda Setting

1. Petitions for Rulemaking

Agencies should post in a prominent place on their websites a plain language explanation of the opportunity to submit rulemaking petitions. Agencies should include instructions and guidance on filing petitions for rulemaking that are understandable to their stakeholders and members of the general public who may be unfamiliar with the rulemaking process. This guidance should include the types of data, arguments, and information the agency finds most helpful for evaluating and deciding whether to grant petitions for rulemaking. Agencies should also include examples of successful (and unsuccessful) petitions for rulemaking along with explanations of why the petitions succeeded (or failed). The examples should include petitions to create a new rule, petitions to amend an existing rule, and petitions to repeal a rule.

Agencies should announce petitions for rulemaking in the *Federal Register*, on Regulations.gov, and on their websites. Agencies should also post petitions for rulemaking and related documents, including any agency action on the petitions, on Regulations.gov and on their websites to allow the public to monitor the progress of petitions. Agencies should note on Regulations.gov and on their websites whether they are seeking public comments on petitions for rulemaking.

Agencies should consider whether to solicit public comments on their petitions for rulemaking as a matter of course or on a case-by-case basis.

Agencies should consider affirmatively soliciting comments from regulatory beneficiaries and unaffiliated experts who do not traditionally participate in the notice-and-comment process when they are seriously considering petitions filed by regulated entities and these groups may have relevant information, views, or experiences to share. Agencies should be particularly mindful of soliciting comments from regulatory beneficiaries when they are seriously considering a petition to amend or repeal a rule filed by a regulated entity seeking regulatory relief.

When agencies seek comments on petitions for rulemaking from individuals and groups traditionally absent from the rulemaking process, agencies should summarize the key issues raised by the petition and describe the specific types of information, views, and experiences that would be helpful for the agency to hear about in order to decide whether to grant the petition. Agencies should also conduct targeted outreach to encourage these groups to participate in the consideration of the petition.

2. Hotlines and Suggestion Boxes

Agencies should consider establishing hotlines or suggestion boxes on their websites to help rulemaking novices and members of the general public raise issues or concerns and submit suggestions related to the agency's regulatory agenda. When establishing hotlines or suggestion boxes, agencies should ensure that staff is trained to answer the calls and respond to the messages in a reasoned and reasonably prompt manner.

3. Requests for Information (RFIs)

Requests for Information (RFIs) are an important way for agencies to solicit data, views, or other information from the public when agencies need to determine the existence, magnitude, or nature of a regulatory problem and evaluate potential strategies to address the issue, which may involve rulemaking. Agencies should presumptively use RFIs to solicit public comments on their regulatory agendas when they have some discretion over their agenda or priorities and are open-minded about which matters to pursue or when to pursue them. When using RFIs for agenda setting, agencies should (1) remain neutral regarding at least part of their agenda and (2) pose detailed questions aimed at soliciting the information they need to make informed decisions about their priorities; and (3) indicate that they are open to input on other questions and concerns.

When using RFIs in connection with agenda setting, agencies should identify (1) any individuals or groups who may have relevant data, views, or other information but are traditionally absent from the notice-and-comment process, and (2) any unaffiliated experts who may have special expertise on the relevant issues. Agencies should address these groups directly in their RFIs and engage in targeted outreach to encourage participation by these groups.

Agencies should review any comments they receive in response to RFIs and explain in subsequent public notices how these comments informed or influenced the agency's course of action.

4. Listening Sessions

Agencies should consider holding listening sessions related to their agendas when they seek informed public input or a more deliberative or informal exchange.

Agencies should consider conducting listening sessions in multiple locations and using available technology to facilitate remote attendance. Agencies should also engage in robust outreach to bring listening sessions to the attention of missing stakeholders, unaffiliated experts, and other interested parties. In addition, agencies should provide attendees with the background and information they need to offer constructive feedback. Finally, agencies should consider using moderators or facilitators to plan and run their listening sessions, particularly when they may involve controversial issues or groups with different interests at stake. Facilitators can ensure that targeted stakeholders are included and the discussion is balanced and productive.

5. Advisory Committees

Agencies may consult with advisory committees at all stages of the rulemaking process, from agenda setting, to rule development, as part of the notice-and-comment process, and in connection with retrospective review.

