



Virtual Public Engagement in Agency Rulemaking

Committee on Rulemaking

Draft Recommendation for Committee | April 25, 2023

1 The law often requires agencies to give interested persons an opportunity to participate in
2 rulemakings,¹ and, as a matter of best practice, the Administrative Conference has encouraged
3 agencies to consider additional opportunities for public engagement.² Interested persons are
4 often able to learn about participation opportunities through notice in the *Federal Register* and
5 participate in the rulemaking by submitting written data, views, and arguments, typically after
6 the agency has issued a notice of proposed rulemaking (NPRM). In many contexts, statutes,
7 presidential directives, and agency rules and policies also require some opportunity for oral
8 presentation, whether before or after an NPRM has been issued.³ This opportunity can take the
9 form of a public hearing, public meeting, or listening session open to the general public—what
10 this Recommendation refers to as a “public rulemaking engagement.” The Conference has also
11 encouraged agencies to hold public rulemaking engagements when it would be beneficial to do
12 so and to explore more effective options for notice, to ensure interested persons are aware of and
13 understand regulatory developments that affect them. Agencies also directly engage with people

¹ See 5 U.S.C. § 553(c).

² Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking*, 82 Fed. Reg. 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in E-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (July 19, 1976); Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973).

³ Kazia Nowacki, *Virtual Public Engagement in Agency Rulemaking 5–6* (Mar. 30, 2023) (draft report to the Admin. Conf. of the U.S.).



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14 and organizations that are interested in and affected by their rules, and the Conference has
15 encouraged them to do so in ways that safeguard the integrity of the rulemaking process.⁴

16 Effective public engagement requires overcoming barriers to participation, including
17 geographical constraints, resource limitations, and language barriers. For example, to ensure that
18 all people affected by a rulemaking are aware of the rulemaking and opportunities to participate,
19 the Conference has recommended that agencies conduct outreach that targets members of the
20 public with relevant views who do not typically participate in rulemaking or may otherwise not
21 be represented.

22 In recent years, and especially during the COVID-19 pandemic, agencies increasingly
23 have used widely available, internet-based videoconferencing software to engage with the
24 public.⁵ By reducing some barriers that people, especially members of historically underserved
25 communities, encounter, virtual public engagement can help broaden participation in agency
26 rulemakings.⁶

27 This Recommendation encourages agencies to offer virtual options when they determine
28 it would be beneficial to hold a public rulemaking engagement or directly engage with specific
29 people and organizations. It also offers best practices for planning, improving notice of, and
30 managing public rulemaking engagements, as well as ensuring that members of the public can
31 easily access materials related to virtual public rulemaking engagements (e.g., agendas,
32 recordings, transcripts) and underlying rulemakings (e.g., draft rules, docket materials).
33 This Recommendation builds on many previous recommendations of the Conference regarding
34 public participation in agency rulemaking, including Recommendation 2018-7, *Public*
35 *Engagement in Rulemaking*, which, among other things, encouraged agencies to develop
36 comprehensive plans for public engagement in rulemaking, and Recommendation 2014-4, “*Ex*

⁴ See Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” *Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).

⁵ This mirrors developments with respect to the use of virtual hearings in agency adjudication. See Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 Fed. Reg. 1715 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021).

⁶ Kazia Nowacki, *Virtual Public Engagement in Agency Rulemaking* (Mar. 30, 2023) (draft report to the Admin. Conf. of the U.S.).



37 *Parte*” *Communications in Informal Rulemaking*, which offered best practices for engaging with
38 members of the public while safeguarding the integrity of agency rulemaking.

RECOMMENDATION

Virtual Public Engagement Planning

- 39 1. Each agency that engages in rulemaking should utilize internet-based videoconferencing
40 software as a way to broaden engagement with interested persons in a cost-effective way,
41 including through outreach that targets members of the public with relevant views who
42 do not typically participate in rulemaking or may otherwise not be represented. As part of
43 its overall policy for public engagement in rulemaking (described in Recommendation
44 2018-7, *Public Engagement in Rulemaking*), each agency should explain how it intends
45 to use internet-based videoconferencing to engage with the public.
- 46 2. Each agency should ensure that its policies regarding informal communications between
47 agency personnel and individual members of the public related to a rulemaking
48 (described in Recommendation 2014-4, “*Ex Parte*” *Communications in Informal*
49 *Rulemaking*) cover communications that take place virtually.
- 50 3. Each agency should prepare and post to a publicly-available website guidance on the
51 conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening
52 session, or other live event that is rulemaking related and open to the general public—and
53 ensure employees involved with such engagements are familiar with that guidance.
- 54 4. When an agency plans to hold a public rulemaking engagement it should allow for
55 interested persons to observe the engagement remotely and, when feasible, provide input
56 and ask questions remotely.
- 57 5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel
58 should collaborate with personnel who oversee communications, public affairs, public
59 engagement, and other relevant activities for the agency to ensure the engagement
60 reaches the targeted audience and facilitates effective participation from interested
61 persons, including groups that are affected by the rulemaking and have otherwise been
62 underrepresented in the agency’s administrative process.