Agencies should consider using advisory committees to inform their rulemaking agendas when they have discretion over which matters to pursue or the order in which to pursue them. Agencies should ensure that their advisory committees are composed of a balanced group of stakeholders and that all significant interests are adequately represented. Agencies whose stakeholders closely mirror the general public should consider consulting advisory committees that are composed entirely of a representative sample of ordinary citizens.

Agencies should consider using their advisory committees in conjunction with other more open forms of public engagement. For example, agencies should consider consulting with their advisory committees about their agenda and priorities after receiving public comments on a petition for rulemaking or in response to an RFI related to agenda setting.

To the extent possible and practical, agencies should re-purpose briefing materials prepared for their advisory committees for other audiences and other forms of public engagement.

6. Focus Groups

Agencies should consider using focus groups to obtain meaningful feedback on their regulatory agendas from individuals and groups with relevant views, data, and

other information but who are difficult to reach and traditionally do not participate in public engagement that is self-selective.

7. Public Complaint Databases

Agencies with public complaint databases should establish a process for identifying issues raised in the complaints that may be appropriate for rulemaking. When seriously considering rulemaking in connection with an issue raised in public complaints, agencies should use other public engagement tools to solicit broader input on whether the matter is appropriate for rulemaking.

8. Public Notice and Comment

Agencies should publish their proposed regulatory agendas for public comment after using other methods of public engagement described herein.

C. Early and Advanced Rule Development

1. Traditional or Negotiated Rulemaking

At the beginning of each rulemaking an agency undertakes or seriously considers, the agency should identify the interests that may be affected by the rulemaking and whether organized groups represent them adequately. ACUS Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement* (June 16, 2017), sets forth conditions under which negotiated rulemaking may be appropriate for drafting a proposed rule.

Negotiated rulemaking is likely not appropriate when the agency identifies (1) individuals or groups who may be affected by the rulemaking but (2) traditionally do not participate in the rulemaking process and (3) may not be adequately represented by other groups that do. Nor is negotiated rulemaking appropriate where there is a large group of diverse interests affected in different ways or who hold a variety of different perspectives. When agencies identify individuals or groups who may be affected by a rulemaking but whose interests or preferences may not be adequately represented by organized groups, agencies should identify the types of information they need from these groups and how to reach them as early in the process of developing a rule as possible.

2. Requests for Information (RFIs)

Agencies should presumptively use RFIs to solicit data, views, or other information from the public early in the process of developing a rule when they are open to different approaches to a matter and need additional information or data before choosing the best regulatory approach. When using an RFI in early rule development, agencies should (1) remain neutral regarding how it would or should resolve the matters on which it seeks public comments, (2) pose detailed questions aimed at soliciting the data, views, or other information the agency needs to make an informed decision, and (3) indicate that they are open to input on other questions and concerns.

When using RFIs during rule development, agencies should identify (1) any individuals or groups who may have relevant data, views, or other information but are traditionally absent from the notice-and-comment process and (2) any unaffiliated experts who may have special expertise on the relevant issues. Agencies should address these groups directly in their RFIs and engage in targeted outreach to encourage participation by these groups.

Agencies should review any comments they receive in response to RFIs and explain in subsequent public notices how these comments informed or influenced the development of the rule.

3. Internet and Web-Based Outreach

Agencies should also follow ACUS's previously issued recommendations on best practices for using the Internet and social media in rulemaking. ACUS Recommendation 2013-5, *Social Media in Rulemaking* (Dec. 5, 2013). In addition, agencies should routinely use the Internet and social media to inform the public of (1) an agency's interest in a potential rule, (2) rules currently under development, and (3) opportunities to participate in the process of developing rules.

Agencies should also consider using the Internet and social media as platforms for public discussion and input concerning potential regulatory initiatives and rules under development. It may be particularly useful to use the Internet and social media to facilitate public input concerning regulatory initiatives when agencies seek a more informed or deliberative process than possible with an RFI and input from a broader or more dispersed group than possible using in-person listening sessions. When paired with targeted outreach, the Internet and social medial may provide a means of reaching individuals and groups with relevant views, experiences, or other information who are traditionally absent from the notice-and-comment rulemaking process.

When creating web-based opportunities to participate in rule development, agencies should conduct targeted outreach (1) to inform stakeholders and members of the general public traditionally absent from the rulemaking process about web-based opportunities to participate in rule development, (2) to persuade these individuals and groups to participate, and (3) to provide the targeted audience with the information and guidance they need to participate effectively in rule development. Such information might include a description in plain language of the of the issues under consideration and background material; an explanation of the rulemaking process, the role of public participation, and the qualities of a useful comment; and summaries of public engagement efforts to date, including any information received from the public to date.

Agencies should consider the information they receive from the public through the Internet and social media when developing their proposed rules. Agencies should also inform participants of how the public input influenced the development of the rule and any decisions the agency made.

4. Advance Notices of Proposed Rulemaking (ANPRMs)

Agencies should presumptively use ANPRMs to solicit public comments when they need additional information to choose between more than one regulatory alternative or develop and refine a proposed rule. When using ANPRMs during advanced rule development, agencies should pose detailed questions aimed at soliciting the data, views, or other information they need to make an informed decision, and ask for potential revisions to their tentatively favored approach.

In addition, agencies should identify (1) any individuals or groups who may have relevant data, views, or other information but are traditionally absent from the notice-and-comment process and (2) any unaffiliated experts who may have special expertise on the relevant issues. Agencies should address these groups directly in their ANPRMs and engage in targeted outreach to encourage participation by these groups.

Agencies should consider the information received from the public through ANPRMs when drafting an NPRM or making another decision. In addition, agencies should inform the public of how its input influenced the development of the proposed rule and any decisions the agency made. The agency should include this information in the preamble to an NPRM published after an ANPRM or in some other manner if the agency does not proceed promptly with an NPRM.

5. Advisory Committees

Agencies should consider consulting with their advisory committees during rule development. It is generally most appropriate to consult advisory committees in conjunction with other more open forms of public engagement. For example, agencies may want to consult with their advisory committees when framing RFIs or ANPRMs, after receiving public comments in response to an RFI or ANPRM, or when drafting a proposed rule.

To the extent possible and practical, agencies should re-purpose briefing materials prepared for their advisory committees for other audiences and other forms of public engagement.

6. Listening Sessions and Public Meetings

Agencies should presumptively hold in-person, online, or telephonic listening sessions during rule development to educate interested persons about the regulatory process and obtain informed public input on the development of their rules. Listening sessions are particularly helpful when agencies seek informed public input or a more deliberative or informal exchange with stakeholders. Agencies should consider conducting listening sessions in multiple locations and using available technology to facilitate remote attendance. Agencies should also engage in robust outreach to bring listening sessions to the attention of missing stakeholders, unaffiliated experts, and other interested parties. In addition, agencies should provide attendees with the background and information they need to offer constructive feedback. Finally, agencies should consider using moderators or facilitators to plan and run their

listening sessions, particularly when they may involve controversial issues or groups with different interests at stake. Facilitators can ensure that targeted stakeholders are included and the discussion is balanced and productive.

7. Focus Groups

Agencies should consider using focus groups to obtain feedback during rule development from individuals and groups with relevant views, data, and other information but who are difficult to reach and traditionally do not participate in public engagement that is self-selective.

D. The Notice-and-Comment Process

1. Plain Language NPRMs

Agencies should ensure the preambles to their NPRMs speak in plain language to individuals and groups the agency identifies as sources of relevant views, data and other information but may be unfamiliar or inexperienced with the notice-and-comment process. When drafting NPRMs, agencies should highlight issues that would benefit from public ventilation and pose specific questions to individuals and groups the agency identifies during rule development as sources of relevant views, data, experiences and other information. Questions directed to rulemaking novices and members of the general public should be featured prominently and as early as possible in the preamble to the NPRM. Agencies should also include questions directed to rulemaking novices and members of the general public on their websites along with links to Regulations.gov.

Agencies should consider employing visual elements, such as numbered lists, bullet points, tables, Q&A formats, and more colloquial language to reach rulemaking novices and members of the general public.

Agencies should look to ACUS Recommendation 2017-3, *Plain Language in Regulatory Drafting* (Dec. 14, 2017), when drafting their NPRMs. In addition, agencies should consider including personnel who do not have subject-matter expertise in the rulemaking or routinely draft regulations to review draft NPRMs for clarity and accessibility to rulemaking novices and members of the general public.