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Notice

- 63 6. An agency should, as applicable, include the following information in the public notices
64 for a public rulemaking engagement with a virtual or remote component:
- 65 a. The date and time of the engagement, at the beginning of the notice;
 - 66 b. Options for remote attendance including direct links to the internet-based
67 videoconferencing event or a registration page and the dial-in number for the
68 meeting, at the beginning of the notice;
 - 69 c. A plain-language summary of the rulemaking and description of the engagement's
70 purpose and agenda and the nature of the public input, if any, the agency is
71 seeking to obtain through the engagement;
 - 72 d. A link to the webpage described in Recommendation 7;
 - 73 e. Information about opportunities for members of the public to speak during the
74 engagement, including any directions for requesting to speak and any moderation
75 policies, such as limits on the time for speaking;
 - 76 f. The availability of closed captioning, language interpretation, and
77 telecommunications relay services and access instructions;
 - 78 g. The availability of a recording, a transcript, a summary, or minutes and its
79 location; and
 - 80 h. Contact information for a person who can answer questions about the engagement
81 or arrange accommodations.
- 82 7. To encourage remote participation in a public rulemaking engagement, the agency should
83 create a dedicated webpage for each such engagement that includes the information
84 described in Recommendation 6. The webpage should include, as applicable, a link to the
85 internet-based videoconferencing event or its registration page; a link to the *Federal*
86 *Register* notice; any materials associated with the engagement, such as an agenda, a
87 program, speakers' biographies, a draft rule, the rulemaking docket, or questions for
88 participants; a livestream of the engagement while it is occurring; and, after the
89 engagement has ended, any recording, transcript, summary, or minutes.



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- 90 8. The Office of the Federal Register (OFR) should update the Document Drafting
91 Handbook to provide agencies guidance on drafting *Federal Register* notices for public
92 rulemaking engagements with virtual or remote components that include the information
93 described in Recommendation 6.
- 94 9. OFR should update FederalRegister.gov to include in the “Document Details” sidebar for
95 each notice for public rulemaking engagement a link to the specific agency webpage
96 described in Recommendation 7 where interested persons can learn more about the
97 engagement.

Managing Virtual Public Engagements

- 98 10. When feasible, each agency should allow interested persons to access a public
99 rulemaking engagement remotely at any time while it is occurring and should not require
100 members of the public to register by a certain date or time to observe a livestream of the
101 engagement. Agencies may want to set a registration deadline for those wishing to speak
102 or requiring accommodations.
- 103 11. To manage participant expectations, an agency should communicate the following
104 matters, among others, to participants at the beginning of the event:
- 105 a. The purpose and goal of the engagement;
 - 106 b. The moderation policies, including speaking time limits and whether or why
107 the agency can or cannot respond to oral statements made by participants;
 - 108 c. The management of the public speaking queue;
 - 109 d. Whether the chat function, if using an internet-based videoconferencing
110 platform, will be disabled or monitored and, if monitored, whether the chat
111 will be included in the record;
 - 112 e. How participants can access the rulemaking materials throughout the meeting;
113 and
 - 114 f. Whether the event will be recorded or transcribed and where it will be made
115 available.



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

Recordings and Transcripts

120 13. Each agency should record or transcribe any public rulemaking engagement that takes
121 place after it publishes a notice of proposed rulemaking (NPRM). When an agency holds
122 a public rulemaking engagement before publishing an NPRM, or when no NPRM is
123 required, it should record, transcribe, summarize, or prepare meeting minutes of the
124 engagement unless doing so would adversely affect the willingness of public participants
125 to provide input or ask questions.

126 14. Each agency should make any recording, transcript, summary, or minutes of a public
127 rulemaking engagement available in any public docket associated with the rulemaking
128 and on the webpage described in Recommendation 7, and should do so in a timely
129 manner.