2. Regulations.gov

Regulations.gov needs to be updated to provide a more user-friendly interface for reviewing rulemaking dockets and submitting public comments. The website should allow visitors to search comments in different ways, including by author/submitter and key words in the text of the comments. In addition, users should be able to scroll easily through the public comments and the results of their searches. Users should also be able to toggle more easily between the text of an NPRM and both the public comments already submitted and the comment a user is in the process of drafting.

Regulations.gov should revise its "Tips for Submitting Effective Comments" to emphasize the importance of including facts, relevant experiences, logical argument,

good reasons, and things Congress tells the agency to consider in public comments. Regulations.gov should also emphasize that rulemaking is not a voting process and comments that merely express approval or disapproval of a proposal generally have little value.

Regulations.gov should consider producing a more accessible and engaging video aimed at the general public to provide advice on effective commenting.

3. User-Friendly Rulemaking Portals

When agencies identify individuals and groups who do not traditionally participate in the notice-and-comment process as important potential sources of views, data, experiences, and other information relevant to a rulemaking, they should set up a user-friendly portal to the rulemaking on their websites. The e-rulemaking portal might include: (1) specific questions in plain-language form and directed to the individuals and groups identified by the agency as potential sources of important views and information, (2) plain-language summaries of all or at least key parts of the NPRM, (3) a means for the public to comment on specific issues summarized on the e-rulemaking portal rather than on the whole NPRM, (4) a means for the public to reply to the comments of others, (5) a video tutorial on submitting effective comments, (6) examples of helpful and unhelpful public comments, (7) links to Regulations.gov and other useful information and documents related to the rulemaking, and (8) a means for interested persons to sign up for updates on the status, progress, and major developments in the rulemaking.

Agencies should include the comments received through their e-rulemaking portals in the rulemaking docket along with other public comments. If an agency expects a large number of public comments through the web and the issue is particularly important or controversial, the agency should consider using a third-party to moderate and facilitate a web-based discussion and summarize the discussion for including in the rulemaking docket.

When agencies set up e-rulemaking portals to enhance public engagement by absent stakeholders they should conduct targeted outreach to solicit participation by these groups.

When publishing a final rule, agencies should summarize in plain language on their web portals the basis and purpose of the final rule, including an explanation of how the public input influenced the final rule or otherwise had an effect on the agency's decision.

4. Supplemental Deliberative Exercises

Agencies should consider using enhanced deliberative methods in appropriate circumstances to supplement their traditional rulemaking processes. There are numerous examples of mechanisms for enhanced deliberation that could be used as a supplement to the traditional rulemaking process, including Regulation Room, Citizen Juries, Citizen Advisory Committees, Citizen Assemblies, and Deliberative Polls. These methods commonly (1) are more dialogic in nature than typical public

meetings, (2) provide participants with balanced and objective briefing materials, (3) include opportunities for small group discussion, (4) provide participants with opportunities to consider and respond to competing perspectives, (5) include opportunities to ask questions of experts and/or agency officials, (6) produce new information that should be incorporated into resulting recommendations, and (7) result in a final report with findings and recommendations. They allow agencies to facilitate collective decisions about a policy decision that take into account all of the interests and perspectives that emerge from a reasoned deliberative process.

In assessing when such efforts are likely to prove worthwhile, agencies should (1) focus on rulemakings in which new participants are likely to have useful information and it is feasible to provide the participation support necessary to elicit this information; (2) consider the "information load" or effort required to provide sufficient information to rulemaking newcomers to enable them to participate effectively; and (3) consider using enhanced deliberative techniques selectively—that is, of targeting only certain types of potential new participants and only certain issues in the rulemaking. Agencies should also favor enhanced deliberative methods when rulemaking proceedings are more rather than less important, more rather than less politically salient, and more rather than less likely to turn on the resolution of conflicting public values.

Agencies should also consider (1) hiring facilitators to plan and conduct enhanced deliberation; (2) engaging in enhanced deliberation with pre-existing groups with balanced participation, such as federal advisory committees or negotiated rulemaking committees; (3) combining in-person deliberative exercises with online communication; and (4) recruiting participants for enhanced deliberation, rather than relying on open, self-selected participation.

5. Reply Comment Periods

Agencies should routinely consider using reply comment periods when they receive a large number of public comments near the end of the section 553 comment period, when new and important issues are raised during the section 553 comment period, when serious conflicts in data and other descriptive or predictive information need to be resolved, or when agencies otherwise believe additional information from the public will help them evaluate the comments received during the section 553 public comment period.

When using reply comment periods, agencies should highlight in plain language any questions or issues they believe individuals or groups traditionally absent from their rulemaking may be able to address, including unaffiliated experts with special expertise on the relevant issues. In addition, agencies should conduct targeted outreach to encourage participation by these groups.

When publishing a final rule after a reply comment period, agencies should explain in plain language how the public input during the reply comment period influenced the final rule or otherwise had an effect on the agency's decision.

E. Retrospective Review

1. Preambles to Final Rules

When publishing preambles to final rules, agencies should strive to include a description of the information that will help them to assess the effectiveness of the rule in accomplishing its objectives.

When conducting retrospective review, agencies should seek to identify individuals or groups traditionally absent from the rulemaking process who may possess relevant information on the effectiveness of the rule in accomplishing its objectives. When agencies believe rulemaking novices may have information, views or experiences relevant to retrospective review, agencies should highlight these in plain language in the preamble and speak directly to these individuals and groups.

2. Open or Living e-Rulemaking Dockets

Agencies should provide the public with open or living e-rulemaking dockets—portals on their websites for submitting comments on existing regulations and suggesting rules that may warrant review and modification or repeal.

When summarizing final rules on their websites, agencies should highlight the goals and assumptions upon which the rule is based and the information the agency believes will enable it to evaluate the effectiveness of the rule going forward. In particular, agencies should highlight in plain language the specific information, views, or experiences that different groups may possess or come to possess that will help the agency evaluate the effectiveness of the rule.

When agencies cannot create an e-rulemaking docket dedicated to a single rule or collection of rules, they should utilize "hotlines" and/or on-line "suggestion boxes" that allow the public to comment on existing regulations. Agencies should ask the public to identify the specific rule or regulation that is the subject of their comments and be as specific as possible in describing their experiences with the rule, what is working and what is not working, and the most effective remedy consistent with the agency's statutory mandate.

Open e-rulemaking dockets or online suggestion boxes should explain how the agency evaluates existing regulations, identify the types of information or experiences that are most helpful to the agency, and offer other tips on submitting effective retrospective comments. Open e-rulemaking dockets or general suggestion boxes should also provide the public with examples of helpful and unhelpful comments on existing regulations.

3. Requests for Information (RFIs)

Agencies should presumptively use RFIs to solicit public comments when they are conducting regulatory lookbacks and are open-minded concerning whether or how to amend or repeal an existing regulation.

When using an RFI for regulatory lookbacks, agencies should (1) remain neutral regarding the best way to proceed and (2) pose detailed questions aimed at soliciting the information needed to conduct the retrospective review.

Before publishing an RFI in connection with retrospective review, agencies should identify (1) any individuals or groups who do not traditionally participate in the rulemaking process but may possess data, views, experiences, or other information relevant to retrospective review and (2) any unaffiliated experts who may have special expertise on the relevant issues. Agencies should address these groups directly in the RFI, ask them specific questions, and conduct targeted outreach to encourage their participation.

4. Advisory Committees

Agencies should consider consulting with their advisory committees when deciding whether or how to conduct a regulatory lookback. Agencies should ensure that advisory committees used for this purpose are composed of a balanced group of stakeholders and that all significant interests are adequately represented. Agencies whose stakeholders closely mirror the general public should consider consulting advisory committees that are composed entirely of a representative sample of ordinary citizens.

Agencies should consider using their advisory committees in conjunction with other more open forms of public engagement. For example, agencies should consider consulting their advisory committees after receiving a petition to amend or repeal a regulation or public comments in response to an RFI related to retrospective review. Advisory committees may generate their own candidates for regulatory review, evaluate reviews proposed by other members of the public, and help the agency design a process for evaluating the effectiveness of a rule.

5. Focus Groups

Agencies should consider using focus groups to obtain meaningful feedback on existing regulations from individuals and groups with relevant views, data, experiences, and other information but who are difficult to reach and traditionally do not participate in public engagement that is self-selective.

6. Listening Sessions and Public Hearings

Agencies should presumptively hold in-person, online, or telephonic listening sessions early in the process of conducting a regulatory lookback to educate interested persons about the process and obtain informed public input on potential changes to their rules. Listening sessions are particularly helpful when agencies seek informed public input or a more deliberative or informal exchange with stakeholders.

When planning listening sessions, agencies should provide attendees with the background and information they need to offer constructive feedback. Agencies should consider using moderators or facilitators to run the listening sessions,

particularly when they may involve controversial issues or groups with different interests at stake.

APPENDIX A

SURVEY ON PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING

Dear Respondent,

Thank you for taking the time to complete this Survey. The results will inform a report to the Administrative Conference of the United States (ACUS) on agency strategies to enhance public engagement at various stages of the rulemaking process—including during early agenda setting stages, during the informal rulemaking process, or when undertaking retrospective review.

This Study seeks to help agencies invest resources in ways that maximize the probability that rulewriters obtain high quality information from commenters—including from traditionally absent stakeholders, unaffiliated experts, and members of the general public—as early in the process as possible. Among other things, the Study considers efforts to promote public education and participation through print or web-based media, use plain writing and clear visual formatting for rule text and supporting material, and take advantage of in-person engagement opportunities to solicit stakeholder input and support future informed participation. Your answers to the following questions will be invaluable to this Study.

To avoid confusion, we have defined the following terms used in the Survey:

"**Absent stakeholders**" means individuals or groups that a regulation may benefit or burden, or otherwise have a direct stake in the outcome of the agency's rulemaking, but who do not traditionally participate in the agency's rulemaking process.

"**Unaffiliated experts**" means scientific, technical, or other professionals with expertise relevant to the agency's rulemaking who are neither direct stakeholders nor employed or retained by a stakeholder.

Agenda Setting

1. Does the agency utilize any procedures or practices (other than petitions for rulemaking) to engage the public in setting its rulemaking agenda?

   If so, please describe any such procedures or practices, including the types of parties the agency tries to engage and how the agency seeks to engage them.

   In addition, please describe how, if at all, these efforts have focused on: (a) "absent stakeholders;" (b) "unaffiliated experts" in the field; and (c) members of the general public, including citizens with situated knowledge of the conduct or activities being regulated.

Informal Rulemaking Proceedings

2. Which types of stakeholders typically participate in the agency's rulemaking proceedings, for example, by participating in town halls and workshops or by submitting comments on proposed rules?

3. Aside from the solicitation of public comments in connection with notices of proposed rulemaking, does the agency utilize any procedures or practices, formal or informal, to enhance public involvement in the agency's rulemaking process (including rule formation prior to issuance of the NPRM)?

   If so, please describe any such procedures or practices, including the types of parties the agency tries to engage and how the agency seeks to engage them.

   In addition, please describe how, if at all, these efforts have focused on: (a) "absent stakeholders;" (b) "unaffiliated experts" in the field; and (c) members of the general public, including citizens with situated knowledge of the conduct or activities being regulated.

4. Does the agency have any experience conducting web-based or in-person deliberative exercises (using, for example, citizen assemblies or deliberative juries) or any other practices to engage the public in its rulemaking that the agency considers "innovative"?

   If so, please briefly describe the nature of the exercise(s).

Retrospective Review

5. Does the agency utilize any procedures or practices (other than petitions for rulemaking) to engage the public in retrospective review?

   If so, please describe any such procedures or practices including the types of parties the agency tries to engage and how the agency seeks to engage them.

   In addition, please describe how, if at all, these efforts have focused on: (a) "absent stakeholders;" (b) "unaffiliated experts" in the field; and (c) members of the general public, including citizens with situated knowledge of the conduct or activities being regulated.

Value of Public Engagement in Rulemaking

6. How would you characterize the value of public engagement in the agency's:

   (a) agenda setting?

   (b) rulemaking (including rule formation)?

   (c) retrospective review?

7. In general, what types of information or views of the general public are most useful to the agency in pursuing its statutory mandate?

Please include your name and contact information for any follow-up questions:

Thank you for your help with this important Study!

APPENDIX B

As part of our study, we received survey responses and/or interviewed current or former officials at the following federal agencies:

Consumer Financial Protection Bureau

Consumer Product Safety Commission

Department of Agriculture

Department of Education

Department of Energy

Department of Justice

Department of Labor

Department of Transportation

Environmental Protection Agency

Federal Energy Regulatory Commission

Federal Maritime Commission

Federal Trade Commission

General Services Administration

National Park Service

Nuclear Regulatory Commission

Pension Benefit Guaranty Corporation

Occupational Safety and Health Commission

Office of Government Ethics

Social Security Administration

United States Coast Guard

United States Forest Service

Appendix C: Modes of Public Engagement

Mode	Function/Goal	Stages of RM	Selection Method	Mode of Communication	Collective Recommend	IAP2 Level	Strengths or Benefits	Weaknesses or Challenges
Rulemaking Petitions	Give interested persons the right to petition for the issuance, amendment, or repeal of a rule.	AS, RR	Open	Express Preferences	No	Consult	Provide ideas for regulatory change, especially when petitioners have diffuse information that is otherwise unavailable or difficult for agencies to collect.	Reviewing petitions may divert agency from its own priorities or provide a relatively low visibility mechanism for regulatory capture.
Advisory Committees	Allow agencies to solicit and obtain advice from formally established groups of stakeholders, unaffilated experts, and/or ordinary citizens.	All	Professional or Lay Stakeholders	Express and Develop Preferences	Yes	Collaborate	Provide relatively inexpensive advice from formally established and balanced groups of outside experts (or citizens).	Relatively heavily regulated by law, time-consuming and expensive to charter, and composition may not truly be representative.
Focus Groups	Facilitated, small group discussions of prepared questions by individuals or members of targeted demographic groups.	All	Random or Targeted Recruitment	Express and Develop Preferences	No	Consult	Provide relatively inexpensive sounding board to guage participants' reactions to information, ideas, messages, or proposals, and identify preferred alternatives and potential concerns.	Requires skilled facilitation and careful planning, participants may face steep learning curve, and views expressed may not be representative (even in an informal sense).
Requests for Information	Published requests for written information, data, or comments on a designated problem or issue of potential regulatory interest.	AS, ERD, RR	Open	Express Preferences	No	Consult	Provide information about issues or problems when agency lacks knowledge and is open-minded about how to proceed.	Requires robust outreach efforts to generate participation by missing stakeholders and unaffiliated experts; may be difficult to secure representative or balanced feedback.
Listening Sessions	Public meetings to gather information, data, or comments on a designated problem or issue of potential regulatory interest.	AS, ERD, ARD, RR	Open	Express and Develop Preferences	No	Consult	Provide benefits similar to RFIs, but allow for more informal and interactive exchange than typically possible through written communications.	Requires robust outreach and skilled facilitation to secure attendance from a broad range of interested stakeholders, achieve balanced participation, and obtain sufficiently detailed or focused advice.
Reverse Industry Days	Results in invitations to carefully selected industry representatives to tell agency officials about their needs and challenges in the procurement process.	AS, RR	Professional Stakeholders	Express Preferences	No	Involve	Provide feedback about agencies' practices from the perspective of the regulated community and builds stronger relationships with stakeholders. Brings unappreciated problems to light and suggests avenues for reform.	Ensuring adequate and balanced participation from the entire range of relevant stakeholders, given RIDs' traditional focus on the regulated community.
Hotlines or Suggestion Boxes	Provides mechanism for interested persons to contact agencies informally by telephone or web-based communication with questions, comments, or suggestions.	AS, RR	Open	Express Preferences	No	Consult	Provide ideas for regulatory change, especially when petitioners have diffuse information that is otherwise unavailable or difficult for agencies to collect. More informal, open, and accessible than rulemaking petitions.	Requires broad advertisement, and sufficient staffing and resources to answer calls or respond to messages in a reasonably prompt and substantively adequate fashion.
Public Complaints	Provides mechanism for interested persons to lodge complaints with agency that regulated entity engaged in potentially unlawful behavior.	AS, RR	Open	Express Preferences	No	Involve	Provide mechanism for public to express concerns and for the agency to assess the frequency or magnitude of problems, which could inform its rulemaking agenda or provide an impetus for rule development.	Requires broad advertisement and sufficient resources to respond to complaints in a timely and substantively adequate fashion.
Web-Based Outreach	Online tools that facilitate two-way communication, collaboration, interaction, or sharing between agencies and the public.	All	Open	Express and Develop Preferences	No	Involve	Facilitates outreach and public education, and may be a useful mechanisms for obtaining situated knowledge and other valuable input during rule development from missing stakeholders, unaffiliated experts, and perhaps ordinary citizens.	If you build it, the public will not necessarily come: even e-rulemaking may require robust outreach and skilled facilitation to obtain meaningful input. Conversely, mass participation presents logistical challenges.
ANPRMs	Published requests for public comments or proposed alternatives to a tentative proposal before agency's issuance of an NPRM.	ARD, RR	Open	Express Preferences	No	Consult	Provide public feedback on preliminary or tentative proposals, including the likelihood of compliance, potential costs and benefits, and unintended consequences.	Participation tends to be imbalanced and limited primarily to relatively sophisticated stakeholders.
Public Meetings	Live and/or remote public forum for agency to explain its proposals and solicit the views and concerns of interested stakeholders and other citizens.	All	Open	Listen and Express Preferences	No	Consult	Allow agency to explain proposals, hear views and concerns of stakeholders, describe how agency has responded to public input, and publicize futher opportunities for participation.	Participation may not be representative or balanced, the audience may not be well-informed about the process or the agency's proposals, and opportunities for reasoned deliberation are limited.
Shuttle Diplomacy	Private meetings with specific stakeholders to gain a deeper understanding of their views or perspectives.	ARD, N&C	Professional Stakeholders	Express and Develop Preferences	No	Collaborate	Provides agency with candid views of certain staekholers when developing solutions or addressing challenges identified during rule development.	Typically involve sophisticated stakeholders who routinely participate in rulemaking. Because such meetings generally occur behind closed doors, they can raise transparency and capture concerns.

Technical Workshops	Workshops with stakeholder representatives with special expertise or unaffiliated experts to obtain feedback on agencies' technical data or analyses.	ARD, N&C	Professional Stakeholders or Targeted Recruitment	Express and Develop Preferences	No	Collaborate	Provide a relatively informal alternative to using advisory committees for obtaining technical advice from experts outside the agency.	Stakeholders may be biased and present agency with unbalanced information. Agency should therefore also consider soliciting information from unaffiliated experts as part of this process.
Negotiated Rulemaking	Advisory committees composed of representatives of key stakeholders that collaborate on proposed rules for public notice and comment.	ARD	Professsional and Lay Stakeholders	Express and Develop Preferences	Yes	Collaborate	Provides a deliberative, consensus-driven process that is appropriate when there are a limited number of identifiable interests that will be significantly affected by a rule and there is a reasonable likelihood that a balanced committee can be convened to adequately represent those interests and negotiate in good faith.	Generally inappropriate when agency identifies stakeholders not adequately represented by other parties or where diverse interests are affected in different ways or hold a variety of different preferences or perspectives.
Public Notice and Comment	Publication of a proposed rule or other course of action for written public comments.	AS, N&C, RR	Open	Express Preferences	No	Consult	Provides public input on proposed rules or other courses of action. Sometimes described as "one of the greatest inventions of modern government."	Participation typically limited to sophisticated stakeholders, may be reluctance to make major changes at this stage, and mass comments from the general public raise logistical concerns and tend to be of limited value.
Enhanced Deliberative Exercises	A variety of mechanisms that facilitate reasoned deliberation about what should be done by agency officials in collaboration with well-informed citizens.	All	Random, Targeted Recruitment, or Professional and Lay Stakeholders	Develop Preferences	Yes	Collaborate	Facilitates robust levels of participation, and provides detailed information about what stakeholders or the general public would think about a problem if they were fully informed about the relevant issues and had a chance to engage in reasoned deliberation about what should be done. Provides a valuable supplement to notice and comment in appropriate circumstances.	Resource intensive to design and implement, and will not always produce a substantial amount of useful new information.